Western Australian

Industrial Gazette

PUBLISHED BY AUTHORITY

Sub-Part 9 WEDNESDAY, 28 DECEMBER, 2005 Vol. 85—Part 2

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

85 W.A.I.G.

CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Procedural Directions and Orders—

2005 WAIRC 03077

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALLISON PTY LTD T/A SEAWEST MARINE SERVICES **APPELLANT**
	-and-
	RODNEY PAUL BROWN **RESPONDENT**
CORAM	FULL BENCH THE HONOURABLE M T RITTER, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER J H SMITH
DATE	WEDNESDAY, 16 NOVEMBER 2005
FILE NO/S	FBA 11 OF 2005
CITATION NO.	2005 WAIRC 03077

Decision	Appeal discontinued by consent.
Appearances	
Appellant	No appearance.
Respondent	No appearance.

Order

The Notice of Appeal herein, having been filed in the Registry of the Commission on 6 September 2005, and having been served upon the respondent on 8 September 2005, and a Declaration of Service having been filed in the Registry of the Commission on 21 September 2005, and the agent for the above-named appellant, on 18 October 2005, having filed a Notice of Discontinuance in the Registry of the Commission, and the above-named respondent having advised the Commission by facsimile that he consents to the appeal being discontinued by the appellant on 15 November 2005, and the parties herein having waived their rights pursuant to s35 of the *Industrial Relations Act 1979* (as amended), it is this day, 16 November 2005, ordered and declared, by consent as follows:-

(1) Leave is granted for appeal No FBA 11 of 2005 to be discontinued.

(2) The appeal is dismissed.

By the Full Bench

(Sgd.) M T RITTER,
Acting President.

[L.S.]

2005 WAIRC 03120

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALLISON PTY LTD T/A SEAWEST MARINE SERVICES
	APPELLANT
	-and-
	KELVIN PAUL GADEKE
	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE M T RITTER, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER J H SMITH
DATE	WEDNESDAY, 16 NOVEMBER 2005
FILE NO/S	FBA 12 OF 2005
CITATION NO.	2005 WAIRC 03120

Decision	Appeal discontinued by consent.
Appearances	
Appellant	No appearance.
Respondent	No appearance.

Order

The Notice of Appeal herein, having been filed in the Registry of the Commission on 6 September 2005, and having been served upon the respondent on 8 September 2005, and a Declaration of Service having been filed in the Registry of the Commission on the 21 September 2005, and the agent for the above-named appellant, on 18 October 2005, having filed a Notice of Discontinuance in the Registry of the Commission, and the above-named respondent having advised the Commission by email that he consents to the appeal being discontinued by the appellant on 24 October 2005, it is this day, 16 November 2005, ordered and declared, by consent as follows:-

(1) Leave is granted for appeal No FBA 12 of 2005 to be discontinued.

(2) The appeal is dismissed.

By the Full Bench

[L.S.] (Sgd.) M T RITTER, Acting President.

PRESIDENT—Matters dealt with

2005 WAIRC 02983

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN HOLLAND GROUP PTY LTD
	APPLICANT
	-v-
	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	RESPONDENT
CORAM	THE HONOURABLE M T RITTER, ACTING PRESIDENT
HEARD	FRIDAY, 4 NOVEMBER 2005
DELIVERED	MONDAY, 7 NOVEMBER 2005
FILE NO.	PRES 6 OF 2005, PRES 7 OF 2005
CITATION NO.	2005 WAIRC 02983

CatchWords	Industrial Law (WA) – Applications to stay operation of interim order – Jurisdiction of Commission – Finding – Public interest – Whether an appeal is instituted – Stay of order principles – Consequences granting/not granting stay orders - *Industrial Relations Act* 1979 (as amended), s7, s35(3), s44, s44(6), s44(6)(ba), s49, s49(2), s49(2a), s49(3), s49(11) – *Industrial Relations Commission Regulations* 2005, regulation 102, regulation 102(1)
Decision	Applications for a stay - Dismissed
Appearances	
Applicant	Mr J Long (of Counsel), by leave, and with him Ms A Casellas (of Counsel), by leave
Respondent	Ms K Scoble (of Counsel), by leave

Reasons for Decision

THE ACTING PRESIDENT:

THE APPLICATIONS

1 The Commission has before it two applications, PRES 6 of 2005 and PRES 7 of 2005, both seeking an order that the operation of orders made by the Commission, by a single Commissioner, on 14 and 19 October 2005 respectively, be stayed pending the hearing and determination of appeals which have been filed against the orders made.

2 In support of the applications, the Commission has received into evidence two affidavits, both sworn by Mr Jonathan Adam Griffiths Long on 2 November 2005. These were tendered by the applicant. The Commission has also received into evidence an affidavit sworn by Mr Ricky Kavanagh on 2 November 2005. This was tendered by the respondent in opposition to the orders sought.

BACKGROUND

3 The background to the making of the orders by the Commission, which are appealed against, is as follows. On 10 October 2005, the applicant gave notice to Mr Kavanagh, of the termination of his employment, by the applicant. Mr Kavanagh is a member of the respondent union. The termination of employment was to take effect on 25 October 2005.

4 On 11 October 2005, the respondent filed a notice of application seeking a conference pursuant to s44 of the *Industrial Relations Act* 1979 (as amended) ("*the Act*"). The grounds on which the application was made is set out in a schedule to the application. The schedule, in summary, referred to the dispute which existed at the Country Traveler's Association Project site over the termination of employment of Mr Kavanagh, who was an occupational health and safety delegate on that project.

5 Subsequent to the application being made, the Commission convened a conciliation conference pursuant to s44 of *the Act* on 11 October 2005. At the conference, the respondent sought an interim order that Mr Kavanagh be reinstated to his position pending the further conciliation of the application. Conciliation conferences took place on 11 and 12 October 2005.

6 By letter from the Commission to Clayton Utz, the solicitors for the applicant, dated 12 October 2005, the Commission indicated that it was minded to issue an order which would include the suspension of the operation of Mr Kavanagh's termination notice while conciliation attempted to resolve the matter. The letter then stated that, before making such an order, the Commission would like to hear from the applicant's counsel and the respondent in reply before a decision was reached. The letter said that another conference was listed for 13 October 2005. This conference proceeded.

7 On 14 October 2005, the Commission sent a letter to the parties which enclosed a minute of orders. The letter stated that:-

> "*If you consider that the Minute of Order is not accurate and you wish to speak to the Minutes, you should make your submission to the Commission, in writing, by* ***4:30pm*** *on* ***Friday, 14 October 2005*** *indicating what change is required to be made to the Minute*."

8 The letter stated that, if no correspondence was received from the parties by the time specified, the order would issue in the form of the minute.

9 The applicant, by its solicitors, attempted to make written submissions about the contents of the minute. The applicant's solicitors drafted two letters dated 14 October 2005 and sent them by facsimile to the Commission. It appears that the facsimile number to which at least one of the letters was sent was not the facsimile number of the chambers of the Commissioner who was dealing with the application, but the general facsimile number of the Commission. It also appears that, accordingly, the contents of this letter were not brought to the attention of the Commissioner prior to 4.30pm on 14 October 2005. As a result, the Commissioner made orders in terms of the minute of orders. The letter which the Commissioner had not at that stage received made submissions about the contents of the minute.

10 The order dated 14 October 2005 has a lengthy preamble which set out the background to the making of the orders by the Commission. The operative parts of the order are as follows:-

> "*1. That the notice of termination given to Mr Kavanagh on 10 October 2005 be suspended as from the date of this order.*
>
> *2. That the suspension of the notice of termination remain until further order or until conciliation has resolved the union's claim that the notice of termination issued to Mr Kavanagh is, in all of the circumstances, unfair.*
>
> *3. That if there is any need to arbitrate this application, this order will remain until such time as the matter is heard and determined.*
>
> *4. That further conciliation proceedings be reconvened by the Commission, commencing as soon as practicable, on the following basis –*
>
> *(a) That the parties be represented at a senior level.*
>
> *(b) That the discussions are private and without prejudice and not be used for any purpose other than conciliation before the Commission.*
>
> *(c) That any documentation tabled or prepared for the purposes of conciliation be limited to those conciliation proceedings only.*
>
> *(d) That the purpose of conciliation is to discuss issues relevant to the dispute including the following matters –*
>
> *(i) The circumstances relating to the issuance of a series of disciplinary letters to Mr Kavanagh by the employer;*
>
> *(i) The role and duties of the CFMEU occupational safety and health representative on the CTA site having regard to the provisions of the Occupational Safety and Health Act 1984;*
>
> *(ii) Communications between John Holland Pty Ltd and the CFMEU with respect to the CTA site; and*
>
> *(iii) Communications between John Holland Pty Ltd, its employees and the site personnel.*
>
> *5. That a copy of this order be posted on the site noticeboard.*
>
> *6. That either party have liberty to apply to amend this order upon the giving of 48 hours' notice to the Commission and to the other party*."

11 It is noted that in order 2, the suspension of the notice of termination was to remain until further order or until conciliation had resolved the union's claim that there was no valid reason for the termination of employment. Also, order 6 stated that both parties had liberty to apply to amend the order upon the giving of the requisite notice.

12 On 17 October 2005, the Commissioner became aware of the letter sent by facsimile by Clayton Utz on 14 October 2005. The Commissioner then convened a hearing on 18 October 2005, purportedly as a speaking to the minute. The transcript of the hearing which took place on 18 October 2005 is before the Commission in support of the stay applications. At the commencement of the hearing, the Commissioner said that she wanted to ascertain whether the minute distributed to the parties on 14 October 2005 accurately reflected the Commission's reasons for decision as contained therein. The Commissioner indicated that she had received correspondence from both parties. When asked to make submissions, the applicant's counsel said that they were not seeking to speak to the minute, but submitted that the Commission was *functus officio* in relation to the order made and, as there had been no opportunity to speak to the minute, it was now not open to the Commission to hear the applicant speak to the minute at that time because the order had been finalised and issued.

13 Following discussion between counsel and the Commissioner, the Commissioner asked whether the applicant wanted any changes made to the order. The applicant's counsel said the applicant's submission was that they could not seek any changes to the order by virtue of speaking to the minute. Upon inquiry by the Commissioner, counsel indicated that they did not wish to make any further submissions.

14 On 19 October 2005, the Commission made the second order against which an appeal has been filed. The terms of the orders made by the Commission on that date were identical to those made by the Commission on 14 October 2005. The preamble to the orders was different, however, in that as well as setting out the background up to 14 October 2005, it set out the events which had taken place in relation to the issuing of the order on 14 October 2005. Relevantly, the preamble to the order said that:-

> "*AND WHEREAS the Commission issued a Minute of Order on the morning of Friday 14 October 2005 requesting the parties respond in writing by 4.30pm that day if they required a Speaking to the Minutes. Unknown to the Commission the Registry received two communications from the employer; an additional submission for the Commission to consider and a request for a Speaking to the Minutes;*
>
> *AND WHEREAS unlike other correspondence which had been sent to my chambers by direct facsimile, the correspondence was forwarded by the employer to the Commission's general facsimile number and as a result did not reach me by 4.30pm;*
>
> *AND WHEREAS the Commission proceeded to issue an order as if no request for a Speaking to the Minutes had been received and as if s 35(3) of the Act had been complied with;*
>
> *AND WHEREAS upon receipt of the facsimile from the employer on Monday 17 October 2005 the Commission convened a Speaking to the Minutes attended by the parties. The union submitted that the order was issued in accordance with the Act, the order contained a liberty to apply clause in the event amendments were considered necessary and the employer had waived their rights by forwarding the correspondence to an inappropriate facsimile number;*
>
> *AND WHEREAS with respect to the union's submission the Commission disagrees with their assertion that the order was issued in accordance with the Act. The Commission considers the stronger argument to be that the Minute of Order that purportedly issued as an order is a mere waste of paper because it had issued without s 35(3) of the Act being complied with.*
>
> *AND WHEREAS the employer submitted that the Commission was functus officio with respect to the order and therefore no further change could be made. For similar reasons to those given in response to the union's submissions I disagree. It is accurate to say an order, once perfected, cannot be corrected and there is no "slip rule" in the Act or at common law. In this regard the Commission adopts the views of the Full Bench in Aussie Online Ltd v. Lane (2001) 81 WAIG 2511. An order issued contrary to the Act, in this case contrary to s 35(3), cannot be considered to be a "perfected order" as defined by the Full Bench;*
>
> *AND WHEREAS the application concerns an active industrial matter that remains before the Commission and the interim order that purportedly issued on Friday 14 October, 2005 was interim in nature and once perfected, does not conclude the matter;*
>
> *AND WHEREAS having considered the written submissions as forwarded by the employer on Friday 15 October 2005 and received in my chambers on Monday 17 October 2005 together with the submissions of the parties at the Speaking to the Minutes, the Commission proposes to issue the interim order pursuant to s 44(6)(ba)(i), (ii) and (iii) of the Act*."

15 The orders made were then set out.

16 On 21 October 2005, the applicant filed an appeal against both orders made by the Commission on 14 and 19 October 2005 respectively, being FBA 16 and FBA 17 of 2005. The applications for a stay of the orders were filed on 25 October 2005.

GROUNDS OF APPEAL

17 The grounds of appeal to the Full Bench in respect of the orders made by the Commission on 14 October 2005 are set out in an attachment to the Notice of Appeal and are as follows:-

> "*1. The Commission erred in law by failing to provide the Applicant with an opportunity to speak to the minutes of the proposed Order as required by Section 35(3) of the Industrial Relations Act (WA) 1979 ("**the Act**").*
>
> *2. The Commission erred in law in denying the Appellant natural justice by declining to inform the Appellant of the matters or information upon which the Commission was relying when it informed the Appellant in writing on 12 October 2005 that the Commission was minded to issue an interim order which would include the suspension of the termination notice issued by the Appellant to the Respondent's member.*
>
> *3. The Commission erred in law by requiring the Appellant to satisfy the Commission that an interim order should not be made rather than by requiring the Respondent to satisfy the Commission that an interim order could and should be made.*
>
> *4. The Commissioner erred in holding that a relevant consideration under section 35(3) of the Act was whether the Appellant had requested a speaking to the minutes whereas the relevant consideration is whether the Appellant had waived its rights to speak to the minutes (which it had not).*

5. The Commission erred in law in that the Order is contrary to the purpose of Section 44(6) of the Act requiring, in the circumstances of this matter, any interim order to have the effect of enabling conciliation or arbitration to resolve the matter in question.

6. The Commission erred in law by issuing an Order the terms of which are uncertain.

PARTICULARS

(a) Paragraph 3 requires the Order to remain in force until such time as the matter is heard and determined whereas paragraph 2 provides that the suspension of the termination notice remains in force until further order or until conciliation has resolved the Respondent's claim;

(b) Paragraph 4(d)(i) requires the parties to discuss the role and duties of the CFMEU Occupational Health and Safety Representative having regarding to the provisions of the Occupational Safety and Health Act 1984 which is inconsistent with, and irrelevant to, the requirement under Section 44(6) of the Act that any orders made, in the circumstances of this matter, must have the effect of enabling conciliation or arbitration; and

(c) the scope of paragraph 4(c) is so uncertain in its terms as to be incapable of application.

7. The Commission erred in making the Order which by its terms denies the occurrence of the event of which the Respondent complained."

18 The grounds of appeal against the orders made by the Commission on 19 October 2005 are contained in an attachment to the Notice of Appeal and are as follows:-

"*1. The Commission erred in law in failing to give the parties any opportunity to be heard before making the Order.*

2. The Commission erred in law in denying the Appellant natural justice by declining to inform the Appellant of the matters or information upon which the Commission was relying when it informed the Appellant in writing on 12 October 2005 that the Commission was minded to issue an interim order which would include the suspension of the termination notice issued by the Appellant to the Respondent's member.

3. The Commission erred in law by requiring the Appellant to satisfy the Commission that an interim order should not be made rather than by requiring the Respondent to satisfy the Commission that an interim order could and should be made.

*4. The Commissioner erred in holding that a relevant consideration under section 35(3) of the Industrial Relations Act (WA) 1979 ("**the Act**") was whether the Appellant had requested a speaking to the minutes whereas the relevant consideration is whether the Appellant had waived its rights to speak to the minutes (which it had not).*

5. The Commission erred in law by failing to provide the Appellant with an opportunity to speak to the minutes of the proposed Order as required by Section 35(3) of the Act.

6. The Commission erred in law in that the Order is contrary to the purpose of Section 44(6) of the Act requiring, in the circumstances of this matter, any interim order to have the effect of enabling conciliation or arbitration to resolve the matter in question.

7. The Commission erred in law by issuing an Order the terms of which are uncertain.

PARTICULARS

(a) Paragraph 3 requires the Order to remain in force until such time as the matter is heard and determined whereas paragraph 2 provides that the suspension of the termination notice remains in force until further order or until conciliation has resolved the Respondent's claim;

(b) Paragraph 4(d)(i) requires the parties to discuss the role and duties of the CFMEU Occupational Health and Safety Representative having regarding to the provisions of the Occupational Safety and Health Act 1984 which is inconsistent with, and irrelevant to, the requirement under Section 44(6) of the Act that any orders made, in the circumstances of this matter, must have the effect of enabling conciliation or arbitration; and

(c) the scope of paragraph 4(c) is so uncertain in its terms as to be incapable of application.

8. The Commission erred in law in treating the Order of 14 October 2005 as a nullity without it being duly set aside.

9. The Commission erred in making the Order which by its terms denies the occurrence of the event of which the Respondent complained."

THE STAY APPLICATIONS

19 The applications were heard together on 4 November 2005. Prior to that hearing both parties filed written submissions. Oral submissions were made at the hearing and both parties made brief post hearing written submissions which were received on 4 November 2005. I have considered these submissions in determining the applications.

JURISDICTION

20 There is an issue as to whether the Commission has the jurisdiction to entertain these applications at the present time. This arises because of the contents of s49(2a) and s49(11) of *the Act* and because, as at present, the Full Bench has not determined that the matters, the subject of the appeals, are of such importance that, in the public interest, an appeal should lie against the orders made.

21 It is accepted by the applicant that the appeals made are appeals from a "*finding*", as that term is defined in s7 of *the Act*. S49 distinguishes between a "*finding*" and a "*decision*". Both of these terms are defined in s7.

22 In *Burswood Resort (Management) Ltd v ALHMWU* 83 WAIG 3079, Sharkey P said at 3081:-

"*However, an appeal can only be instituted validly under s.49(2) or (2a) if it "lies", (ie) if a right of appeal exists under the section. As I have already observed, no right of appeal exists against a finding until the Full Bench has reached the opinion required by s.49(2a). Until then, the appeal purported to be instituted is not validly instituted*

and cannot be validly instituted. If the appeal is not validly instituted, there is no institution of an appeal under s49 and thus no jurisdiction in the President under s49(11) because there is no appeal instituted as a condition precedent to the subsequent valid application for a "stay" order."

23 The respondent relies on the *Burswood Resort* decision and submits that the Commission presently has no jurisdiction to hear the stay applications made. The applicant respectfully submits that the *Burswood Resort* decision is incorrect and ought to be departed from by the Commission as presently constituted.

24 To determine the jurisdictional issue, it is necessary to consider the terms of s49 of *the Act*. S49 is as follows:-

"49. Appeals to Full Bench from decision of Commission under this Act

(1) In this section ***"the Commission"*** *means the Commission constituted by a Commissioner, but does not include the Commission exercising jurisdiction under section 80ZE.*

(2) Subject to this section, an appeal lies to the Full Bench in the manner prescribed from any decision of the Commission.

(2a) An appeal does not lie under this section from a finding unless, in the opinion of the Full Bench, the matter is of such importance that, in the public interest, an appeal should lie.

(2b) An appeal does not lie under this section from a determination —

(a) of a relevant industrial authority —

(i) under section 97VP; or

(ii) in an arbitration under any EEA dispute provision of the kind referred to in section 97UP; or

(b) of the Commission under section 97XC or 97XQ.

(3) An appeal under this section shall be instituted within 21 days of the date of the decision against which the appeal is brought and may be instituted by —

(a) any party to the proceedings wherein the decision was made; or

(b) any person who was an intervener in those proceedings.

(4) An appeal under this section —

(a) shall be heard and determined on the evidence and matters raised in the proceedings before the Commission; and

(b) shall, if brought by a person referred to in subsection (3)(b), be dismissed unless, on the hearing of the appeal, that person obtains leave of the Full Bench,

and, for the purpose of paragraph (a), ***"proceedings"*** *includes any proceedings arising under section 35(3).*

(5) In the exercise of its jurisdiction under this section the Full Bench may, by order —

(a) dismiss the appeal;

(b) uphold the appeal and quash the decision or, subject to subsection (6), vary it in such manner as the Full Bench considers appropriate; or

(c) suspend the operation of the decision and remit the case to the Commission for further hearing and determination.

(6) Where the Full Bench varies a decision under subsection (5)(b) the decision as so varied shall be in terms which could have been awarded by the Commission that gave the decision.

(6a) The Full Bench is not to remit a case to the Commission under subsection (5)(c) unless it considers that it is unable to make its own decision on the merits of the case because of lack of evidence or for other good reason.

(7) The decision of the Full Bench shall be signed and delivered by the President.

(8) When the members of the Full Bench are divided on a question, the question shall be decided according to the decision of a majority of the members unless the members are evenly divided on the question in which case the question shall be decided according to the decision of the President.

(9) When any question of law arises in any proceedings before the Full Bench, the President may state a case for the decision of the Court thereon and shall do so if a majority of the members of the Full Bench so request.

(10) Subsections (7), (8), and (9) apply to and in relation to all proceedings before the Full Bench whether under this section or otherwise.

(11) At any time after an appeal to the Full Bench has been instituted under this section a person who has a sufficient interest may apply to the Commission for an order that the operation of the decision appealed against be stayed, wholly or in part, pending the hearing and determination of the appeal.

(12) An application under subsection (11) shall be heard and determined by the President."

25 As appears from s49(11) of *the Act*, an application for an order that the operation of a decision appealed against be stayed can be made at any time after an appeal has been "*instituted*". The jurisdictional issue turns upon whether, at present, the appeals have or have not been instituted. The effect of the *Burswood Resort* decision is that an appeal has not been instituted against a finding until the Full Bench forms the opinion referred to in s49(2a) of *the Act*.

26 S49 of *the Act* does not, in its terms, specify when an appeal has been instituted. S49(2) refers to an appeal lying in the manner prescribed. Regulation 102 of the *Industrial Relations Commission Regulations* 2005 ("*the Regulations*") refers to appeals to the Full Bench. In regulation 102(1), it provides that an appeal to the Full Bench from a decision of the Commission may be commenced by filing a Notice of Appeal in the form of Form 9. The same form is to be used for an appeal against a finding and an appeal against a decision of the Commission.

27 Form 9 of *the Regulations* is a Notice of Appeal to the Full Bench. In its terms, it is to be addressed to the respondent(s) to the appeal and provides notice that the appellant(s), "*has this day instituted an appeal against the decision of the Commission*". This suggests that the filing of the Notice of Appeal "*institutes*" an appeal. Although the terms of *the Regulations* and the forms scheduled thereto, cannot derogate from the meaning of *the Act*, *the Regulations* including Form 9 contain support for the view that an appeal is instituted against both a decision and a finding of the Commission by the filing of a Notice of Appeal.

28 The meaning of the various subsections of s49 of *the Act* are not necessarily of easy reconciliation. They seem to refer to two concepts; one being whether an appeal lies and another being the institution of an appeal. The institution of an appeal is referred to in s49(3). This provides a time limit for instituting an appeal of 21 days from the date of the decision against which the appeal is brought. The subsection also states who may institute the appeal. The meaning of "*instituted*" in s49(3) and s49(11) must, in my opinion, mean the same thing. In my view, the preferable construction of the meaning of the term "*instituted*" in s49 is that an appeal is instituted when filed. This view is enhanced by the following, in my opinion.

29 If s49(2a) of *the Act* were to have the effect that an appeal was not instituted until the Full Bench formed the opinion contained in s49(2a), it would mean that an appeal, to be instituted within the time limit allowed by s49(3), would need to be filed, served and heard by the Full Bench who then formed the opinion referred to in s49(2a). In my view, this is not what s49(3) contemplates. Additionally, all of these things would need to take place before an appellant would be entitled to seek a stay of the operation of the decision appealed against under s49(11). This would, in my view, be an unnecessarily cumbersome process. The purpose of an application for a stay is to obtain relatively expeditious and interim relief against the consequences of orders made by the Commission at first instance. This purpose would potentially be frustrated by a cumbersome process such as that which would take place if an application to, and determination by, the Full Bench would need to be made under s49(2a) before an application for a stay could be made to the President under s49(11) of *the Act*.

30 Accordingly, and with great respect, I differ from the view taken by Sharkey P in the *Burswood Resort* case. Accordingly, in my view, there is jurisdiction in the Commission to hear and determine the applications for a stay which have been made.

STAY OF ORDERS - PRINCIPLES

31 The terms of s49(11) of *the Act* have been set out above. It refers to an application being made by a person who has a sufficient interest. The present applicant clearly has such an interest.

32 S49(11) of *the Act* does not, in itself, set out the criteria which govern the basis upon which a decision should be made as to whether a stay should be granted. The power to order a stay pending an appeal, however, is common amongst Australian civil jurisdictions. I think that it is appropriate to exercise the discretion contained in s49(11) in a way similar to other such jurisdictions.

33 As the legislation contemplates, an appeal does not, of itself, stay the operation of the decision appealed against. The party in whose favour a decision and order have been made is usually entitled to enjoy the benefit of those orders. Ordinarily, something special or unusual is required before a stay will be granted.

34 In *Federal Commissioner of Taxation v Myer Emporium Limited (No 1)* [1986] 160 CLR 220, Dawson J at 222 said that the discretion to "*order a stay of proceedings is only to be exercised where special circumstances exist which justify departure from the ordinary rule that a successful litigant is entitled to the fruits of his litigation pending the determination of any appeal…. Special circumstances justifying a stay will exist where it is necessary to prevent the appeal, if successful, from being nugatory…. Generally that will occur when, because of the respondent's financial state, there is no reasonable prospect of recovering monies paid pursuant to the judgment at first instance. However, special circumstances are not limited to that situation and will, I think, exist where for whatever reason, there is a real risk that it would not be possible for a successful appellant to be restored substantially to his former position if the judgment against him is executed*".

35 These observations were cited with approval by Pullin J in *Commonwealth Bank v Bouwman* [2003] WASC 205 and by Anderson J, with whom Pidgeon J agreed, in *Hamersley Iron Pty Ltd v Lovell (No 2)* (1998) 20 WAR 79 at pages 89-90. In the latter case, Anderson J said:-

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

36 The reasons of Anderson J were cited with approval by Sharkey P in *G & M Partacini t/as Bayswater Powder Coaters v SDAE* (2005) 85 WAIG 51. In that decision, Sharkey P emphasised that the jurisdiction to grant a stay should also be exercised having regard to the requirements of s26 of *the Act* and the "*need to prevent there being any more uncertainty than is necessary, in industrial matters*".

37 In *Eastland Technology Australia Pty Ltd and Others v Whisson and Others* (2003) 28 WAR 308, the court (Murray and Parker JJ) at 311 distilled generally applicable principles in relation to applications for stays of orders. These principles were set out as follows:-

> "• *The successful litigant at first instance will ordinarily be entitled to enforce the judgment pending the determination of any appeal.*
>
> • *It is for the applicant for a stay to move the court to a favourable exercise of its discretion.*
>
> • *It will not do so unless special circumstances are shown justifying the departure from the ordinary rule.*
>
> • *The central issue will be whether the grant of a stay is perceived to be necessary to preserve the subject matter or the integrity of the litigation, or where refusal of a stay could create practical difficulties in respect of the relief which may be granted on appeal. It is often put shortly that it will first and foremost be necessary to establish that without the grant of a stay, the right of appeal, whether upon the grant of leave or special leave or not, will be rendered nugatory.*

• If that can be demonstrated, the stay will generally still be refused unless it can be established that the appeal process, whether upon the grant of leave or special leave or not, has ultimately reasonable prospects of success so as to result in the grant of relief to the appellant.

• If that hurdle can be overcome, the stay may still be refused where it appears that the balance of convenience does not lie in favour of the applicant; where, for example, the grant of a stay will occasion hardship to the respondent which may not be alleviated by the terms upon which the stay may be granted."

38 Accordingly, in my opinion, the primary focus is upon the consequences of a stay being granted or not granted. Where, for example, the absence of a stay would render the appeal nugatory or futile, special circumstances warranting the grant of a stay may exist. It will also be necessary to consider matters such as the arguability of the appeal and the balance of convenience. The parties, in their submissions, emphasised that the Commission should consider whether there is a serious question to be tried and where the balance of convenience would lie. In considering the latter consideration, the circumstances of the respondent or any other affected party, such as Mr Kavanagh, can be important.

CONSIDERATION OF THE APPLICATIONS

39 Mr Long for the applicant submitted that the concept of the "*fruits of the litigation*" often spoken about in applications for stays, had less significance in these matters. This was because the proceedings before the Commission had not gone beyond interim hearings at which no evidence had been heard. The Commission had not made any final determination, for example, that Mr Kavanagh had been unfairly dismissed. I think this submission by Mr Long has limited relevance in that, prima facie, the respondent and Mr Kavanagh are entitled to the benefit of the orders made by the Commission unless there is good reason to make the stay orders sought.

40 In my opinion, the key issue in determining these applications is the consequences of the granting or not granting of the stay orders sought. If the stays are granted, then the operation of the orders made by the Commission on 19 October 2005 are suspended. The centrepiece of these orders was the order that the notice of termination given to Mr Kavanagh be suspended. If the operation of that order is stayed, then the notice of termination given to Mr Kavanagh will take its course. The notice of termination, as set out earlier, was due to take effect on 25 October 2005. That date has now passed. Accordingly and as accepted by Mr Long, if the stays are granted in these applications, the notice of termination of Mr Kavanagh will have taken effect and his employment with the applicant would have ceased.

41 If the stay orders sought are not made, then the operation of the orders made by the Commission at first instance continue, unless and until altered, and Mr Kavanagh remains in employment with the applicant.

42 Accordingly, this is not a situation where, if a stay is ordered, the subject matter of the dispute will be preserved for the purposes of determination on appeal. On the contrary, if the stays are granted, the purpose of the appeals may be rendered nugatory in the sense that the appellants will no longer need to seek to overturn the orders made by the Commission at first instance to achieve the termination of employment of Mr Kavanagh. This will already have occurred. Accordingly, in my opinion, it is appropriate to preserve the status quo so that the termination notice against Mr Kavanagh remains suspended, at least until further order by the Commissioner.

43 In coming to this view, I have taken into account the broad powers which the Commission possesses at a conciliation conference convened under s44 of *the Act*. In making the orders, the Commission indicated that it was acting pursuant to s44(6)(ba) of *the Act*. This section is in the following terms:-

> "*(6) The Commission may, at or in relation to a conference under this section, make such suggestions and give such directions as it considers appropriate and, without limiting the generality of the foregoing may —*
>
> …..…
>
> *(ba) with respect to industrial matters, give such directions and make such orders as will in the opinion of the Commission —*
>
> *(i) prevent the deterioration of industrial relations in respect of the matter in question until conciliation or arbitration has resolved that matter;*
>
> *(ii) enable conciliation or arbitration to resolve the matter in question; or*
>
> *(iii) encourage the parties to exchange or divulge attitudes or information which in the opinion of the Commission would assist in the resolution of the matter in question*;"

44 It is to be noted that the Commissioner who has been seized of this dispute and convened conferences pursuant to s44 of *the Act*, has made the orders which have been made on the basis of the Commission's assessment of the matters referred to in s44(6)(ba). The Commissioner, at least at this stage, is best placed to judge the type of matters which are relevant to the making of the orders which have been made.

45 In the lengthy preamble to the orders made by the Commission on 19 October 2005, it was noted by the Commission that:-

(a) The Commission had formed the view that it was just and correct for an interim order to issue in all of the circumstances and that the issuance of the interim order will promote and enhance the conciliation process in the resolution of the claim;

(b) The Commission is of the opinion that the issuance of an interim order in this matter will prevent the deterioration of industrial relations on site to allow conciliation and/or arbitration to resolve the matter; and

(c) The Commission is of the opinion that conciliation is not exhausted and the existence of an interim order will enable and promote further conciliation in accordance with the objects of *the Act*.

46 In my opinion, I should be slow to ignore such matters being taken into account by the Commission at first instance and grant the stay applications sought with the consequences set out above.

47 Mr Long submitted that, by the terms of the orders made, the Commission had effectively given the respondents the relief sought on behalf of Mr Kavanagh and that the orders made did not leave anything to be conciliated. I do not agree with this submission. This is in part because the orders made by the Commission were interim or interlocutory orders, not final orders. The Commission reserved, by the terms of the orders it made, the possibility of changing or amending the orders. If, for example, the respondent or Mr Kavanagh refused to participate meaningfully in any conciliations, the Commission could change its previous interim orders.

48 In my view, it is necessary to consider the grounds of appeal against the two orders made, for the purposes of considering whether there is a serious issue to be tried. I share, however, the observations of O'Dea P in *Robe River Iron Associates v AMWSU* (1988) 68 WAIG 1709 where the President at page 1710 said:-

> "*It is obviously not an appropriate function in an Application of this kind, to decide whether there is a strong case or a fairly strong case. I do not attempt to set out the precise nature of this task but certainly it is to exclude the possibility that there is in fact no issue of substance to be raised – that is what is raised is not a mere triviality. I think there is some difficulty involved in searching too closely the substance and import of the grounds raised in an Appeal at this stage because a Tribunal is bound to avoid reaching any conclusions which might, in a sense, pre-empt the view taken when he constitutes part of the appeal board ultimately*."

49 In the two stay applications, the applicant has included a statement as to the reasons why a stay should be granted. Included in these statements are the reasons why the applicant submits that there is a serious question to be tried with respect to each appeal. These reasons are as follows in respect of the 14 October 2005 order:-

> "*1. Whether the Order is invalid on the basis that the Commission failed to afford the Appellant an opportunity to speak to the minutes of the proposed Order as contemplated by s.35(3) of the Act.*
>
> *2. Whether the Order was made ultra vires or was otherwise invalid on any or all of the following grounds:*
>
> *(a) the effect of the Order is to prevent the matter in question from being resolved by conciliation or arbitration contrary to s.44(6)(ba) of the Act; and*
>
> *(b) the Order is uncertain in its terms.*
>
> *3. Whether the defects apparent in the Commission's procedure had the effect of denying the Appellant natural justice and thereby rendering the Order invalid.*
>
> ***PARTICULARS OF PROCEDURAL FAILURE AND DENIAL OF NATURAL JUSTICE***
>
> *(a) Declining to inform the Appellant of the matters or information upon which the Commission was relying when it informed the Appellant in writing on 12 October 2005 that the Commission was minded to issue an interim order including the suspension of the termination notice issued by the Appellant to the Respondent's member.*
>
> *(b) Requiring the Appellant to establish why an interim order should not be made instead of requiring the Respondent to establish why an interim order could and should be made.*
>
> *4. Whether the Commission erred in making the Order which by its terms denies the occurrence of the event of which the Respondent complained*."

50 For the 19 October 2005 order, the application for a stay sets out the following reasons why there is a serious issue to be tried:-

> "*1. Whether the Order is invalid on the basis that the Commission failed to provide the parties with any opportunity to be heard before making the Order.*
>
> *2. Whether the Order is invalid on the basis that the Commission failed to afford the Appellant an opportunity to speak to the minutes of the proposed Order as contemplated by s.35(3) of the Act.*
>
> *3. Whether the Commission erred in law in treating the Order of 14 October 2005 as a nullity without it being duly set aside.*
>
> *4. Whether the Order was made ultra vires or was otherwise invalid on any or all of the following grounds:*
>
> *(a) the effect of the Order is to prevent the matter in question from being resolved by conciliation or arbitration contrary to s.44(6)(ba) of the Act; and*
>
> *(b) the Order is uncertain in its terms.*
>
> *5. Whether the defects apparent in the Commission's procedure had the effect of denying the Appellant natural justice and thereby rendering the Order invalid.*
>
> ***PARTICULARS OF PROCEDURAL FAILURE AND DENIAL OF NATURAL JUSTICE***
>
> *(a) Declining to inform the Appellant of the matters or information upon which the Commission was relying when it informed the Appellant in writing on 12 October 2005 that the Commission was minded to issue an interim order including the suspension of the termination notice issued by the Appellant to the Respondent's member.*
>
> *(b) Requiring the Appellant to establish why an interim order should not be made instead of requiring the Respondent to establish why an interim order could and should be made.*
>
> *6. Whether the Commission erred in making the Order which by its terms denies the occurrence of the event of which the Respondent complained*."

51 These points were elaborated upon in the applicant's written and oral submissions.

52 In my view, at least some of the grounds of appeal are arguable and, in that sense, there is a serious issue to be tried. In making this observation, I am not necessarily suggesting that the grounds are of equal strength or merit. There is, in my opinion, however, a serious issue to be tried in the appeals, for the purpose of determining these applications.

53 The applicant has also made submissions about the balance of convenience. The applicant primarily refers to the fact that, in the absence of a stay, they will be financially prejudiced because they are compelled to pay out monies to Mr Kavanagh by way of remuneration and other employment benefits, notwithstanding the fact that the orders made may be found by the Full Bench to be invalid. I accept that this is an inconvenience and possible detriment faced by the applicant. In my view, neither this nor the arguability of the appeals outweigh the considerations referred to above which support the dismissal of the stay applications.

54 The applications also point to the fact that, if a stay is granted, Mr Kavanagh may still proceed to an arbitration of a claim for unfair dismissal where orders for reinstatement and compensation, amongst others, may be made. Again, I accept this to be the case but it does not outweigh the considerations referred to earlier. The applicant also refers to the "*wrong message*" being given to other employees when Mr Kavanagh, at least temporarily, continues his employment despite being given notice of termination on grounds of serious misconduct. Reference is made by the applicant to *Cadbury Schweppes Limited v Peluso*,

AIRC, 30 April 1998, Print Q0507. In all the circumstances, I do not believe that this consideration can be given much weight. This is because I do not believe I can make assumptions about what messages may be sent to other employees by the applicant complying with the orders made by the Commission at first instance.

55 On the balance of convenience issue, the respondent refers to the fact that, if Mr Kavanagh is terminated, he will at least temporarily be out of employment and will be financially disadvantaged as a result. I have taken this into account in determining the applications. There is also reference to the fact that Mr Kavanagh was the occupational health and safety representative of the respondent on site and that there are ongoing health and safety issues. This is a matter that I do not, at this stage, place much weight upon, given the paucity of the evidence before the Commission, as presently constituted on this subject.

CONCLUSIONS

56 As stated earlier I think the primary issue in determining these applications is the consequences of a stay being granted or not granted. If stays are granted then the interim orders of the Commissioner at first instance will be suspended and Mr Kavanagh's termination of employment will have taken effect. This will largely undermine the integrity of the orders made by the Commissioner, prior to any Full Bench determining that the Commissioner had erred, and that the orders should be set aside. In these applications, I do not think it appropriate to order stays which will have this affect.

57 In all of the circumstances, in my view, there are insufficient grounds to support the Commission making orders to stay the operation of the orders made on 14 and 19 October 2005. Accordingly, the applications for stays will be dismissed.

2005 WAIRC 02982

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN HOLLAND GROUP PTY LTD
	APPLICANT
	-v-
	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	RESPONDENT
CORAM	THE HONOURABLE M T RITTER, ACTING PRESIDENT
DATE	MONDAY, 7 NOVEMBER 2005
FILE NO/S	PRES 6 OF 2005, PRES 7 OF 2005
CITATION NO.	2005 WAIRC 02982

Decision	Applications for a stay - Dismissed
Appearances	
Applicant	Mr J Long (of Counsel), by leave, and with him Ms A Casellas (of Counsel), by leave
Respondent	Ms K Scoble (of Counsel), by leave

Order

These matters having come on for hearing before me on 4 November 2005, and having heard Mr J Long (of Counsel), by leave, and with him Ms A Casellas (of Counsel), by leave, on behalf of the applicant and Ms K Scoble (of Counsel), by leave, on behalf of the respondent, and having reserved my decision on the matters, and reasons for decision being delivered on 7 November 2005, it is this day, 7 November 2005, ordered that application Nos PRES 6 of 2005 and PRES 7 of 2005 be and are hereby dismissed.

(Sgd.) M T RITTER,
[L.S.] Acting President.

2005 WAIRC 03015

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SEACODE NOMINEES PTY LTD AS TRUSTEE FOR THE STONEHOUSE FAMILY TRUST
	APPLICANT
	-v-
	NIGEL ANTHONY PENFOLD
	RESPONDENT
CORAM	THE HONOURABLE M T RITTER, ACTING PRESIDENT
HEARD	WEDNESDAY, 26 OCTOBER 2005, WEDNESDAY, 9 NOVEMBER 2005
DELIVERED	WEDNESDAY, 9 NOVEMBER 2005
FILE NO.	PRES 5 OF 2005
CITATION NO.	2005 WAIRC 03015

CatchWords	Industrial Law (WA) - Application to stay operation of order - instituting an appeal - stay of order principles - ability to pay judgment debt - fresh evidence - *Industrial Relations Act* 1979 (as amended), s29AA(4), s29AA(5), s49(2), s49(11) - *Industrial Relations Commission Regulations* 2005, Regulation 102(1).
Decision	Application dismissed.
Appearances	
Applicant	Mr M J Stonehouse
Respondent	Mr N A Penfold

Reasons for Decision

THE ACTING PRESIDENT:

1 This is an application under s49(11) of the *Industrial Relations Act* 1979 (as amended) (*the Act*). The application seeks an order that the operation of a decision made by the Commissioner on 13 September 2005, in application No 1548 of 2004, be stayed, pending the hearing and determination of appeal No FBA 14 of 2005 against that decision.

2 The application first came on for hearing on 26 October 2005. It was then adjourned, on the application of the applicant, to 9 November 2005, to allow the applicant to file an affidavit in support of the application. Programming orders were made to allow both parties the opportunity to file affidavits. This has occurred, as detailed later in these reasons.

3 An application under s49(11) of the Act may be made at any time after an appeal to the Full Bench has been instituted. The Act does not itself set out when an appeal is instituted. S49(2) of the Act simply provides that an appeal "lies to the Full Bench in the manner prescribed from any decision of the Commission". Regulation 102(1) of the Industrial Relations Commission Regulations 2005 provides that:-

> "*An appeal to the Full Bench from a decision of the Commission may be commenced by filing a notice of appeal in the form of Form 9.*"

4 The present appellant filed such a Notice of Appeal on 30 September 2005. Accordingly, the appellant has instituted an appeal and an application under s49(11) of *the Act* may be made.

5 An application for a stay under s49(11) of *the Act* may be made by any person who has "*a sufficient interest*". The decision of the Commission at first instance was to order that the present applicant pay $12,740.00 gross to the present respondent and $623.00 nett to his superannuation fund. Plainly, therefore, the applicant has sufficient interest to make the application for a stay which has been made.

6 S49(11) of *the Act* does not, in itself, set out the criteria which govern the basis upon which a decision should be made about whether to grant a stay. The power to order a stay pending an appeal is however common amongst Australian civil jurisdictions. I think it is appropriate to exercise the discretion contained in s49(11) of *the Act* in a way similar to other such jurisdictions.

7 The institution of an appeal does not, of itself, operate as a stay of an order of the Commission at first instance. The party in whose favour a decision and orders have been made is usually entitled to enjoy the fruits of their success. Ordinarily, something special or unusual is required before a stay will be ordered.

8 In *Eastland Technology Australia Pty Ltd and Others v Whisson and Others* (2003) 28 WAR 308, the court (Murray and Parker JJ) set out as follows the generally applicable principles as to the exercise of a stay pending an appeal, under the *Rules of the Supreme Court* 1971 (WA):-

> "*• The successful litigant at first instance will ordinarily be entitled to enforce the judgment pending the determination of any appeal.*
>
> *• It is for the applicant for a stay to move the court to a favourable exercise of its discretion.*
>
> *• It will not do so unless special circumstances are shown justifying the departure from the ordinary rule.*
>
> *• The central issue will be whether the grant of a stay is perceived to be necessary to preserve the subject matter or the integrity of the litigation, or where refusal of a stay could create practical difficulties in respect of the relief which may be granted on appeal. It is often put shortly that it will first and foremost be necessary to establish that without the grant of a stay, the right of appeal, whether upon the grant of leave or special leave or not, will be rendered nugatory.*
>
> *• If that can be demonstrated, the stay will generally still be refused unless it can be established that the appeal process, whether upon the grant of leave or special leave or not, has ultimately reasonable prospects of success so as to result in the grant of relief to the appellant.*
>
> *• If that hurdle can be overcome, the stay may still be refused where it appears that the balance of convenience does not lie in favour of the applicant; where, for example, the grant of a stay will occasion hardship to the respondent which may not be alleviated by the terms upon which the stay may be granted.*"

9 In my opinion, these principles apply to the exercise of the discretion to order a stay under s49(11) of *the Act*.

10 In support of the application, the applicant has referred to the following documents which have been filed:-

1. The Notice of Appeal.
2. An attachment to the Notice of Application for a Stay of Orders setting out the grounds of the application.
3. An affidavit of Mr Michael John Stonehouse, the director of the applicant, sworn 28 October 2005. (This affidavit was received into evidence in the stay application.)

11 In response to the affidavit of Mr Stonehouse, the respondent, Mr Nigel Anthony Penfold, has filed an affidavit, sworn on 4 November 2005. This affidavit was also received into evidence.

12 The purpose of the affidavit of Mr Stonehouse was in support of the applicant's submission that, if a stay is not granted, the applicant may face liquidation, because it does not have the financial capacity to satisfy the orders made by the Commission at first instance. The affidavit annexes a statement of assets and liabilities as at 27 October 2005. This discloses that the current total assets of the applicant are $217.00 and current liabilities $13,363.00, giving a deficiency of $13,146.00. The affidavit of Mr Stonehouse also deposes that the applicant was acting as trustee for the Stonehouse Family Trust until, on or about 31 May 2004, when there was a change in the trustee of the trust. The applicant ceased to be the trustee and Edinboro Pty Ltd became the trustee. The affidavit deposes to the fact that the change in trustee was communicated in writing to the respondent. A copy of a letter signed by Seacode Nominees Pty Ltd and Edinboro Pty Ltd dated 31 May 2004 and addressed to the respondent is annexed to the affidavit. I note that the statement of assets and liabilities is not independently verified. Additionally, the respondent, both in his affidavit and oral submissions, questions the accuracy of the statement of assets and liabilities of the applicant. Whilst noting this, I take into account in determining the application, the statement of assets and liabilities. It is also necessary, however, to consider the position of the applicant's financial circumstances in determining a stay application.

13 In *The State Bank of Victoria v Parry and Others* [1989] WAR 240, Malcolm CJ at 245 said that:-

> "*…the risk of bankruptcy or liquidation as such would not ordinarily constitute a special circumstance for the purposes of*", the discretion to grant a stay under the applicable rule of the Supreme Court Rules.

14 I note, however, that in *DVG Morley City Hyundai v Fabbri* (2002) 82 WAIG 2440 at 2441, Sharkey P quoted with approval from an earlier decision of the Commission, as constituted by the President, the following:-

> "*An appeal will be nugatory too, if the appellant can show that without a stay of execution he/she will be ruined.*"

15 In support of this proposition, Sharkey P cited *Linotype-Hell Finance Ltd v Baker* [1992] 4 All ER 887 at 888. In that case, Staughton LJ at 888 said that:-

> "*It seems to me that, if a defendant can say that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success, that is a legitimate ground for granting a stay of execution.*"

16 In *Osborne v Drive Park Pty Ltd* [2005] SASC 252, Duggan J at [20] put the matter this way:-

> "*Inability to pay the judgment debt may be relevant to a stay of execution in some cases. However it would not ordinarily be a sufficient reason of itself to attract an exercise of jurisdiction"*, to grant a stay.

17 Consistently with the authorities, in my opinion, it is necessary to consider not only the applicant's financial circumstances but also other matters including the arguability of the appeal and the interests of the respondent. The applicant's financial circumstances do not, in my opinion, of themselves, justify the granting of a stay.

18 As to the respondent's interests, this obviously favours the stay not being granted so that he may obtain the benefit of the orders made at first instance, including the proper enforcement of the orders made, if necessary.

19 With respect to the arguability of the appeal, the Notice of Appeal sets out the following grounds:-

> "*1. The decision of the learned commissioner was erred (sic) in respect that it is based on contradictory evidence presented by the Respondent (Applicant), without having regard to due process or the fair administration of justice.*
>
> *2. The decision of the learned commissioner was erred (sic) in respect to common law principles and the Industrial Relations Act in general without having regard to the following listed matters.*
>
> *3. The learned commissioner has erred in law in deciding as a matter of discretion to exercise jurisdiction to deal, hear and determine the Respondent's (Applicant's) claim pursuant to section 29(1)(b)(ii) of the Industrial Relations Act.*
>
> *4. The learned commissioner has erred in law by failing to consider and determine the issue of the jurisdictional validity of the Commission to deal with the Respondent's (Applicant's) claim pursuant to section 29(1)(b)(ii) of the Industrial Relations Act.*
>
> *5. The learned commissioner erred in law, fact or finding that the Respondent (Applicant) was an employee and not an independent contractor.*
>
> *6. On the balance of probabilities the Respondent (Applicant) failed to prove that any other relationship existed between the Appellant and the Respondent (Applicant) other than as an independent contractor.*
>
> *7. The learned commissioner should have found that the Respondent (Applicant) was an independent contractor and not an employee.*
>
> *8. The learned commissioner should have found that the Commission did not have the jurisdiction to deal with the Respondent's (Applicant's) claim pursuant to section 29AA (4) and (5) of the Industrial Relations Act.*"

20 It can be seen that the grounds of appeal are, by and large, unparticularised.

21 There were two matters which Mr Stonehouse placed emphasis upon in his oral submissions. The first was an argument which is to be made to the Full Bench, that the Commission did not have jurisdiction to determine the respondent's claim, because of the contents of s29AA(4) and (5) of *the Act*. In summary, these sections provide that, in certain circumstances, an employee whose salary is in excess of the prescribed amount must not be determined by the Commission, despite a claim that the employee has not been allowed a benefit to which the employee is otherwise entitled under their contract of employment. The prescribed amount, at the time of the making of the application to the Commission at first instance by the respondent, was $99,700.00.

22 With respect to this issue, Mr Stonehouse conceded that it was not raised before the Commission at first instance. Nor was there any evidence before the Commission which would have enabled the Commissioner to determine that s29AA(4) and (5) of *the Act* applied. Mr Stonehouse stated that this issue is to be the subject of "*fresh*" evidence and an application to the Full Bench to receive such evidence in the determination of the appeal. The respondent, in his oral submissions, submitted that s29AA(4) did not apply to him.

23 At the present time, I am unable to determine whether there is any merit in this ground of appeal. This is because there is no evidence before me relevant to the applicability of s29AA(4) and (5) of *the Act*. It cannot be said, therefore, that this ground of appeal is arguable and thereby supports the application for a stay.

24 The second matter emphasised by Mr Stonehouse was the following. He said that he intended to adduce "*fresh*" evidence before the Full Bench in support of an alternative ground of appeal that the Commission at first instance was wrong to find the respondent was the employee of the applicant. Again, this fresh evidence is not before me and I cannot make any comment upon its possible admissibility before the Full Bench or the strength of such evidence, if it were to be received by the Full Bench. Accordingly, therefore, I cannot at this stage decide that there is sufficient merit in this ground of appeal to support an order for a stay.

25 The reasons of the Commission at first instance indicate that the primary issue was whether the respondent was an employee of, or an independent contractor to, the applicant. In my opinion, with respect, the reasons of the Commissioner at first instance do not indicate other than that the issue was approached and determined in accordance with established principle.

26 Overall, therefore, I am unable to say, at present, that the appeal is sufficiently arguable to support the stay application. When this is taken into account, together with the interests of the respondent referred to earlier, I do not think a stay should be ordered, notwithstanding the evidence of the applicant's financial circumstances.

27 Having regard to all of the circumstances set out above, in my opinion, the applicant has not established that it is appropriate to grant the stay sought. Accordingly, the application is dismissed.

2005 WAIRC 02896

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SEACODE NOMINEES PTY LTD AS TRUSTEE FOR THE STONEHOUSE FAMILY TRUST **APPLICANT** **-and-** NIGEL ANTHONY PENFOLD **RESPONDENT**
CORAM	THE HONOURABLE M T RITTER, ACTING PRESIDENT
DATE	WEDNESDAY, 26 OCTOBER 2005
FILE NO/S	PRES 5 OF 2005
CITATION NO.	2005 WAIRC 02896

Decision	Application adjourned.
Appearances	
Applicant	Mr M J Stonehouse
Respondent	Mr N A Penfold

Order

This matter having come on for hearing before me on 26 October 2005, and having heard Mr M J Stonehouse, on behalf of the applicant and Mr N A Penfold, on his own behalf, it is this day, 26 October 2005, ordered that:-

(1) Any affidavit in support of the applicant's present application be filed by the applicant in the Registry of the Commission and served on the respondent by 4.00pm on Friday, 28 October 2005.

(2) Any affidavit in response to an affidavit filed by the applicant, be filed by the respondent in the Registry of the Commission and served on the applicant by 4.00pm on Friday, 4 November 2005.

(3) The hearing of the application is adjourned to 9.00am on Wednesday, 9 November 2005.

(Sgd.) M T RITTER,
[L.S.] Acting President.

2005 WAIRC 03014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SEACODE NOMINEES PTY LTD AS TRUSTEE FOR THE STONEHOUSE FAMILY TRUST **APPLICANT** **-v-** NIGEL ANTHONY PENFOLD **RESPONDENT**
CORAM	THE HONOURABLE M T RITTER, ACTING PRESIDENT
DATE	WEDNESDAY, 9 NOVEMBER 2005
FILE NO/S	PRES 5 OF 2005
CITATION NO.	2005 WAIRC 03014

Result	Application dismissed.
Appearances	
Applicant	Mr M J Stonehouse
Respondent	Mr N A Penfold

Order

This matter having come on for hearing before me on 26 October 2005 and 4 November 2005, and having heard Mr M J Stonehouse on behalf of the applicant and Mr N A Penfold on his own behalf, and having reserved my decision on the matter, and the reasons for decision being delivered on 9 November 2005, it is this day, 9 November 2005, ordered that application No PRES 5 of 2005 be and is hereby dismissed.

(Sgd.) M T RITTER,
[L.S.] Acting President.

AWARDS/AGREEMENTS—Application for—

2005 WAIRC 03113

THE AEROSPACE ENGINEERING SERVICES (MAINTENANCE SUPPORT)ENTERPRISE AWARD 2003.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIV., THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS-WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	AEROSPACE ENGINEERING SERVICES PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	WEDNESDAY, 23 NOVEMBER 2005
FILE NO/S	A 6 OF 2003
CITATION NO.	2005 WAIRC 03113

Result New Award

Order

HAVING heard Mr D. Hicks on behalf of the The Automotive, Food, Metals, Engineering Printing and Kindred Industries Union of Workers-Western Australian Branch and Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing Union for the Applicant and Mr D. Cronin (of Counsel) for the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby makes the following Award

(Sgd.) J F GREGOR,
[L.S.] Senior Commissioner.

AEROSPACE ENGINEERING SERVICES PTY LTD

ENTERPRISE AWARD 2005

1. - TITLE

This Award shall be known as the Aerospace Engineering Services Pty Ltd Enterprise Award 2005.

2. - ARRANGEMENT

This Award is arranged as follows:

1. Title
2. Arrangement
3. Area, Scope and Term
4. Parties Bound
5. Anti-discrimination
6. Dispute Resolution
7. Contract of Employment
8. Classifications
9. Hours of Work (Day Workers)
10. Part Time Employment
11. Shift Work
12. Overtime
13. Recall to Duty
14. Public Holidays

15. Annual Leave
16. Rates of Pay
17. Payment of Wages
18. Long Service Leave
19. Jury Service
20. Private Motor Vehicle Allowance
21. Uniforms and Protective Equipment
22. Redundancy
23. Personal Leave
24. Parental Leave
25. Mobility of Employment
26. Minimum Adult Award Wage
27. Confidentiality
28. Union Delegate Training Leave
29. Schedule 1

3. – AREA, SCOPE AND TERM

This Award shall apply to the operations of Aerospace Engineering Services Pty Ltd and to employees of the Company, who are not a party to an Australian Workplace Agreement, covered in the classifications of this Award engaged on work in connection with or incidental to the maintenance support of aircraft contracts at the RAAF Pearce Airbase and Gingin Airfield and/or any other future location within the State of Western Australia.

This Award will commence operation from 1 December 2005 for a term of 18 months from commencement.

4. - PARTIES BOUND

1. Aerospace Engineering Services Pty Ltd (ACN 069 272 340), PO Box 213, Bullsbrook, WA 6084.
2. Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers, Western Australian Branch (AMWU).
3. Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch (CEPU).

5. - ANTI-DISCRIMINATION

(1) It is the intention of the parties to this award to achieve the principal object in s.3(j) of the *Workplace Relations Act 1996* (the WR Act) through respecting and valuing the diversity of the workforce by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

(2) Accordingly, in fulfilling their obligations under the dispute resolution procedure clause, the respondents must make every endeavor to ensure that neither the award provisions nor their operation are directly or indirectly discriminatory in their effects.

(3) Nothing in this clause is to be taken to affect:

(a) any different treatment (or treatment having different effects) which is specifically exempted under the Commonwealth and Western Australian anti-discrimination legislation;

(b) junior rates of pay in accordance with s.143(1E) of the WR Act;

(c) an employee, employer or registered organisation, pursuing matters of discrimination in any State or Federal jurisdiction, including by application to the Human Rights and Equal Opportunity Commission or the Western Australian Equal Opportunity Commission;

(d) the exemptions in ss.170CK(3) and (4) of the WR Act.

6. - DISPUTE RESOLUTION

(1) The objective of this procedure is to ensure expeditious, effective and amicable resolution of disputes in the workplace at the earliest possible opportunity without the need for intervention by upper management, the unions or the Commission. This will be done via consultation, co-operation and discussions.

(2) The following steps should be followed in resolving any industrial dispute or grievances:

(a) The first step will involve discussion between the employee(s) concerned and their immediate supervisor.

(b) If the matter is not resolved following the first step, the second step will involve discussions between the employee(s) concerned, their immediate supervisor, the supervisor's Manager and the Programme Manager. At this step employees may be represented by an employee nominated representative.

(c) If the matter is still not resolved following the second step, the third step will involve discussions between the parties mentioned in the second step together with the Human Resources and Administration Manager.

(d) If the matter is still not resolved following conclusion of the third step, the matter will be referred to the Director of Operations for consideration.

(e) If the employee(s) are not satisfied with the resolution after consideration of the Director of Operations, the dispute may be referred to the Western Australian Industrial Relations Commission (WAIRC).

(3) The parties to the Award are committed to adhering to the above procedures. This should be facilitated by the earliest possible advice by one party to the other on any issue or problem which may give rise to a grievance or dispute.

(4) Throughout all stages of the above procedure, all relevant facts will be identified, duly recorded and signed by all parties involved.

(5) Emphasis shall be placed on a negotiated settlement. If, however, the negotiation process is exhausted without the dispute being resolved, the parties shall jointly or individually refer the matter to the WAIRC for assistance in resolving the dispute.

(6) In order to allow for the successful resolution of grievances without disruption, there shall be no work stoppages, lockouts, bans or limitations on the performance of work while the disputes procedure is being pursued.

7. - CONTRACT OF EMPLOYMENT

(1) Employees may be employed on either a full time, part time or casual basis. Employees will be informed in writing at the time of their engagement whether they are full time, part time or casual.

(2) Employees are required to work as directed by the Company from time to time including performing those duties specified in their respective classification.

(3) Employees have the opportunity to progress and be promoted within the Company in accordance with Company policy.

(4) Notice of termination by employer

(a) In order to terminate the employment of an employee, the employer will give the employee the following notice:

Period of Continuous Service	Period of Notice
1 year or less	1 week
Over 1 year and up to the completion of 3 years	2 weeks
Over 3 years and up to the completion of 5 years	3 weeks
5 years and over	4 weeks

(b) In addition to the notice in clause (a), employees over 45 years of age at the time of the giving of the notice with more than two years continuous service will be entitled to an additional week's notice.

(c) Payment in lieu of the notice prescribed in subclauses (a) and (b) will be made if the appropriate notice period is not given.

(d) In calculating any payment in lieu of notice the wages an employee would have received in respect of the ordinary time the employee would have worked during the period of notice had the employee's employment not been terminated will be used.

(e) The period of notice in this clause will not affect the right of the employer to dismiss any employee without notice for misconduct, and in such cases, the wages will be paid up to the time of dismissal only.

(5) Notice of Termination by Employee

(a) The notice of termination required to be given by an employee will be the same as that required of an employer, save and except that there will be no additional notice based on the age of the employee concerned.

(b) If an employee fails to give notice the employer will have the right to withhold monies due to the employee with a maximum amount equal to the ordinary time rate of pay for the period of notice.

(6) Transfer to Lower Paid Duties

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

(7) Probation and Training

(a) Technical Employees

(i) All new technical employees will be employed on probation for a period of 6 months from the commencement of employment, during which period the employee must be security cleared by the Company. If an employee is not security cleared the Company may terminate the employee's employment immediately without notice.

(ii) During the probationary period, the employee must undertake training and pass appropriate tests as required by the Company. Further training and testing may also be required following the completion of the probationary period.

(iii) Prior to the completion of the probationary period, technical employees must obtain an approval stamp for signing off aircraft work. A failure to obtain an approval stamp within the 6 month probation period will result in an extension of the probationary period for a further 2 months. If a technical employee fails to obtain the approval stamp within the extended period of probationary service (without a valid reason), the employment will be terminated without the need for any further notice from the Company.

(iv) During the probationary period, technical employees will be paid in accordance with the Senior Technician 1 (on probation) classification in the Rates of Pay. The annual salary is inclusive of the basic wage and all other allowances. This does not apply to technicians performing sheet metal and ground support equipment technician duties who will be paid the Senior Technician 1 classification in the Rates of Pay clause from commencement.

(v) During the probationary period either an employee or the Company may terminate the employment by giving 1 week's notice to the other party, or payment (or forfeiture) of the equivalent wages in lieu of such notice. This shall not affect the right of the Company to dismiss an employee immediately without notice for misconduct or serious breach of the employment contract.

(vi) Following successful completion of the probationary period, including the required training and testing, an employee's employment with the Company will be confirmed in writing.

(vii) All employees are subject to a performance review conducted at least annually.

(b) Non Technical Employees

(i) All new non technical employees will be employed on probation for a period of 3 months from the commencement of employment, during which period the employee must be security cleared by the Company. If an employee is not security cleared the Company may terminate the employee's employment immediately without notice.

(ii) During the probationary period, the employee must undertake training and pass appropriate tests as required by the Company. Further training and testing may also be required following the completion of the probationary period.

(iii) During the probationary period, employees will be paid in accordance with their classification set out in the Rates of Pay clause of this Award. The annual salary is inclusive of the basic wage and all other allowances.

(iv) During the probationary period either an employee or the Company may terminate the employment by giving 1 week's notice to the other party, or payment (or forfeiture) of the equivalent wages in lieu of such notice. This shall not affect the right of the Company to dismiss an employee immediately without notice for misconduct or serious breach of the employment contract.

(v) Following successful completion of the probationary period, including the required training and testing, an employee's employment with the Company will be confirmed in writing.

(vi) All employees are subject to a performance review conducted at least annually.

8. - CLASSIFICATIONS

(1) The following definitions relate to terms defined in this Award:

SOAP	Spectrometric Oil Analysis Program
POL	Petroleum, Oil and Lubricant
PC-EMIS	PC Engineering and Maintenance Information Systems
GSE	Ground Support Equipment
IMTE	Inspection, Measuring and Test Equipment
TAFE	Technical and Further Education

(2) The following subclauses set out relevant criteria relating to each respective classification. Where the Company wishes to introduce significant change to any classification criteria, it will consult directly with employees impacted before any change is made.

(3) Administration

(a) Administration Assistant 1

(i) Has necessary keyboard and computer literacy skills to perform required tasks.

(ii) Has a minimum of 2 years in similar work.

(iii) Able to carry out various administrative staff functions such as compilation of reports and data.

(iv) Applies departmental administrative operations and quality systems. Execute administrative quality procedures.

(v) Carries out clerical, administrative and / or other departmental duties and tasks as required.

(b) Administration Assistant 2

(i) Achieved and can perform all the necessary skills and duties of an Administration Assistant 1.

(ii) Has worked as an Administration Assistant 1 with the Company for at least 2 years.

(iii) As required, performs more difficult clerical, administrative and / or other departmental duties and tasks than the Administration Assistant 1.

(iv) Able to guide and train Administration Assistant 1 employees in on-the-job training.

(v) Must possess an overall knowledge of the various administration and other departmental functions in his / her area and expertise and be proficient in them.

(vi) Must possess good computer skills across the full range of applicable software packages.

(c) Administration Officer

(i) Achieved and can perform all the necessary skills and duties of an Administration Assistant 2.

(ii) Able to train and supervise Administration Assistants in on-the-job training.

(iii) Lead, supervise and manage a group of Administration Assistants in various departmental functions in at least one sub-section.

(iv) For accounts clerks, must possess relevant TAFE qualifications.

(v) Undertakes performance appraisals of staff under their supervision.

(4) Stores

(a) Storeperson 1

(i) Has a minimum of 2 years experience in similar work.

(ii) Carry out various warehousing duties and / or material handling functions as instructed.

(iii) Able to carry out basic stock control duties.

(iv) Carry out various material functions and duties such as stocktaking and reconciliation exercises.

(v) Executes material quality procedures.

(vi) Able to guide and train new personnel in on-the-job training.

(vii) Able to operate warehousing equipment and / or have appropriate keyboard operating skills.

(b) Storeperson 2

(i) Achieved and can perform all the necessary skills and duties of a Storeperson 1.

(ii) Has worked for at least 2 years as a Storeperson 1 for the Company.

(iii) Perform more complex material handling functions and tasks.

(iv) Able to guide and train staff.

(v) Carry out various material functions and duties such as provisioning exercises, and stock control duties.

(vi) Must possess an overall knowledge of the various material functions in his / her area of expertise.

(c) Stores Officer

(i) Achieved and can perform all the necessary skills and duties of a Storeperson 2.

(ii) Has worked for at least 2 years as a Storeperson 2 for the Company.

(iii) Perform more complex material handling functions and tasks.

(iv) Plan, organize and carry out various material functions such as but not limited to stocktaking and reconciliation exercises, provisioning exercises and stock control.

(v) Must possess an overall knowledge of the various material functions in his / her area of expertise.

(5) Technician Role

(a) Senior Technician 1

(i) Holds trade certificate or equivalent Airforce training certificate and has completed and passed the S211 aircraft type training.

(ii) Has a minimum of 4 years aircraft working experience.

(iii) Performs various technical duties and other associated aircraft and / or equipment duties and functions.

(iv) Performs and signs off servicing, inspection, maintenance, modification, repair and system fault diagnosis.

(v) Update Work Cards / Sheets, PC EMIS, Form F1400, Form 1392, Aircraft and Engine Log Books, and other aircraft-related documentation,

(vi) Observe and practise engineering standards and tools/ loose article control with safety and quality.

(vii) Performs other aircraft-related duties and functions such as but not limited to counter duties, and self audits of work performed to ensure compliance to procedures and requirements.

(viii) Applies quality systems and executes quality procedures.

(ix) The following approvals must have been obtained:

- Crew Chief Authorisation for personnel deployed for flight line operations
- Full Stamp trade Approval

(x) Guide, supervise and train senior technicians in on-the-job training.

(xi) Assist in the performance appraisals of staff under their supervision.

(b) Senior Technician 2

(i) Achieved and can perform all the necessary skills and duties of a Senior Technician 1.

(ii) Has worked for at least 18 months as a Senior Technician 1 for the Company.

(iii) Performs aircraft fault diagnosis and trouble shooting.

(iv) For Airframe / Engine; Egress / Armament; Radar / Electrical / Instrument / Communications / Navigation; Safety Equipment and Sheet Metal senior technicians, have been qualified and appointed as an independent checker and / or authorised to release aircraft for flight.

(v) Conduct classroom training for staff, as required.

(vi) Mentors staff under training.

(c) Senior Technician 3

(i) Achieved and can perform all the necessary skills and duties of a Senior Technician 2.

(ii) Has worked for at least 12 months as a Senior Technician 2 for the Company.

(iii) Perform in process and final inspections.

(iv) Able to manage and supervise lower grade senior technicians in on the job training.

(v) Lead, supervise and manage a team of senior technicians in aircraft / equipment fault diagnosis and trouble shooting, and in production work.

(vi) Provide guidance, training, direction and on-the-job training to staff under their care for all aircraft / equipment maintenance work, and aircraft / equipment fault diagnosis and troubleshooting.

(vii) Plan and ensure serviceable and correct equipment, POL, GSE, IMTE and tools are available for work to be carried out.

(viii) Perform work area audits and surveillance to ensure compliance to standard operating procedures and customer requirements.

(ix) Perform accident / incident investigations.

(x) Review standard operating procedures.

(xi) Lead, control, guide, train and discipline / counsel staff under their supervision.

(xii) Conduct quarterly and annual performance appraisals of staff under their supervision.

(d) Service Engineer 1

(i) Achieved and can perform all the necessary skills and duties of a Senior Technician 3.

(ii) Has worked for at least 12 months as Senior Technician 3 in the Company.

(iii) Performs production planning, scheduling, organising, coordination, staffing, directing and controlling.

(iv) Manage all tasks and activities in Log Cell / Counter / Ops Brief / SOAP / Tool Crib / POL / Publications, flight launching, receiving, rectification, depot and workshop.

(v) Plan, lead, distribute, co-ordinate and manage day-to-day work to completion and on time.

(vi) Conduct spares provisioning.

(vii) Conduct quarterly and annual performance appraisal of staff under their supervision.

(e) Service Engineer 2

(i) Achieved and can perform all the necessary skills and duties of a Service Engineer 1.

(ii) Has worked for at least 24 months as a Service Engineer 1 for the Company.

(iii) Leads, supervises and manages a large team of technicians in complex aircraft fault diagnosis and trouble-shooting, and in production work.

(f) Senior Service Engineer

(i) Achieved and can perform all the necessary skills and duties of a Service Engineer 2.

(ii) Leads, supervises and manages the work operation of a sub-section or section.

9. - HOURS OF WORK (DAY WORKERS)

(1) From the commencement of this Award the Company will restructure its work arrangements so that ordinary hours for employees covered by this Award are 38 per week rather than the 42 hours per week arrangement which operated at the Company prior to the introduction of this Award.

(2) The ordinary hours of work will be an average 38 hours per week exclusive of meal and tea breaks.

(3) The ordinary hours will be worked Monday to Friday between 6.00am and 6.00pm with 7.6 hours to be worked each day unless an alternative arrangement is agreed between the Company and the majority of employees concerned or an individual employee to vary the hours of work within the spread of ordinary hours.

(4) Ordinary hours of work will be continuous except for meal breaks. Employees will be entitled to the following breaks during ordinary hours:

(a) An unpaid meal break of not more than 45 minutes;

(b) A paid morning tea break of 10 minutes; and

(c) An unpaid afternoon tea break of not more than 10 minutes.

(5) Changes to work hours

(a) Where demands of the Company's customer requires the Company to change the employee's ordinary hours of work, within the spread of ordinary hours, the Company will inform employees affected by the change as soon as reasonably practicable after the Company is notified of the requirement.

(b) In all other cases employees will be consulted about any permanent changes to hours of work within the spread of ordinary hours of work prior to the change and will be provided with a minimum of 2 weeks' notice prior to the change.

10. - PART TIME EMPLOYMENT

(1) Part time employees are entitled to receive payment for wages and entitled to leave on a pro-rata basis in the same proportion as the number of hours they are contracted to work each week relates to 38 hours. Any time worked in excess of contracted hours will be paid at overtime rates.

11. - SHIFT WORK

(1) At the commencement of this Award work will be arranged to commence and finish between the hours of 6.00am and 6.00pm. However, employees may be required to work shifts outside the ordinary work hours of 6.00am to 6.00pm on any day from Monday to Friday to suit the operational requirement and flying programmes of the Company.

(2) The ordinary hours of work for shift workers will be 38 hours per week inclusive of meal and tea breaks and will not exceed 7.6 hours per shift unless an alternative arrangement is agreed between the Company and the majority of employees concerned or an individual employee to vary the spread of ordinary hours of each shift.

(3) Ordinary hours of work for shift workers will be consecutive except for meal breaks. Employees will be entitled to the following breaks during ordinary hours:

(a) One paid meal break of not more than 20 minutes; and

(b) One paid tea break of 15 minutes.

(4) Payment for Shift Work

(a) Where the ordinary hours of a rostered shift commence before 6.00am or ends after 6.00pm on any day of the week, the rate to be paid shall be the Standard Hourly Rate plus 15%.

(b) Where shift work is performed on a Saturday, Sunday or public holiday, the rates to be paid shall be as follows:

Saturday	the Standard Hourly Rate multiplied by a factor of 2.0
Sunday	the Standard Hourly Rate multiplied by a factor of 2.0
Public Holiday	the Standard Hourly Rate multiplied by a factor of 2.5

(5) Changes to shift work hours

(a) Where demands of the Company's customer requires the Company to change the employee's ordinary shift work hours, the Company will inform employees affected by the change as soon as reasonably practicable after the Company is notified of the requirement.

(b) In all other cases employees will be consulted about any permanent changes to ordinary shift work hours prior to the change and will be provided with a minimum of 2 weeks' notice prior to the change.

12. – OVERTIME

(1) Overtime will be paid for all work done outside the ordinary hours of work.

(2) Overtime for day workers will be paid at 1.5 times the Standard Hourly Rate for the first two hours and 2 times the Standard Hourly Rate thereafter for all work done in excess of 7.6 hours each day (or other relevant period of hours as agreed pursuant to clause 9 (3)).

(3) Overtime work on Saturday will be paid at 1.5 times the Standard Hourly Rate for the first two hours and 2 times the Standard Hourly Rate thereafter. All overtime work on Sundays will be paid at 2 times the Standard Hourly Rate.

(4) All overtime worked by shift workers will be paid at 2 times the Standard Hourly Rate except for overtime worked by shift workers on public holidays, which shall be paid at 2.5 times the Standard Hourly Rate.

(5) Overtime worked on public holidays shall be paid at 2.5 times the Standard Hourly Rate.

(6) In calculating overtime each day stands alone.

(7) All employees may be required to work reasonable overtime.

(8) Employees are entitled to a break of 10 hours between the conclusion of overtime on one shift and the commencement of the employee's next shift. Where a break of 10 hours is not provided the employee will be paid at overtime rates for work performed until the employee has a 10 hour break.

(9) Breaks During Overtime

(a) A non shift employee working overtime Monday to Friday is entitled to a paid break of 20 minutes after each four hours of overtime worked if the employee is required to continue working after the break.

(b) A shift employee working overtime Monday to Friday is entitled to a paid break of 20 minutes after two hours of overtime worked if the employee is required to continue working after the break. The employee will be entitled to a further paid break of 20 minutes after a further four hours of work provided the employee is required to continue working after the break.

(c) An employee working overtime on Saturday or Sunday is entitled to a 10 minute paid break after four hours of work and a 45 minute unpaid meal break after 6 hours work if the employee is required to continue working after the meal break. An employee is entitled to a further 10 minute unpaid break if the employee works for a further 2 hours after the conclusion of the meal break if the employee is required to continue working after the break.

13. - RECALL TO DUTY

(1) An employee recalled to duty after leaving the premises will be paid at the applicable overtime rates subject to a minimum payment for at least four hours work.

14. – PUBLIC HOLIDAYS

(1) An employee will be entitled to holidays, without loss of pay, on the following days:

New Year's Day, Good Friday, Easter Monday, Christmas Day, Boxing Day, Australia Day, Anzac Day, Queen's Birthday, Labour Day, and Foundation Day.

(2) Where a prescribed public holiday falls on a Saturday or Sunday, it shall be observed on the next succeeding week day.

(3) If another day is prescribed as a public holiday is substituted for any of the public holidays listed in subclause (1), then an employee will be entitled to a public holiday on that day, without loss of pay, instead of the public holiday listed in subclause (1).

15. - ANNUAL LEAVE

(1) Employees are entitled to 20 days annual leave per annum, accruing weekly. Such leave shall be taken at times agreed between the Company and the employee, subject to the operational requirements of the Company and provisions of the *Minimum Conditions of Employment Act (1993)*. Only accrued leave will be approved.

(2) Employees may be required to take annual leave, or such period of unpaid leave as may be necessary, should the Company wish to observe a close-down period. Where possible, the Company will provide employees with at least one month's notice of a close-down period.

(3) The preceeding year's leave entitlement (20 days) must be taken within the current year unless the Company otherwise agrees in writing to allow employees to accrue the leave for special reasons.

16. - RATES OF PAY

(1) Employees will be paid no less than the consolidated base annual salary in accordance with their classification in the following table. The annual salary is inclusive of the 38 hour rostered hours and all allowances (which include annual leave loading, leading hand, first aid, meal allowance, transport allowance, dirty work, hot work, cold work, wet places work, confined space work, fuel tank work and fibreglass work). The annual salary does not include overtime penalties, shift allowances and superannuation payments.

(2) Employees will be rewarded with promotion and pay increases based on merit and in accordance with Company policy.

38 Hour Week Remuneration			
Classification	***Annualised Salary (AS)***	***Base Weekly Payment (BWP)***	***Standard Hourly Rate***
Administrative Assistant 1	***28,500.00***	*AS/52 weeks*	*BWP/38 hours*
Administrative Assistant 2	***30,000.00***	*AS/52 weeks*	*BWP/38 hours*
Administrative Officer	***31,500.00***	*AS/52 weeks*	*BWP/38 hours*
Storesperson 1	***30,564.00***	*AS/52 weeks*	*BWP/38 hours*
Storesperson 2	***32,000.00***	*AS/52 weeks*	*BWP/38 hours*
Stores Officer	***33,500.00***	*AS/52 weeks*	*BWP/38 hours*
Snr Technician 1 (on probation)	***32,075.00***	*AS/52 weeks*	*BWP/38 hours*
Snr Technician 1	***33,400.00***	*AS52 weeks*	*BWP/38 hours*
Snr Technician 2	***34,900.00***	*AS/52 weeks*	*BWP/38 hours*
Snr Technician 3	***36,400.00***	*AS/52 weeks*	*BWP/38 hours*
Service Engineer 1	***37,900.00***	*AS/52 weeks*	*BWP/38 hours*
Service Engineer 2	***39,400.00***	*AS/52 weeks*	*BWP/38 hours*
Senior Service Engineer	***40,900.00***	*AS/52 weeks*	*BWP/38 hours*

(3) Where an employee is paid in excess of the base of the consolidated annual base salary, any increase to the rates resulting from a State Wage Increase will be absorbed within the employee's actual rate and the employee's pay rate will not be adjusted. Employee's pay will only be adjusted as a result of State Wage Increases if an increase to the base rate would result in the employee being paid less than the adjusted rate.

17. - PAYMENT OF WAGES

(1) Wages will be paid fortnightly by Electronic Funds Transfer to a financial institution account nominated by the Employee.

(2) Any change to the method of payment must be agreed between the Company and the majority of employees covered by this Award.

18. - LONG SERVICE LEAVE

(1) The Employer will provide long service leave entitlements for its employees in accordance with the provisions of the Western Australian *Long Service Leave Act 1958*.

19. - JURY SERVICE

(1) An employee required to attend for jury service during the employee's ordinary working hours will be reimbursed by the employer the amount equal to the difference between the amount paid in respect of the employee's attendance for such jury service and the amount of wage the employee would have received had the employee not been on jury service.

(2) An employee will notify the employer as soon as possible of the date upon which the employee is required to attend for jury service. Further, the employee will give the employer proof of the employee's attendance, the duration of such attendance and the amount received in respect of such jury service.

20. - PRIVATE MOTOR VEHICLE ALLOWANCE

(1) No employee will be required to use their private vehicle on the employer's business unless the employee so agrees.

(2) When an employee agrees to use their private vehicle for the employer's purposes, the employee will be paid an allowance of 63 cents per kilometre.

21. - UNIFORMS AND PROTECTIVE EQUIPMENT

(1) Technicians and storepersons will be provided with uniforms and safety shoes upon commencement of employment. Employees are responsible for the laundry.

(2) Replacement issues will be provided to employees on a fair wear and tear basis.

(3) Where necessary and in accordance with statutory requirements, the Company will provide personal protective equipment to ensure the safety and well being of employees.

22. – REDUNDANCY

(1) Where the Company has made a definite decision that it no longer wishes the job an employee has been doing to be done by any one, and that is not due to ordinary and customary turnover and may lead to an employee's termination, the Company will inform the employee and the employee's Union as soon as reasonably practicable after the decision has been made and will hold discussions with the employee about:

(a) reasons for the decision and the likely effects of the decision in respect of the employee; and

(b) measures that may be taken by the Company or the employee to minimise the effect of the decision on the employee.

(2) Subject to subclause (3) of this clause, in the event that an employee's position is made redundant the employee will be paid severance pay in accordance with the following:

Years of Service	Severance Pay
Less than 1 year	Nil
Between 1 and 2 years	4 weeks
Between 2 and 3 years	6 weeks
Between 3 and 4 years	7 weeks
Between 4 and 5 years	8 weeks
Between 5 and 6 years	10 weeks
Between 6 and 7 years	11 weeks
Between 7 and 8 years	13 weeks
Between 8 and 9 years	14 weeks
Between 9 and 10 years	16 weeks
More than 10 years	12 weeks

(3) Alternative Employment

Where the Company offers the employee acceptable alternative employment with the Company, the employee will not be entitled to severance pay. Where the Company arranges or obtains acceptable employment with another company it may make application to the Commission to avoid paying severance pay or to have the severance pay prescription varied. Upon accepting the alternative employment, the pay of the employee will be adjusted to the pay scheme the employee has agreed to accept.

(4) Employee Leaving During Notice

An employee may terminate his / her employment during the period of notice and, if so, will be entitled to the same benefits and payments under this clause as they would had they remained with the Company until the expiry of such notice. In such circumstances the employee will not be entitled to payment in lieu of notice.

(5) Time Off Work During Notice Period

During the period of notice of termination given by the employer, an employee will be allowed up to eight hours time off without loss of pay for the purpose of seeking other employment.

(6) Where an employee has given or been given notice in accordance with this clause then the employee will continue in the employee's employment until the date of the expiration of such notice. Any employee who, having given or been given notice, without reasonable cause (proof of which will lie on the employee) is absent from work during such period, will be deemed to have abandoned the employee's employment and will not be entitled to payment for work done by him/her within that period.

(7) An employee (other than an employee who has given or received notice in accordance with this clause) not attending for duty will, except as provided by this award, lose pay for the actual time of such non-attendance.

(8) Where notice under this clause is given by the employee whilst the employee is away from home base the period of notice will commence from the date given. The effective date of termination will be the expiry of the period of notice or the date of return to home base on completion of the assignment, whichever is the later.

(9) An employee who is terminated for misconduct or who resigns will not be entitled to the benefits of this clause.

23. – PERSONAL LEAVE

(1) Sick Leave

(a) Employees are entitled to 10 days paid sick leave per annum credited at 1 January each year subject to the provisions of this clause.

(b) Sick leave will accrue weekly on a pro rata basis. If an employee leaves the Company and has taken sick leave in excess of sick leave that has accrued, the difference between sick leave taken and sick leave accrued will be deducted from the employee's final payment.

(c) Employees must advise the Company of any inability to attend work due to sickness as soon as possible on the day concerned.

(d) Except in the case of two single day absences in any year, an employee wanting paid sick leave must provide a doctor's certificate, or evidence that would satisfy a reasonable person of the entitlement, stating that an employee is unfit for work as proof of sickness or injury on each occasion.

(2) Carer's Leave

(a) Employees are entitled to use up to 5 days sick leave each year to care for the employee's spouse or defacto spouse, child, parent, sibling or grandparent or member of the employee's household who is sick and requires care and support. This entitlement is subject to an employee being responsible for the care and support of the person concerned. In normal circumstances an employee is not entitled to take carer's leave where another person has taken leave to care for the same person.

(b) Before taking carer's leave, an employee must give notice before their next rostered starting time, unless the employee has a good reason for not doing so. The notice must include:

(i) the name of the person requiring care and support and their relationship to the employee;

(ii) the reason for taking such leave; and

(iii) the estimated length of absence.

(c) Employees must establish by production of a medical certificate or evidence that would satisfy a reasonable person of the entitlement, the illness of the person concerned and that the illness is such as to require care by another.

(d) An employee may take unpaid carer's leave if the Company agrees.

(3) Bereavement Leave

(a) Employees may take up to 3 days paid bereavement leave upon the death of the employee's:

(i) spouse or de facto spouse;

(ii) child or step-child;

(iii) parent or step-parent;

(iv) sibling;

(v) grandparents; or

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

(b) Bereavement leave is not to be taken during a period of any other kind of leave.

(c) An employee who claims paid bereavement leave is to provide to the Company, if so requested by the Company, evidence that would satisfy a reasonable person as to:

(i) the death that is the subject of the leave sought; and

(ii) the relationship of the employee to the deceased person.

24. – PARENTAL LEAVE

(1) The Employee is entitled to parental leave in accordance with Schedule 14 of the *Workplace Relations Act 1996* (Cth) which is attached as Appendix 1 to this Award.

25. - MOBILITY OF EMPLOYMENT

(1) The Company may require an employee to work in any location or area in accordance with its operational requirements.

(2) Operational requirements may lead to an employee being deployed temporarily to a distant location to support aircraft operations as required by the Company's customer. Where practicable, employees will be consulted and then informed prior to any decision on a deployment. The Company will bear all reasonable costs in terms of transport and accommodation (if necessary) for any such deployment.

26. - MINIMUM ADULT AWARD WAGE

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

(2) The Minimum Adult Award Wage for full time adult employees is $484.40 per week payable from the first pay period on and from 7 July 2005.

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

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

(6) (a) The Minimum Adult Award Wage shall not apply to apprentices, employees engaged on traineeships or Jobskill placements or employed under the Commonwealth Government Supported Wage System or to other categories of employees who by prescription are paid less than the minimum award rate.

(b) Liberty to apply is reserved in relation to any special categories of employees not included here or otherwise in relation to the application of the Minimum Adult Award Wage.

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

(a) apply to all work in ordinary hours.

(b) apply to the calculation of overtime and all other penalty rates, superannuation, payments during any period of paid leave and for all purposes of this award.

(8) Minimum Adult Award Wage

The rates of pay in this award include the minimum weekly wage for adult employees payable under the 2005 State Wage Case Decision. Any increase arising from the insertion of the adult minimum wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.

Increases under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset the adult minimum wage.

(9) Adult Apprentices

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

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

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

(d) Nothing in this clause shall operate to reduce the rate of pay fixed by the award for an adult apprentice in force immediately prior to 7 July 2005.

27. - CONFIDENTIALITY

(1) Employees must keep confidential information relating to the Company's affairs. Employees cannot disclose to third parties during their employment, or thereafter, any information relating to the Company's affairs which may come to the employee's knowledge in the course of the employee's employment, unless the information enters the public domain otherwise than as a result of a breach of this clause.

(2) Upon termination employees must return all documents, files, books, manuals, records or other information whether in written, electronic, magnetic or other form relating to the Company's affairs whether created or brought into existence by the employee or otherwise.

(3) Upon termination or request of the Company, employees must return all property and equipment of the Company which is in the employee's possession.

28. – UNION DELEGATE TRAINING LEAVE

(1) One accredited Union delegate from each relevant Union will be granted up to 5 days of leave per year to attend union training courses.

(2) The entitlement to this leave is subject to:

(a) the leave not unduly affecting the Company's operations;

(b) reasonable notice being given to the Company of the date and duration of the course; and

(c) copies of the course curriculum being provided to the Company if requested.

(3) Where a public holiday falls during the duration of a course, a day in lieu of that day will not be granted.

Schedule 1

Parental leave

Part 1—Preliminary

1. Basic Principles

(1) Under this Schedule, an employee who gives birth to a child, and that employee's spouse, are entitled to unpaid parental leave totalling 52 weeks to care for the newborn child.

(2) However, an employee's entitlement to leave under this Schedule is reduced by his or her other parental leave entitlements (for example, under an award or under a State law).

(3) To obtain parental leave under this Schedule, an employee must satisfy requirements relating to:

(a) length of service;

(b) notice periods;

(c) information and documentation.

(4) Except for a period of one week at the time of the birth, an employee and his or her spouse must take parental leave at different times.

(5) An employee may take other leave (for example, annual leave) in conjunction with parental leave, but this will reduce the amount of parental leave he or she may take.

(6) Parental leave may be varied in certain circumstances. In general, if a variation is foreseeable, an employee must give notice of it, but if a variation is not foreseeable notice is not required (for example, in the case of a premature birth).

(7) Cancellation of parental leave by the employer is limited to situations where the employee will not become, or ceases to be, the child's primary care-giver, or where there has been a mistake in calculating the amount of leave to which the employee is entitled.

(8) An employee who takes parental leave is, in most circumstances, entitled to return to the position which he or she held before the leave was taken.

(9) Parental leave does not break an employee's continuity of service.

2. Definitions

In this Schedule:

employee includes a part-time employee, but not a casual or seasonal employee.

continuous service means service (otherwise than as a casual or seasonal employee) under an unbroken contract of employment, and includes a period of leave, or a period of absence, authorised:

(a) by the employer; or

(b) by an award or order of a court or tribunal that has power to fix wages and other terms and conditions of employment, or a workplace agreement certified by such a body; or

(c) by a contract of employment; or

(d) by this Schedule or another law of the Commonwealth or of a State or a Territory.

law includes an unwritten law.

long paternity leave means Schedule 14 long paternity leave or any other leave (however described):

(a) to which an employee is entitled, or that has been applied for by or granted to an employee, in respect of the birth of a child of his spouse, otherwise than under this Schedule (for example, under another law of the Commonwealth or of a State or Territory, or under an award, order or agreement); and

(b) that is of a kind analogous to Schedule 14 long paternity leave, or would be of such a kind but for one or more of the following:

(i) it is paid leave;

(ii) differences in the rules governing eligibility for it;

(iii) differences in the period or periods for which it can be taken.

maternity leave means Schedule 14 maternity leave or any other leave (however described):

(a) to which an employee is entitled, or that has been applied for by or granted to an employee, in respect of her pregnancy or the birth of her child, otherwise than under this Schedule (for example, under another law of the Commonwealth or of a State or Territory, or under an award, order or agreement); and

(b) that is of a kind analogous to Schedule 14 maternity leave, or would be of such a kind but for one or more of the following:

(i) it is paid leave;

(ii) it can begin before the estimated date of birth;

(iii) differences in the rules governing eligibility for it;

(iv) differences in the period or periods for which it can be taken.

medical certificate means a certificate signed by a registered medical practitioner.

parental leave means maternity leave or paternity leave.

paternity leave means short paternity leave or long paternity leave.

short paternity leave means Schedule 14 short paternity leave or any other leave (however described):

(a) to which an employee is entitled, or that has been applied for by or granted to an employee, in respect of the birth of a child of his spouse, otherwise than under this Schedule (for example, under another law of the Commonwealth or of a State or Territory, or under an award, order or agreement); and

(b) that is of a kind analogous to Schedule 14 short paternity leave, or would be of such a kind but for one or more of the following:

(i) it is paid leave;

(ii) differences in the rules governing eligibility for it;

(iii) differences in the period or periods for which it can be taken.

Schedule 14 long paternity leave has the meaning given by clause 13.

Schedule 14 maternity leave has the meaning given by subclause 3 (1).

Schedule 14 short paternity leave has the meaning given by clause 13.

spouse, in relation to an employee, includes a person of the opposite sex to the employee who lives with the employee in a marriage-like relationship, although not legally married to the employee.

Part 2—Maternity leave

3. Entitlement to maternity leave

(1) Subject to this Schedule, an employee who becomes pregnant is entitled to a single period of unpaid leave (***Schedule 14 maternity leave***) in respect of the birth of the child.

(2) An employer must grant Schedule 14 maternity leave to an employee in accordance with clause 4 if:

(a) at least 10 weeks before the estimated date of birth, she notifies the employer in writing of that date; and

(b) she applies in writing for the leave; and

(c) the application specifies the first and last days of the period of leave; and

(d) the first day of the period of leave is the estimated date of birth or a later day; and

(e) she submits the application at least 4 weeks before the first day of the period of leave; and

(f) she submits with the application a medical certificate that:

(i) states that she is pregnant and specifies the estimated date of birth; or

(ii) states that she has given birth to a living child and specifies the date of birth;

as the case requires; and

(g) she submits with the application a statutory declaration specifying:

(i) any period of short paternity leave for which her spouse intends to apply, or has applied, in respect of the birth of the child; and

(ii) the first and last days of any period of long paternity leave for which her spouse intends to apply, or has applied, in respect of the birth of the child; and

(iii) the first and last days of each period of annual leave, or long service leave, for which her spouse intends to apply, or has applied, instead of, or in conjunction with, such paternity leave;

and stating:

(iv) that she will be the child's primary care-giver throughout the period of maternity leave; and

(v) that she will not engage in any conduct inconsistent with her contract of employment while on maternity leave; and

(h) it is reasonable to expect that she will complete, or she had completed, as the case requires, a period of at least 12 months continuous service with the employer on the day before the date notified under paragraph (a).

(3) Paragraphs (2)(a) and (h) do not apply if:

(a) because the child was premature, or for some other compelling reason, it was not reasonably practicable for the employee to comply with paragraph (2)(a); and

(b) if it was reasonably practicable for the employee to give to the employer, before the actual date of birth, written notice of the estimated date of birth—she did so as soon as reasonably practicable; and

(c) otherwise—the medical certificate submitted under paragraph (2)(f) also specifies the date that, as at the 70th day before the actual date of birth, was the estimated date of birth; and

(d) it is reasonable to expect that the employee will complete, or the employee had completed, as the case requires, 12 months continuous service with the employer on the day before the date notified under paragraph (b), or specified under paragraph (c), of this subclause.

(4) Paragraph (2)(e) does not apply if:

(a) because the child was premature, or for some other compelling reason, it was not reasonably practicable for the employee to comply with that paragraph; and

(b) the employee submits the application as soon as reasonably practicable before, on or after the first day of the period of leave; and

(c) if the child is born before the employee submits the application—the first day of the period of leave is the date of the child's birth or a later day.

If paragraph (c) of this subclause applies, paragraph (2)(d) does not apply.

(5) If, because of paragraph (4)(c), the first day of the period of leave is earlier than the date notified under paragraph (2)(a) or (3)(b) or specified under paragraph (3)(c), a reference in paragraph (2)(h) or (3)(d) or clause 9 to 12 months continuous service is taken to be a reference to a period of continuous service equal to 12 months reduced by the period beginning on the first day of the period of leave and ending on that date.

(6) If an employee applies under subclause (2) for maternity leave (***the substitute leave***) to be taken instead of maternity leave (***the original leave***) for which she has already applied under that subclause, then:

(a) if a document submitted with the application for the original leave complies with paragraph (2)(f) or (g) as applying in relation to the application for the substitute leave, the document is taken to have also been submitted with the latter application; and

(b) if the employer grants the substitute leave, the employer:

(i) must cancel the original leave if it has already been granted; or

(ii) must not grant it if it has not already been granted.

4. What maternity leave must the employer grant?

(1) The period of Schedule 14 maternity leave that clause 3 requires an employer to grant to an employee:

(a) if the child has not yet been born—must begin on the later of:

(i) the day specified in the application as the first day of the period of leave; or

(ii) the estimated date of birth;

and must not extend beyond the first anniversary of the estimated date of birth; and

(b) otherwise—must begin on the later of:

(i) the day specified in the application as the first day of the period of leave; or

(ii) the child's date of birth;

and must not extend beyond the child's first birthday; and

(c) must not overlap with a period of leave (other than short paternity leave) specified in the relevant statutory declaration; and

(d) subject to the preceding paragraphs, must be a continuous period equal to the shorter of:

(i) the period applied for;

(ii) the period of entitlement.

(2) The period of entitlement is 52 weeks less the total of:

(a) each period of unpaid leave, or paid sick leave, other than maternity leave, that the employer has already granted to the employee in respect of the same pregnancy; and

(b) each period of annual leave, or long service leave, that the employee has applied for instead of, or in conjunction with, maternity leave in respect of the pregnancy; and

(c) each period of leave specified in the relevant statutory declaration.

5. Entitlement under clauses 3 and 4 to be reduced by other maternity leave available to employee

(1) This section applies if, had this Schedule not been enacted:

(a) an employee could have applied, in respect of her pregnancy or the birth of her child, for maternity leave to which paragraphs (a) and (b) of the definition of *maternity leave* in clause 2 applies; and

(b) if she had so applied in accordance with the rules governing that maternity leave, she would have a legally enforceable right to a period of such leave;

whether or not she has in fact so applied.

(2) The period of leave referred to in paragraph (1)(b) is called ***the period of alternative leave***.

(3) The period (if any) of Schedule 14 maternity leave that clauses 3 and 4 would, but for this clause, require the employer to grant to the employee in respect of the birth of the child is called ***the unadjusted period of maternity leave***.

(4) If the period of alternative leave is as long as, or longer than, the unadjusted period of maternity leave, the employer must not grant maternity leave to the employee under clauses 3 and 4 in respect of the birth.

(5) Otherwise, the employer must grant to the employee, instead of the unadjusted period of maternity leave, a period of maternity leave that:

(a) equals the difference between the unadjusted period of maternity leave and the period of alternative leave; and

(b) begins immediately after the period of alternative leave if the employer grants it; and

(c) in other respects complies with clause 4.

Note: This clause assumes that an employee will make a single application for a composite period of parental leave to which she is entitled, and that the application will be made in accordance with both this Schedule and the rules governing the other kind of parental leave for which the employee is applying.

6. Taking annual leave or long service leave instead of, or in conjunction with, maternity leave

If an employee (***the mother***) applies to take annual leave, or long service leave, instead of, or in conjunction with, Schedule 14 maternity leave, the employer must grant the annual leave or long service leave if:

(a) had this Schedule not been enacted, the employer would have been obliged to grant it (for example, because of some other law of the Commonwealth or of a State or Territory); or

(b) the total of the following does not exceed 52 weeks:

(i) the period of annual leave or long service leave;

(ii) each period of annual leave, or long service leave, that the employer has already granted to the mother instead of, or in conjunction with, the maternity leave;

(iii) the period of maternity leave;

(iv) each period of unpaid leave, or paid sick leave, other than maternity leave, that the employer has already granted to the mother in respect of the same pregnancy;

(v) each period of leave specified under paragraph 3(2)(g) in the relevant statutory declaration.

7. Extension of maternity leave

(1) An employee may apply in writing for an extension of Schedule 14 maternity leave granted to her.

(2) The employer must grant the application if:

(a) it is given to the employer at least 14 days before the last day of the period of leave; and

(b) it specifies the first or last day of the extended period of leave, as the case requires; and

(c) unless the matters referred to in subparagraphs 3(2)(g)(i), (ii) and (iii) are still as stated in the relevant statutory declaration—the employee submits with the application for the extension a statutory declaration stating the matters referred to in those subparagraphs; and

(d) the period of leave, if extended in accordance with the application, would not exceed the period of entitlement under clause 4, calculated as at the time of granting the application for the extension.

(3) The period of maternity leave may be extended again only by agreement between the employer and the employee.

8. Shortening of maternity leave

(1) An employee may apply in writing to shorten the period of Schedule 14 maternity leave granted to her.

(2) The employer may grant the application if it specifies the last day of the shortened period of leave.

9. Effect on maternity leave of failure to complete 12 months continuous service

If Schedule 14 maternity leave has been granted on the basis that it is reasonable to expect that the employee will complete a period of at least 12 months continuous service with the employer on a particular day, the employer may cancel the leave if the employee does not complete such a period on that day.

10. Effect on maternity leave if pregnancy terminates or child dies

(1) This clause applies if an employer has granted Schedule 14 maternity leave to an employee and:

(a) the pregnancy terminates otherwise than by the birth of a living child; or

(b) the employee gives birth to a living child but the child later dies.

(2) The employer may cancel the maternity leave at any time before it begins.

(3) If the maternity leave has begun, the employee may notify the employer in writing that she wishes to return to work.

(4) If she does so, the employer must notify her in writing of the day on which she is to return to work. That day must be within 4 weeks after the employer received the notice under subclause (3).

(5) If the maternity leave has begun, the employer may notify the employee in writing that she must return to work on a specified day that is not less than 4 weeks after the notice is given.

(6) If the employee returns to work, the employer must cancel the rest of the maternity leave.

11. Effect on maternity leave if mother ceases to be the primary care-giver

(1) This clause applies if:

(a) during a substantial period beginning on or after the beginning of an employee's Schedule 14 maternity leave, the employee is not the child's primary care-giver; and

(b) having regard to the length of that period and to any other relevant circumstances, it is reasonable to expect that the employee will not again become the child's primary care-giver within a reasonable period.

(2) The employer may notify the employee in writing that she must return to work on a specified day that is not less than 4 weeks after the notice is given.

(3) If the employee returns to work, the employer must cancel the rest of the maternity leave.

12. Return to work after maternity leave

(1) This clause applies when an employee returns to work after a period of Schedule 14 maternity leave.

(2) The employer must employ her in the position she held:

(a) if she was transferred to a safe job because of her pregnancy—immediately before the transfer; or

(b) if she began working part-time because of the pregnancy—immediately before she so began; or

(c) otherwise—immediately before she began maternity leave.

(3) If that position no longer exists but she is qualified for, and can perform the duties of, other positions in the employer's employment, the employer must employ her in whichever of those positions is nearest in status and remuneration to the position referred to in subclause (2).

Part 3—Paternity leave

13. Entitlement to paternity leave

Subject to this Schedule, an employee is entitled, in respect of the birth of a child of his spouse, to each of the following:

(a) a period of unpaid paternity leave (***Schedule 14 short paternity leave***) beginning on the child's date of birth and lasting not more than one week;

(b) a period of unpaid paternity leave (***Schedule 14 long paternity leave***) in order to be the child's primary care-giver.

14. Short paternity leave

(1) An employer must grant Schedule 14 short paternity leave to an employee if:

(a) at least 10 weeks before the estimated date of birth, he gives to the employer:

(i) a written notice stating his intention to apply for the leave and specifying how long the leave is to last, being a period of not more than one week; and

(ii) a medical certificate that names his spouse, states that she is pregnant and specifies the estimated date of birth; and

(b) he applies in writing for the leave; and

(c) the application specifies the first and last days of the period of leave; and

(d) he submits the application as soon as reasonably practicable on or after the first day of the period of leave; and

(e) the period of leave does not exceed the period specified under paragraph (a); and

(f) unless the first day of the period of leave is the same as the date specified under subparagraph (a)(ii):

(i) he submits with the application a medical certificate that names his spouse and specifies the actual date of birth; and

(ii) the first day of the period of leave is that day; and

(g) it is reasonable to expect that he will complete, or he had completed, as the case requires, a period of at least 12 months continuous service with the employer on the day before the date specified under subparagraph (a)(ii).

(2) Paragraphs (1)(a) and (g) do not apply if:

(a) because the child was premature, or for some other compelling reason, it was not reasonably practicable for the employee to comply with paragraph (1)(a); and

(b) if it was reasonably practicable for the employee to give to the employer, before the actual date of birth, the notice and certificate referred to in that paragraph—he did so as soon as reasonably practicable; and

(c) otherwise—the medical certificate submitted under subparagraph (1)(f)(i) also specifies the date that, as at the 70th day before the actual date of birth, was the estimated date of birth; and

(d) it is reasonable to expect that the employee will complete, or the employee had completed, as the case requires, 12 months continuous service with the employer on the day before the estimated date of birth specified in the certificate given under paragraph (b), or specified under paragraph (c), of this subclause.

15. Long paternity leave

(1) An employer must grant Schedule 14 long paternity leave to an employee if:

(a) he applies in writing for the leave; and

(b) the application specifies the first and last days of the period of leave; and

(c) he submits the application at least 10 weeks before the first day of the period of leave; and

(d) he submits with the application a medical certificate that names his spouse and:

(i) states that she is pregnant and specifies the estimated date of birth; or

(ii) states that she has given birth to a living child and specifies the date of birth;

as the case requires; and

(e) he submits with the application a statutory declaration specifying the first and last days of:

(i) each period of unpaid leave, or paid sick leave, other than maternity leave, for which the spouse intends to apply, or has applied, in respect of the pregnancy; and

(ii) any period of maternity leave for which the spouse intends to apply, or has applied, in respect of the birth of the child; and

(iii) each period of annual leave, or long service leave, for which the spouse intends to apply, or has applied, instead of, or in conjunction with, maternity leave;

and stating:

(iv) that he will be the child's primary care-giver throughout the period of paternity leave; and

(v) that he will not engage in any conduct inconsistent with his contract of employment while on paternity leave; and

(f) it is reasonable to expect that he will complete, or he had completed, as the case requires, a period of at least 12 months continuous service with the employer on the day before the first day of the period of leave.

(2) Paragraph (1)(c) does not apply if:

(a) because the child was premature, or for some other compelling reason, it was not reasonably practicable for the employee to submit the application at least 10 weeks before the first day of the period of leave; and

(b) the employee submits the application as soon as reasonably practicable before, on or after that day.

(3) The period of Schedule 14 long paternity leave:

(a) if the child has not yet been born—must begin on the later of:

(i) the day specified in the application as the first day of the period of leave; or

(ii) the estimated date of birth;

and must not extend beyond the first anniversary of the estimated date of birth; and

(b) otherwise—must begin on the later of:

(i) the day specified in the application as the first day of the period of leave; or

(ii) the child's date of birth;

and must not extend beyond the child's first birthday; and

(c) must not overlap with a period of leave specified in the relevant statutory declaration; and

(d) subject to the preceding paragraphs, must be a continuous period equal to the shorter of:

(i) the period applied for;

(ii) the period of entitlement.

(4) The period of entitlement is 52 weeks less the total of:

(a) if the employee has given the employer notice of his intention to apply for a period of short paternity leave in respect of the birth of the child—that period; and

(b) each period of annual leave, or long service leave, that the employee has applied to take instead of, or in conjunction with, long paternity leave in respect of the birth of the child; and

(c) each period of leave specified in the relevant statutory declaration.

16. Entitlement under clause 14 or 15 to be reduced by other paternity leave available to employee

(1) This clause applies if, had this Schedule not been enacted:

(a) an employee could have applied, in respect of the birth of a child of his spouse, for short paternity leave or long paternity leave to which paragraphs (a) and (b) of the definition of ***short paternity leave*** or ***long paternity leave***, as the case may be, in clause 2 apply; and

(b) if he had so applied in accordance with the rules governing that paternity leave, he would have a legally enforceable right to a period of such leave;

whether or not he has in fact so applied.

(2) The period of leave referred to in paragraph (1)(b) is called ***the period of alternative leave***.

(3) The period of Schedule 14 short paternity leave or Schedule 14 long paternity leave, as the case may be, that clause 14 or 15 would, but for this clause, require the employer to grant to the employee in respect of the birth of the child is called the ***unadjusted period of paternity leave***.

(4) If the period of alternative leave is as long as, or longer than, the unadjusted period of paternity leave, the employer must not grant leave under clause 14 or 15, as the case may be, in respect of the birth.

(5) Otherwise, the employer must grant to the employee, instead of the unadjusted period of paternity leave, a period of short paternity leave, or long paternity leave, as the case may be, that:

(a) equals the difference between the unadjusted period of paternity leave and the period of alternative leave; and

(b) begins immediately after the period of alternative leave if the employer grants it; and

(c) in other respects complies with clause 14 or 15, as the case may be.

Note: This clause assumes that an employee will make a single application for a composite period of parental leave to which he is entitled, and that the application will be made in accordance with both this Schedule and the rules governing the other kind of parental leave for which the employee is applying.

17. Taking annual leave or long service leave instead of, or in conjunction with, paternity leave

If an employee applies to take annual leave, or long service leave, instead of, or in conjunction with, Schedule 14 short paternity leave or Schedule 14 long paternity leave in respect of the birth of a child of the employee's spouse, the employer must grant the annual leave or long service leave if:

(a) had this Schedule not been enacted, the employer would have been obliged to grant it (for example, because of some other law of the Commonwealth or of a State or a Territory); or

(b) the total of the following does not exceed 52 weeks:

(i) the period of annual leave or long service leave;

(ii) each period of annual leave, or long service leave, that the employer has already granted to the employee instead of, or in conjunction with, the paternity leave;

(iii) each period of paternity leave that the employer has already granted to the employee in respect of the birth;

(iv) each period of leave specified under paragraph 15(1)(e) in the relevant statutory declaration.

18. Extension of long paternity leave

(1) An employee may apply in writing for an extension of Schedule 14 long paternity leave granted to him.

(2) The employer must grant the application if:

(a) it is given to the employer at least 14 days before the last day of the period of leave; and

(b) it specifies the last day of the extended period of leave; and

(c) unless the matters referred to in subparagraphs 15(1)(e)(i), (ii) and (iii) are still as stated in the statutory declaration submitted with the application for the leave—the employee submits with the application for the extension a statutory declaration stating the matters referred to in those subparagraphs; and

(d) the period of leave, if extended in accordance with the application, would not exceed the period of entitlement under subclause 15(4), calculated as at the time of granting the application for the extension.

(3) The period of paternity leave may be extended again only by agreement between the employer and the employee.

19. Shortening of paternity leave

(1) An employee may apply in writing to shorten the period of Schedule 14 paternity leave granted to him.

(2) The employer may grant the application if it specifies the last day of the shortened period of leave.

20. Effect on long paternity leave of failure to complete 12 months continuous service

If Schedule 14 long paternity leave has been granted on the basis that it is reasonable to expect that the employee will complete a period of at least 12 months continuous service with the employer on a particular day, the employer may cancel the leave if the employee does not complete such a period on that day.

21. Effect on long paternity leave if pregnancy terminates or child dies

(1) This clause applies if an employer has granted Schedule 14 long paternity leave to an employee and:

(a) the employee's spouse's pregnancy terminates otherwise than by the birth of a living child; or

(b) the employee's spouse gives birth to a living child but the child later dies.

(2) The employer may cancel the leave at any time before it begins.

(3) If the leave has begun, the employee may notify the employer in writing that he wishes to return to work.

(4) If he does so, the employer must notify him in writing of the day on which he is to return to work. That day must be within 4 weeks after the employer received the notice under subclause (3).

(5) If the leave has begun, the employer may notify the employee in writing that he must return to work on a specified day that is not less than 4 weeks after the notice is given.

(6) If the employee returns to work, the employer must cancel the rest of the leave.

22. Effect on paternity leave of ceasing to be the primary care-giver

(1) This clause applies if:

(a) during a substantial period beginning on or after the beginning of an employee's Schedule 14 long paternity leave, the employee is not the child's primary care-giver; and

(b) having regard to the length of that period and to any other relevant circumstances, it is reasonable to expect that the employee will not again become the child's primary care-giver within a reasonable period.

(2) The employer may notify the employee in writing that he must return to work on a specified day that is not less than 4 weeks after the notice is given.

(3) If the employee returns to work, the employer must cancel the rest of the leave.

23. Return to work after paternity leave

(1) This clause applies when an employee returns to work after a period of Schedule 14 long paternity leave.

(2) The employer must employ him in the position he held immediately before that period.

(3) If that position no longer exists but he is qualified for, and can perform the duties of, other positions in the employer's employment, the employer must employ him in whichever of those positions is nearest in status and remuneration to the position referred to in subclause (2).

Part 4—General

24. Employee's duty if excessive leave granted or if maternity leave and paternity leave overlap

(1) This clause applies if the total of the following exceeds 52 weeks:

(a) any period of maternity leave granted by an employer to an employee (***the mother***) in respect of a pregnancy;

(b) each period of annual leave or long service leave granted by the employer to the mother instead of, or in conjunction with, such maternity leave;

(c) each period of unpaid leave, or paid sick leave, other than maternity leave, granted by the employer to the mother in respect of the same pregnancy;

(d) each period of paternity leave granted by an employer to the mother's spouse in respect of the birth of the child;

(e) each period of annual leave or long service leave granted, by the employer referred to in paragraph (e), to the mother's spouse instead of, or in conjunction with, such paternity leave.

(2) This clause also applies if a period of leave of a kind referred to in paragraph (1)(a), (b) or (c) overlaps with a period of leave of a kind referred to in paragraph (1)(d) or (e).

(3) The mother must give to her employer a written notice that:

(a) if subclause (1) applies—states that the total exceeds 52 weeks and specifies the amount of the excess; and

(b) if subclause (2) applies—specifies the period of overlap; and

(c) sets out how she suggests the employer vary or cancel leave granted to her (except in so far as she has already taken it) so as to reduce or remove the excess or overlap; and

(d) unless the variations and cancellations suggested under paragraph (c) will remove the excess or overlap—sets out the suggestions her spouse has made or will make under paragraph (4)(c).

(4) The mother's spouse must give to his employer a written notice that:

(a) if subclause (1) applies—states that the total exceeds 52 weeks and specifies the amount of the excess; and

(b) if subclause (2) applies—specifies the period of overlap; and

(c) sets out how he suggests the employer vary or cancel leave granted to him (except in so far as he has already taken the leave) so as to remove the excess or overlap; and

(d) unless the variations or cancellations suggested under paragraph (c) will remove the excess or overlap—specifies the suggestions that the mother has made or will make under paragraph (3)(c).

(5) The variations and cancellations suggested under this clause must be such that, if they are all made, the excess or overlap will be removed.

(6) An employer who receives a notice under subclause (3) or (4) may vary or cancel periods of leave as suggested in the notice, or as agreed with the mother or her spouse, as the case may be.

25. Employer to warn replacement employee that employment is only temporary

An employer must not employ a person:

(a) to replace an employee while he or she is on parental leave; or

(b) to replace an employee who, while another employee is on parental leave, is to perform the duties of the position held by the other employee;

unless the employer has informed the person:

(c) that his or her employment is only temporary; and

(d) about the rights of the employee who is on parental leave.

26. Parental leave and continuity of service

A period of parental leave does not break an employee's continuity of service, but does not otherwise count as service except:

(a) for the purpose of determining the employee's entitlement to a later period of parental leave; or

(b) as expressly provided in a law of the Commonwealth or of a State or Territory, or in an award, order, agreement or instrument; or

(c) as prescribed by the regulations.

27. Effect of Schedule on other laws

To avoid doubt, this Schedule has effect despite:

(a) a law of a State or Territory; or

(b) an award, order, agreement or instrument;

but is not intended to exclude or limit the operation of such a law, or of an award, order, agreement or instrument, in so far as that law, award, order, agreement or instrument can operate concurrently with this Schedule.

2005 WAIRC 03081

FIRE AND RESCUE SERVICES AWARD (PRIVATE) 2004

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED FIREFIGHTERS UNION OF WESTERN AUSTRALIA
	APPLICANT
	-v-
	TRANSFIELD SERVICES (AUSTRALIA) PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 17 NOVEMBER 2005
FILE NO/S	A 10 OF 2004
CITATION NO.	2005 WAIRC 03081

Result Application for new award discontinued

Order

WHEREAS on 19 November 2004 the applicant applied to the Commission for an order pursuant to the *Industrial Relations Act, 1979* ("the Act"); and

WHEREAS on 7 April 2005 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties were given time to consider their positions; and

WHEREAS on 22 April 2005 the Commission convened a further conference for the purpose of conciliating between the parties however, agreement was not reached and the Commission wrote to the parties requesting they file further and better particulars within set timeframes; and

WHEREAS the application was set down for hearing and determination on 20 July 2005 in relation to preliminary issues; and

WHEREAS at the hearing on 20 July 2005 the Commission was advised that the parties had reached agreement in relation to the preliminary issues and requested the hearing be vacated to allow the parties time for further discussions; and

WHEREAS the Commission agreed to the hearing being adjourned and set down a report back conference for 9 September 2005; and

WHEREAS at the conference on 9 September 2005 the Commission was advised that discussions were ongoing and the parties requested further time be allowed for discussions and a report back conference was set down for 17 November 2005; and

WHEREAS on 16 November 2005 the applicant advised the Commission that it did not wish to proceed with the application; and

WHEREAS on 16 November 2005 the applicant filed a Notice of Discontinuance in respect of the application; and

WHEREAS on 17 November 2005 the respondents consented to the matter being discontinued and the conference was vacated;

NOW THEREFORE pursuant to the powers vested in it by the *Industrial Relations Act, 1979,* the Commission, hereby orders:

THAT the application be, and is hereby, discontinued.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

2005 WAIRC 03196

WESTERN AUSTRALIAN MINT AWARD 2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS -WESTERNAUSTRALIAN BRANCH;THE WESTERN AUSTRALIAN MINT, THE COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY , INFORMATION, POSTAL, PLUMBING AND ALLIED SERVICE S UNION OF AUSTRALIA (CEPU)
	APPLICANT
	-v-
	THE WESTERN AUSTRALIAN MINT
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	WEDNESDAY, 30 NOVEMBER 2005
FILE NO/S	A 11 OF 2004
CITATION NO.	2005 WAIRC 03196

Result New Award

Order

HAVING heard Mr D. McLane on behalf of The Automotive, Food, Metals, Engineering Printing and Kindred Industries Union of Workers- Western Australian Branch and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing Union and Ms S. Coutts-Wood and with her Mr D. Lee for the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* by consent, hereby makes the following Award.

(Sgd.) J F GREGOR,
[L.S.] Senior Commissioner.

WESTERN AUSTRALIAN MINT AWARD 2005

1. - TITLE

This award shall be know as the Western Australian Mint Award 2005 (''the award" or "this Award").

2. – ARRANGEMENT

1. Title
2. Arrangement
3. Area and Scope
4. Terms
5. No Further Claims
6. Classification Structure and Definitions
7. Contract of Service
8. Casual and Part Time Employees
9. Under-Rate Employees
10. Deleted
11. No Reduction
12. Apprentices
13. Hours of Duty
14. Overtime
15. Shift Work
16. Payment of Wages
17. Special Rates and Provisions
18. Car Allowance
19. Holidays
20. Annual Leave
21. Sick Leave/Carer's Leave
22. Compassionate Leave
23. Maternity & Parental Leave
24. Adoption Leave
25. Long Service Leave
26. Defence Force Leave
27. Emergency Services Leave
28. Jury Service
29. Shop Stewards
30. Notice Boards
31. Right of Entry
32. Leave to Attend Union Business
33. Trade Union Training Leave
34. Complaints and Charges Against Employees
35. Introduction of Change
36. Redundancy

Appendix - Resolution of Disputes Requirement
First Schedule – Wages
Second Schedule – List of Respondents
Third Schedule – Names Parties to the Award

3. - AREA AND SCOPE

This award shall apply to the operations of the Western Australia Mint at 310 Hay Street, East Perth and to employees engaged in the classifications contained in Clause 6 – Classifications Structure and Definitions.

4. – TERM

This award shall operate for the period from the date of registration until 31 December 2006.

5. - NO FURTHER CLAIMS

(1) The union and employees bound by the Award undertake that for the term of the Award there shall be no wage increases sought or granted other than those provided under the terms of the Award. This includes wage adjustments arising out of State Wage Case decisions. Such increases are to be absorbed into the wages set out in the Award.

(2) The parties to the Award undertake that for the term if the Award there will be no further claims on matters contained in the Award.

6. - CLASSIFICATION STRUCTURE AND DEFINITIONS

Classification Structure:

Wage Group	Classification Title	Minimum Training Requirement
C 6	Advanced Engineering Tradesperson - Level I	2nd Year of Advanced Certificate
C 7	Engineering Tradesperson Special Class - Level II	Nine appropriate modules or equivalent in addition to the training requirements for a C10 level
C 8	Engineering Tradesperson Special Class - Level I	Six appropriate modules or equivalent in addition to the training requirements for a C10 level
C 9	Engineering Tradesperson - Level II	Three appropriate modules or equivalent in addition to the training requirements for a C10 level
Wage Group	Classification Title	Minimum Training Requirement
C10	Engineering Tradesperson Or Production System Employee	Trade Certificate Production/Engineering Certificate III
C11	Engineering Employee -	
C12	Engineering Employee -	
C13	Engineering Employee -	

Wage Group C13

Engineering Employee

(Relativity - 82%)

As per schedule 1 and/or;

An employee who has completed up to three months' structured training in order to perform work within the scope of this level.

At this level an employee performs work above and beyond the skills of an employee at C14 and to the level of training -

Works under direct supervision, either individually or in a team environment.

Understands and undertakes basic quality control/assurance procedures including the ability to recognise basic quality deviations and faults.

Indicative of the tasks which an employee at this level may perform are the following

Repetitive work on automatic, semi-automatic or single purpose machines or equipment.

Assembles components using basic written, spoken and/or diagrammatic instructions in an assembly environment.

Basic soldering or butt and spot welding skills or cuts scrap with oxy-acetylene blow pipe.

Uses selected hand tools.

Cleans boilers.

Assists in the provision of on-the-job training in conjunction with Tradespersons and supervises trainees.

Maintains simple records.

Uses hand trolleys and pallet trucks.

Wage Group C12

Engineering Employee

(Relativity - 87.4%)

As per schedule 1 and / or ;

An employee who has completed an Engineering Certificate I or equivalent training to enable work to be performed within the scope of this level.

At this level an employee performs work above and beyond the skills of an employee at C13 and in addition -

Is responsible for the quality of his/her own work, subject to routine supervision.

Works under routine supervision, either individually or in a team environment.

Exercises discretion within the levels of skills and training.

Indicative of the tasks which an employee at this level may perform are the following -

Operates flexibly between assembly stations.

Operates machinery and equipment which requires exercising skills and knowledge beyond that of an employee at Level C13.

Non-trade engineering skills.

Basic tracing and sketching skills.

Receiving, despatching, distributing, sorting, checking, packing (other than repetitive packing in a standard container or containers in which such goods are ordinarily sold), documenting and recording of goods, materials and components.

Basic inventory control in the context of a production process.

Basic keyboard skills.

Advanced soldering techniques.

Attends to boilers.

Operation of mobile equipment including forklifts, hand trolleys, pallet trucks, overhead cranes and winch operation.

Ability to measure accurately.

Assists one or more tradespersons.

Welding which requires the exercise of knowledge and skills above Level C13.

Wage Group C11

Engineering Employee

(Relativity - 92.4%)

As per schedule 1 and/or;

An employee who has completed an Engineering Certificate II or equivalent training to enable work to be performed within the scope of this level.

An employee at this level performs work above and beyond the skills of an employee at C12 to the level of training

Works from complex instructions and procedures.

Assists in the provision of on-the-job training to a limited degree.

Co-ordinates work in a team environment or works individually under general supervision.

Is responsible for assuring the quality of his/her own work.

Indicative of the tasks an employee at this level may perform are the following -

Use of precision measuring instruments.

Machine setting, loading and operation.

Rigging (certificated).

Responsibility for the operation and co-ordination of a store.

Inventory and store control, including computer use.

Intermediate keyboard skills.

Basic engineering and fault-finding skills.

Basic quality checks on the work of others.

Licensed and certified for forklift, engine and crane driving operations to a level higher than C12.

Knowledge of the employer's operations as it relates to production processes.

Wage Group C10

Engineering Tradesperson - Level I

(Relativity 100%)

As per schedule 1 and/or;

An employee who holds a Trade Certificate or a Tradesperson's Rights Certificate as an -

Engineering Tradesperson (Electrical/Electronics) - Level I; or

Engineering Tradesperson (Mechanical) - Level I; or

Engineering Tradesperson (Fabrication) - Level I;

and is able to exercise the skills and knowledge of that trade.

An Engineering Tradesperson - Level I works above and beyond an employee at C11 and to the level of his/her training -

Understands and applies quality control techniques.

Exercises good interpersonal and communication skills.

Exercises keyboard skills at a level higher than C11.

Exercises discretion within the scope of this grade.

Performs work under limited supervision, either individually or in a team environment.

Operates all lifting equipment incidental to his/her work.

Performs non-trade tasks incidental to his/her work.

Performs work which, while primarily involving the skills of the employee's trade, is incidental or peripheral to the primary task and facilitates the completion of the whole task. Such incidental or peripheral work would not require additional formal technical training.

Is able to inspect products and/or materials for conformity with established operational standards.

Wage Group C9

Engineering Tradesperson - Level II

(Relativity to C10 - 105%)

As per schedule 1 and/or;

An Engineering Tradesperson - Level II is an -

Engineering Tradesperson (Electrical/Electronics) - Level II; or

Engineering Tradesperson (Mechanical) - Level II; or

Engineering Tradesperson (Fabrication) - Level II;

who has completed one of the following training requirements -

three appropriate modules in addition to the training requirements for C10 level; or

three appropriate modules towards an Advanced Certificate; or

three appropriate modules towards an Associate Diploma, or equivalent,

as prescribed in the Implementation Manual.

An Engineering Tradesperson - Level II works above and beyond a Tradesperson at C10 and to the level of his/her training -

Exercises the skills attained through satisfactory completion of the training for this classification, subject to the standards prescribed by the Implementation Manual.

Exercises discretion within the scope of this grade.

Works under general supervision, either individually or in a team environment.

Understands and implements quality control techniques.

Provides trade guidance and assistance as part of a work team.

Exercises trade skills relevant to specific requirements of the enterprise at a level higher than Engineering Tradesperson - Level I.

Tasks which an employee at this level may perform are subject to the employee having the appropriate Trade and Post Trade Training to enable the particular tasks to be performed.

Wage Group C8

Special Class Engineering Tradesperson - Level I

(Relativity to C10 - 110%)

As per schedule 1 and/or;

An employee who is a -

Special Class Engineering Tradesperson (Electrical/Electronics) - Level I; or

Special Class Engineering Tradesperson (Mechanical) - Level I; or

Special Class Engineering Tradesperson (Fabrication) - Level I,

who has completed the following training requirements -

six appropriate modules in addition to the training requirements for a C10 level, or equivalent; or

six appropriate modules towards an Advanced Certificate; or

six appropriate modules towards an Associate Diploma,

as prescribed in the Implementation Manual.

A Special Class Engineering Tradesperson - Level I works above and beyond a Tradesperson at C9 and to the level of his/her training -

Exercises the skills attained through satisfactory completion of the training for this classification, subject to the standards prescribed by the Implementation Manual.

Provides trade guidance and assistance as part of a work team.

Assists in the provision of training in conjunction with supervisors and trainers.

Understands and implements quality control techniques.

Works under limited supervision, either individually or in a team environment.

The following tasks are indicative of what an employee at this level may perform, subject to the employee having the appropriate Trade and Post Trade Training to enable the particular tasks to be performed -

Exercises high precision trade skills using various materials and/or specialised techniques.

Performs operations on a CAD/CAM terminal in the performance of routine modifications to NC/CNC programmes.

High voltage switching.

Works on complex machinery and equipment which utilises hydraulic and/or pneumatic principles and who, in the course of such work, is required to read and understand hydraulic and/or pneumatic circuitry which controls fluid power systems; or

Works on complex or intricate electrical circuitry which involves examining, diagnosing and modifying systems comprising interconnected circuits.

Wage Group C7

Special Class Engineering Tradesperson - Level II

(Relativity to C10 - 115%)

As per schedule 1 and/or ;

An employee who is a -

Special Class Engineering Tradesperson (Electrical/Electronics) - Level II; or

Special Class Engineering Tradesperson (Mechanical) - Level II; or

Special Class Engineering Tradesperson (Fabrication) - Level II;

who has completed one of the following training requirements -

three appropriate modules in addition to the training requirements for a C8 level, or equivalent; or

nine appropriate modules towards an Advanced Certificate; or

nine appropriate modules towards an Associate Diploma,

as prescribed in the Implementation Manual.

An Engineering Tradesperson Special Class - Level II works above and beyond a Tradesperson at C8 and to the level of his/her training -

Exercises the skills attained through satisfactory completion of the training for this classification, subject to the standards prescribed by the Implementation Manual.

Is able to provide trade guidance and assistance as part of a work team.

Provides training in conjunction with supervisors and trainers.

Understands and implements quality control techniques.

Works under limited supervision, either individually or in a team environment.

The following tasks are indicative of what an employee at this level may perform, subject to the employee having the appropriate Trade and Post Trade Training to enable the particular tasks to be performed -

Works on machines or equipment which utilise complex electrical/electronic, mechanical, hydraulic and/or pneumatic circuitry and controls, or a combination thereof.

Works on machinery or equipment which utilises complex electrical/electronic circuitry and controls.

Works on instruments which make up a complex control system which utilises some combination of electrical, electronic, mechanical or fluid power principles.

Applies advanced computer numerical control techniques in machining or cutting or welding or fabrication.

Exercises intermediate CAD/CAM skills in the performance of routine modifications to programmes.

Works on complex or intricate interconnected electrical circuits at a level above C8.

Works on complex radio/communication equipment.

N.B. The Post Trade Certificate referred to in this definition is not directly comparable with existing post trade qualifications and the possession of such qualification does not in itself justify classification of a tradesperson to this level.

Wage Group C6

Advanced Engineering Tradesperson - Level I

(Relativity to C10 - 125%)

As per schedule 1 and/or;

An Advanced Engineering Tradesperson - Level I means an -

Advanced Engineering Tradesperson (Electrical/Electronic) - Level I; or

Advanced Engineering Tradesperson (Mechanical) - Level I; or

Advanced Engineering Tradesperson (Fabrication) - Level I;

who has completed -

12 appropriate modules towards an Advanced Certificate; or

12 appropriate modules towards an Associate Diploma; or

Equivalent accredited training,

prescribed in the Implementation Manual.

An Advanced Engineering Tradesperson - Level I works above and beyond a Tradesperson at C7 and to the level of training -

Undertakes quality control and work organisation at a level higher than C7.

Provides trade guidance and assistance as part of a work team.

Assists in the training of employees in conjunction with supervisors/trainers.

Performs maintenance planning and predictive maintenance work other than in technical fields.

Works under limited supervision, either individually or in a team environment.

Prepares reports of a technical nature on specific tasks or assignments as directed.

Exercises broad discretion within the scope of this level.

The following are indicative of tasks which an employee at this level may perform, subject to the employee having the appropriate Trades and Post Trades Training to enable the particular tasks to be performed -

Works on combinations of machines or equipment which utilises complex electronic, mechanical and fluid power principles.

Works on instruments which make up a complex control system which utilise some combination of electrical, electronic, mechanical or fluid power principles and electronic circuitry containing complex analogue and/or digital control systems utilising integrated circuitry.

Application of computer integrated manufacturing techniques involving a higher level of computer operating and programming skills than for Level C7.

Works on various forms of machinery and equipment which are electronically controlled by complex digital and/or analogue control systems using integrated circuitry.

7. - CONTRACT OF SERVICE

(1) (a) A contract of service to which Part I - GENERAL of this award applies may be terminated in accordance with the provisions of this clause and not otherwise but this subclause does not operate so as to prevent any party to a contract from giving a greater period of notice than is hereinafter prescribed, nor to affect an employer's right to dismiss an employee without notice for conduct that justifies instant dismissal, including malingering, inefficiency or neglect of duty, and an employee so dismissed shall be paid for the time worked up to the time of dismissal only.

(b) Subject to the provisions of this clause, a party to a contract of service may, on any day give to the other party the appropriate period of notice of termination of the contract prescribed in subclause (2) of this clause and the contract terminates when that period expires.

(2) **Notice of Termination by Employer:**

(a) In order to terminate the employment of an employee (other than a casual employee) the employer shall give the employee the following notice –

Period of Continuous Service	Period of Notice
During the first month	1 day
More than one month but less than 1 year	1 week
1 year but less than 3 years	2 weeks
3 years but less than 5 years	3 weeks
5 years and over	4 weeks

(b) An employee who at the time of being given notice is over 45 years of age and who at the date of termination has completed two years' continuous service with the employer, shall be entitled to one week's notice in addition to the notice prescribed in paragraph (a) of this subclause.

(c) Payment in lieu of the notice prescribed in paragraphs (a) and (b) of this subclause shall be made if the appropriate notice period is not given. Provided that employment may be terminated by part of the period of notice specified and part payment in lieu thereof.

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

(e) The period of notice in this subclause shall not apply in the case of casual employees, apprentices or employees engaged for a specific period of time or for a specific task or tasks.

(f) (i) For the purpose of this clause continuity of service shall not be broken on account of -

(aa) any interruption or termination of the employment by the employer if such interruption or termination has been made merely with the intention of avoiding obligations hereunder in respect of leave of absence;

(bb) any absence from work on account of personal sickness or accident for which an employee is entitled to claim sick pay as prescribed by this award or on account of leave lawfully granted by the employer; or

(cc) any absence with reasonable cause, proof whereof shall be upon the employee;

Provided that in the calculation of continuous service under this subclause any time in respect of which an employee is absent from work except time for which an employee is entitled to claim annual leave, sick pay, long service leave and public holidays as prescribed by this award shall not count as time worked.

(ii) service by the employee with a business which has been transmitted from one employer to another and the employee's service has been deemed continuous in accordance with subclause (3) of Clause 2 of the Long Service Leave Provisions published in Volume 66 of the Western Australian Industrial Gazette at pages 1-4 shall also constitute continuous service for the purpose of this clause.

(g) The provisions of this subclause shall not apply in any case where the employee's Contract of Service is changed from Part I - General to Part II - Construction of this award.

(3) **Notice of Termination by Employee:**

(a) The notice of termination required to be given by an employee shall be the same as that required of an employer, save and except that there shall be no additional notice based on the age of the employee concerned.

(b) If an employee fails to give the required notice or having given, or been given, such notice leaves before the notice expires, the employee forfeits the entitlement to any moneys owing to the employee under this award except to the extent that those moneys exceed the ordinary wages for the required period of notice.

(4) **Time Off During Notice Period:**

Where an employer has given notice of termination to an employee who has completed one month's continuous service, that employee shall, for the purpose of seeking other employment be entitled to be absent from work up to a maximum of eight ordinary hours without deduction of pay. The time off shall be taken at times that are convenient to the employee after consultation with the employer.

Provided that this subclause shall not apply to a casual employee.

(5) **Statement of Employment:**

The employer shall, upon receipt of a request from an employee whose employment has been terminated, provide to the employee a written statement specifying the period of employment and the classification or the type of work performed by the employee.

(6) **Notification on Engagement:**

On the first day of engagement an employee shall be notified by the employer or by the employer's representative, whether the duration of the employment is expected to exceed one month and, if hired as a casual employee shall be advised accordingly.

(7) **Casual Employees:**

(a) (i) The period of notice of termination in the case of a casual employee shall be one hour.

(ii) If the required notice of termination is not given one hour's wages shall be paid by the employer or forfeited by the employee.

(b) An employee shall for the purpose of this award be deemed to be a casual employee:

(i) if the expected duration of the employment is less than one month, or

(ii) if the notification referred to in subclause (6) of this clause is not given and the employee is dismissed through no fault of the employee within one month of commencing employment.

(8) **Absence from Duty:**

The employer shall be under no obligation to pay for any day not worked upon which the employee is required to present for duty, except when such absence is due to illness and comes within the provisions of Clause 24. - Absence through Sickness of this award or such absence is on account of holidays to which the employee is entitled under the provisions of this award.

(9) **Standing Down of Employees:**

(a) The employer is entitled to deduct payment for any day or part of a day on which an employee (including an apprentice) cannot be usefully employed because of industrial action by any of the unions party to this award, or by any other association or union.

(b) The provisions of paragraph (a) of this subclause also apply where the employee cannot be usefully employed through any cause which the employer could not reasonably have prevented.

8. – CASUAL AND PART-TIME EMPLOYEES

(1) A “Casual Employee” shall mean en employee who is engaged on the basis the employment is casual and there is no entitlement to paid leave and who is informed of these conditions at the time of engagement.

(2) A casual employee shall be paid a loading of 20 per cent in addition to the rates prescribed in the First Schedule – Wages of this award, reduced to an hourly basis.

(3) A “Part-time Employee” shall mean an employee who is regularly employed on hours less than 38 per week.

(4) No part-time employee shall be engaged to work less than two consecutive hours per week.

9. - UNDER-RATE EMPLOYEES

Supported Wage System

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

(2) **Definitions**

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

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

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

(c) "Disability Support Pension" means the Commonwealth pension scheme to provide income security for persons with a disability as provided under the Social Security Act 1991, as amended from time to time, or any successor to that scheme.

(d) "Assessment Instrument" means the form provided for under the Supported Wage System that records the assessment of the productive capacity of the person to be employed under the Supported Wage System.

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

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

(d) Provided that this exclusion shall not prevent services funded under Sections 10 or 12A of the Act referred to in (2), engaging persons who meet the eligibility criteria under the Supported Wages System, on work covered by this Award, where both parties wish to access the system provided all other criteria are met.

(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	% 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 be not less than $60.00 per week.

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

(4) **Assessment of Capacity**

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

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

(c) The employer and an accredited assessor from a panel agreed to by the parties to the Award and the employee.

(5) **Lodgement of Assessment Instrument**

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

(b) All assessment instruments shall be agreed and signed by the parties to the assessment, provided that where the Union party to this Award is not a party to the assessment, it shall be referred by the Registrar to the Union by certified mail and shall take effect unless an objection is notified to the Registrar within 10 working days.

(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 in accordance with the procedure for assessing capacity under the Supported Wage System.

(7) **Other Terms and Conditions of Employment**

Where an assessment has been made, the applicable percentage shall apply to the minimum wage rate only. Employees covered by the provisions of the clause will be entitled to the same terms and conditions of employment as all other employees covered by this Award, but be paid at the rate of wage as determined in accordance with this clause.

(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 organisation in consultation with other employees in the area.

(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 provision of this clause for a trial period not exceeding 12 weeks, except that in some cases additional work adjustment time, not exceeding four weeks, may be utilised where required.

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

(c) The minimum amount payable to the employee during the trial period shall be not less than the figure defined in (3).

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

(e) Where the employer and the employee wish to establish a continuing employment relationship following the completion of the trial period, a further contract of employment shall be entered into based on the outcome of assessment under (4).

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

11. - NO REDUCTION

This award shall not in itself operate to reduce the wages of any employee who is at present receiving above the minimum rate prescribed for his class of work.

12. - APPRENTICES

(1) Apprentices may be taken in the ratio of one apprentice for every two or fraction of two (the fraction being not less than one) journeymen and shall not be taken in excess of that ratio unless -

(a) The union or unions concerned so agree; or

(b) The Commission so determines.

(2) Where an apprentice's rostered day off duty as prescribed in Clause 12. - Hours of Duty falls within a period of block release, an alternative rostered day off will be arranged at a mutually convenient time to the employer and the apprentice.

(3) A mature aged apprentice will commence on a C13 rate and annually progress a level each year over the four year period until C10 classification.

13. - HOURS OF DUTY

(1) (a) The provisions of this subclause apply to all employees other than those engaged on continuous shift work.

(b) The ordinary hours of work may be worked on any or all days of the week Monday to Friday inclusive and, except in the case of shift employees, shall be worked between the hours of 6.00 a.m. and 6.00 p.m. The spread of hours may be altered by agreement between the employer and the majority of employees in plant, section or sections concerned.

(c) Except as provided elsewhere in this Award the ordinary working hours shall be an average of thirty eight hours per week to be worked in accordance with one of the following provisions -

(i) 38 hours within a work cycle not exceeding seven consecutive days; or

(ii) 76 hours within a work cycle not exceeding fourteen consecutive days; or

(iii) 114 hours within a work cycle not exceeding twenty-one consecutive days; or

(iv) 152 hours within a work cycle not exceeding twenty-eight consecutive days; or

(v) where the ordinary hours being worked each day are in accordance with paragraph (e)(ii) of this subclause, any other work cycle during which a weekly average of 38 ordinary hours are worked; or

(vi) for the purposes of paragraph (g) of subclause (3) of this clause any other work cycle during which a weekly average of 38 ordinary hours are worked as may be agreed in accordance with paragraph (g) of subclause (3).

(d) Where the first night shift in any week commences on Monday night, the night shift commencing on Friday and finishing not later than 8.00 a.m. on Saturday of that week, shall be deemed to have been worked on the Friday in ordinary hours.

(e) (i) In any arrangement of ordinary hours, where working hours are to exceed eight on any day the spread of hours shall be subject to agreement between the employer and the majority of employees in the section or sections concerned.

(ii) By arrangement between the employer, union or unions concerned and the majority of employees in the relevant section or sections, ordinary hours, not exceeding 12 on any day, may be worked subject to -

(aa) the employer and the employees being guided by the Occupational Health and Safety Provisions of the ACTU Code of Conduct on 12-hour shifts;

(bb) proper health monitoring procedures being introduced;

(cc) suitable roster arrangements being made; and

(dd) proper supervision being provided.

(f) (i) Subject to the provisions of this paragraph, a rest period of seven minutes from the time of ceasing to the time of resumption of work shall be allowed each morning.

(ii) 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.

(iii) Refreshments may be taken by employees during the rest period but the period of seven minutes shall not be exceeded under any circumstances.

(iv) If the employer satisfies the Commission that any employee has breached any condition expressed or implied in this paragraph they may be exempted from liability to allow the rest period.

(g) The ordinary hours of work shall be consecutive, except for a meal interval which shall not exceed one hour.

(i) An employee shall not be required to work for more than five hours without a break for a meal, provided that by agreement between the employer and the majority of employees in the section or sections concerned, employees may be required to work in excess of five hours, but not more than six hours, at ordinary rates of pay, without a meal break.

(ii) The time of taking a scheduled meal or rest break by one or more employees may be altered by the employer if it is necessary to do so in order to meet a requirement for continuity of operations.

(iii) The employer may stagger the time of taking a meal or rest break to meet operational requirements or to coincide with the availability of canteen or other facilities.

(iv) Subject to the provisions of subparagraph (i) hereof, an employee engaged as a regular maintenance person shall work during meal breaks at ordinary rates of pay whenever instructed so to do for the purpose of rectifying a breakdown of plant, or for routine maintenance of plant which can only be done while such plant is idle.

(v) Except as provided in subparagraphs (i) and (iv) hereof and except where an alternative arrangement has been entered into time and a half rates shall be paid for all work done during meal hours and thereafter until a meal break is taken when the taking of the meal is delayed for more than half an hour.

(2) (a) The provisions of this subclause apply only to employees engaged on continuous shift work.

(b) Forty hours (inclusive of crib time) shall constitute a week's work to be worked in five shifts of eight hours each. Provided that this clause shall be deemed to have been complied with if the ordinary working hours do not exceed eighty hours per fortnight to be worked in shifts of eight hours each. For the purpose of this proviso a "fortnight" means any two consecutive weekly pay periods. Provided further that where the employer and majority of employees concerned agree, a roster system may operate on the basis that the weekly average of 38 ordinary hours is achieved over a period that exceeds 28 consecutive days.

(c) Subject to alternative arrangements being agreed under (b) above, 0.4 of one hour of each such shift worked shall accrue at ordinary time rates as an entitlement to take the twentieth day off in each four weekly cycle as a rostered day off, paid for as though worked.

(d) (i) In any arrangement of ordinary hours, where working hours are to exceed eight on any shift the spread of hours shall be subject to agreement between the employer and the majority of employees in the section or sections concerned.

(ii) By arrangement between the employer and the majority of employees in the relevant section or sections, ordinary hours, not exceeding 12 on any day, may be worked subject to -

(aa) the employer and the employees being guided by the Occupational Health and Safety Provisions of the ACTU Code of Conduct on 12-hour shifts;

(bb) proper health monitoring procedures being introduced;

(cc) suitable roster arrangements being made; and

(dd) proper supervision being provided.

(3) (a) The provisions of this subclause relate to work arrangements which result from the introduction of a 9 day fortnight or 19 day month.

(b) Where a rostered day off in each ten or twenty day work cycle falls on a Public Holiday as prescribed in Clause 22. - Holidays, the next working day shall be taken in lieu of the rostered day off unless an alternate day in that four weekly cycle or nine day fortnight is agreed in writing between the employer and employee.

(c) Except as provided elsewhere in this Award, each day of paid leave taken and any Public Holiday occurring during any four week cycle shall be regarded as a day worked for the purpose of calculating the accrual towards the rostered day off on the twentieth day.

(d) Except as provided elsewhere in this Award an employee who has not worked or is not regarded by reason of subclause (3)(c) above as having worked a complete 19 day four week cycle shall receive pro rata accrued entitlements for each day worked in such cycle, payable for the rostered day off.

(e) Maintenance of Rosters

(i) The employer is responsible for the preparation of the roster which will allow one day off in each ten or 20 working day cycle as the case may be, for employees. The maintenance of the rosters shall be the responsibility of the employer and alterations may be made to meet the needs of the employer.

(ii) Any dispute concerning rosters shall be referred to a meeting of the employer and the unions concerned.

(f) Should it not be possible because of the operational requirements of the employer, for an employee to take a rostered day off when it falls due as specified in this clause, the employee will be re-rostered for another day off duty within ten working days unless such other time is agreed between the employer and the employee.

The rostered day off shall be the first or last working day of the week unless another day is agreed between the employer and employee.

(g) Where the 38 hour week 19 day work cycle or 9 day fortnight cycle is worked there will be no entitlement to payment for time accrued towards a rostered day off on either termination or dismissal, nor will there be any requirement to accumulate a full credit prior to being entitled to a rostered day off.

14. - OVERTIME

(1) (a) The provisions of this subclause apply to all employees other than those engaged on continuous shift work.

(b) Except as hereinafter provided, all time worked in excess of or outside of the usual working hours on any day shall be paid for at the rate of time and a half for the first two hours and double time thereafter.

(c) Where work is done on Saturdays, the employee shall be paid at the rate of time and a half for the first two hours and double time thereafter, but if work is performed on a Sunday, or after 12 noon on a Saturday the worker shall be paid double time for all time so worked but this paragraph does not apply in a case to which paragraph (c) of subclause (1) of Clause 13. - Hours of Duty applies.

(d) When an employee is required for duty during his usual meal time and the meal break is postponed for more than half an hour, the employee shall be paid at the rate of time and a half until he/she gets their meal.

(e) In computing overtime each day shall stand alone but when an employee works overtime which continues beyond midnight on any day, the time worked after midnight shall be deemed to be part of the previous day's work for the purpose of this subclause.

(2) (a) The provisions of this subclause apply only to employees engaged on continuous shift work.

(b) Subject to the provisions of paragraph (c) of this subclause all time worked in excess of or outside the ordinary working hours as prescribed, or on a shift other than a rostered shift, shall be paid for at the rate of double time, except where an employee is called upon to work a sixth shift in not more than one week in any four weeks, when he shall be paid for such shift at time and a half for the first four hours and double time thereafter.

(c) Time worked in excess of the ordinary working hours shall be paid for at ordinary rates -

(i) if it is due to private arrangements between the employees themselves; or

(ii) if it does not exceed two hours and is due to a relieving man not coming on duty at the proper time; or

(iii) if it is for the purpose of effecting the customary rotation of shifts.

(3) The provisions of this subclause apply to all employees.

(a) Overtime provisions will not apply until the ordinary hours which includes the daily accrual time towards a rostered day off as provided in Clause 13. - Hours of Duty, have been worked.

(b) Overtime on shift work shall be based on the ordinary rate payable.

(c) (i) When overtime work is necessary it shall, wherever reasonably practicable be so arranged that employees have at least ten consecutive hours off duty between the work on successive days.

(ii) An employee (other than a casual employee) who works so much overtime between the termination of their ordinary work on one day and the commencement of their ordinary work on the next day that e/she has not had at least ten consecutive hours off duty between those times shall, subject to this paragraph, be released after completion of such overtime until he/she has had ten consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.

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

(iv) Where an employee (other than a casual employee or an employee engaged on continuous shift work) is called into work on a Sunday or holiday preceding an ordinary working day, he/she shall, wherever reasonably practicable, be given ten consecutive hours off duty before their usual starting time on the next day. If this is not practicable then the provisions of subparagraphs (ii) and (iii) of this paragraph shall apply mutatis mutandis. Provided that overtime worked as a result of a recall, shall not be regarded as overtime for the purpose of this paragraph, when the actual time worked is less than three hours on such recalls or on each of such recalls.

(v) The provisions of this paragraph shall apply in the case of shift employees who rotate from one shift to another, as if eight hours were substituted for ten hours when overtime is worked -

(aa) for the purpose of changing shift rosters; or

(bb) where a shift employee does not report for duty; or

(cc) where a shift is worked by arrangement between the employees themselves.

(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 **$8.70** for a meal if, owing to the amount of overtime worked, a second or subsequent meal is required, he/she shall be supplied with each such meal by the employer or be paid **$5.10** for each meal so required.

(f) The provisions of paragraph (e) of this subclause do not apply -

(i) in respect of any period of overtime for which the employee has been notified on the previous day or earlier that he will be required; or

(ii) to any employee who lives in the locality in which the place of work is situated in respect of any meal for which he can reasonably go home.

(g) If an employee to whom subparagraph (i) of paragraph (f) of this subclause applies has, as a consequence of the notification referred to in that subclause, provided himself with a meal or meals and is not required to work overtime or is required to work less overtime than the period notified, he shall be paid, for each meal provided and not required, the appropriate amount prescribed in paragraph (e) of this subclause.

(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 **$4.05** for breakfast.

(i) (i) An employer may require any employee to work reasonable overtime at overtime rates, and such employee shall work overtime in accordance with such requirements.

(ii) No union or association party to this award, or employee or employees covered by this award, shall in any way, whether directly or indirectly, be a party to or concerned in any ban, limitation, or restriction upon the working of overtime in accordance with the requirements of this paragraph.

(j) The provisions of this subclause do not operate so as to require payment of more than double time rates, or double time and a half on a holiday prescribed under this award, for any work except and to the extent that the provisions of Clause 17. - Special Rates and Provisions of this award apply to that work.

(4) Employees in such areas as agreed between the parties may be rostered for stand by duty outside of the ordinary hours of work and, in addition to any payment due under this award for any overtime worked, each employee so rostered for stand by duty shall be paid -

(a) Three hours pay at ordinary rates if he is rostered on any day Monday to Friday inclusive.

(b) Four hours pay at ordinary rates if he is rostered on a Saturday or a Sunday.

(c) Three hours pay at ordinary rates plus a day in lieu if he is rostered on a holiday.

(5) Should stand by rates be applicable on a rostered day off duty prescribed in Clause 13. - Hours of Duty, then payment shall be made at the Monday to Friday rate referred to in subclause (6)(i) of this clause.

(6) (a) An employee required to work on a day observed as a rostered day off as provided in Clause 13. - Hours of Duty of this award, shall be re-rostered for another day off within ten working days in lieu of overtime rates prescribed in this clause. A rostered day will be the first or last working day of the week unless another day is agreed between the employer and employee.

(b) Provided that, should the employer and employee so agree, the time involved may be treated and paid as overtime in accordance with the other provisions of this clause.

(c) Provided further, that where an employee works on a rostered day off for less than one complete day then the employee shall be paid in accordance with the call out provisions.

(7) The provisions of this clause do not apply to a casual or part-time employee as defined in Clause 8. – Casual and Part-Time Employees of this award.

15. - SHIFT WORK

(1) The provisions of this clause apply to shift work whether continuous or otherwise.

(2) The employer may, work part or all of the operations on shifts, but before doing so, shall give notice of the intention to the union concerned and of the intended starting and finishing times of ordinary working hours of the respective shifts.

(3) (a) Where work is carried out on afternoon or night shifts and less than five consecutive afternoon or five consecutive night shifts are worked, then employees employed on such afternoon or night shift shall be paid at overtime rates.

Provided that where the ordinary hours of work are performed over less than five (5) days then that lesser number of days shall be substituted.

(b) The work on afternoon or night shift shall be deemed to be consecutive when less than five shifts are worked as the result of any authorised absence from work, whether paid or unpaid, or the fact that work on the afternoon or night shift is not carried out on a Saturday or Sunday or any other day the employer provides for the purpose of allowing a 38 hour week or any holiday.

(4) Subject to the provisions of paragraph (c) of subclause (1) of Clause 12. - Hours of Duty where a shift commences on or after 10.00 p.m. on any day the whole of the shift shall be deemed, for the purposes of this award, to have been worked on the following day.

(5) A continuous shift employee who is not required to work on a holiday which falls on the employee's day off prescribed in their shift roster, shall be allowed a day's leave with pay to be added to their annual leave or taken at some other time if the employee so agrees.

(6) (a) When a short-term urgent or significant minting project requiring special working arrangements is identified by management, the employees in the work area affected and the union will be informed at least two weeks in advance where practicable. Provided that if management has received less notice than two weeks, it will inform the employees as soon as information on a definite need for the work has been received.

(b) Following on from subclause (a) of this clause, management agrees to discuss the minting requirements employees with the employees affected to explain the project and discuss the work arrangements. Where a 9 day fortnight is being worked, it is agreed that should it be necessary in the opinion of the employer to roster employees to work 10 days per fortnight to meet delivery requirements, rostered days off (RDOs) will be deferred until the project is completed. Subject to ensuring that normal production is not hampered significantly, the employer will enable employees to take their deferred rostered days off within six months of the date when each day accrued, and employees will take their RDOs within that time. Should it not be possible to release staff to take an accumulated RDO within six months, that day will be paid out at the employee's ordinary rate.

(c) If an RDO has been deferred under subclause (2) of this clause, the day on which that RDO would have been taken shall be a normal working day paid at the employee's ordinary rate of pay in respect of the first 7.6 hours worked by that employee.

(d) If, during an urgent or significant minting project referred to in subclause (1) of this clause management considers it necessary to operate two or three shifts daily, Monday to Friday, afternoon and night shifts shall attract a shift loading of 25% of wages for ordinary hours worked, notwithstanding that the number of shifts in a week prescribed in paragraphs (a) and (b) of subclause (3) of clause 15 – Shift Work of the Award to which the loading prescribed in paragraph (b) of subclause (5) of that clause applies have not been worked, and meal breaks will be paid.

(e) Subclause (4) of this clause does not apply if the number of weekly shifts to which the loading prescribed in paragraph (b) of subclause (5) of clause 15 –Shift Work of the Award is applicable has been worked.

(f) If, during a significant minting project or urgent situation referred to in subclause (1) of this clause, management considers it necessary to stagger daytime working hours, employees may be allocated to groups commencing and finishing work at different times. This will only be done within the spread of hours in the Award.

16. - PAYMENT OF WAGES

(1) Each employee shall be paid the appropriate rate shown in the First Schedule to this award. Payment shall be pro rata where less than the full week is worked.

(2) The employee's wages will be paid by direct electronic transfer into the employee's bank or other recognised financial institutional account.

(3) When an employee is discharged before the usual pay day he shall be paid his wages when he ceases work, or it shall be forwarded by Electronic Funds Transfer to the employee's usual nominated financial institute account by the end of the normal pay period.

17. - SPECIAL RATES AND PROVISIONS

(1) Height Money: An employee shall be paid an allowance of **$1.95** for each day in which he/she works at a height of 15.5 metres or more above the nearest horizontal plane.

(2) Dirt Money: Dirt Money of 41 cents per hour shall be paid where the work is of an exceptionally dirty nature where clothes are necessarily unduly soiled or damaged by the nature of the work done.

(3) Confined Space:

48 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 24 cents per hour extra whilst so engaged.

(5) Hot Work: An employee shall be paid an allowance of 41 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.

(6) (a) Where, in the opinion of the Board of Reference, the conditions under which work is to be performed are, by reason of excessive heat, exceptionally oppressive, the Board may.

(i) fix an allowance, or allowances, not exceeding the equivalent of half the ordinary rate;

(ii) fix the period (including a minimum period) during which any allowance so fixed is to be paid; and

(iii) prescribe such other conditions, relating to the granting of rest periods, as the Board sees fit.

(b) The provisions of paragraph (a) of this subclause do not apply unless the temperature in the shade at the place of work has been raised by artificial means beyond 54.4 degrees Celsius.

(c) An allowance fixed pursuant to paragraph (a) of this subclause includes any other allowance which would otherwise be payable under this clause.

(7) Special Rates Not Cumulative -

Where more than one of the disabilities entitling an employee to extra rates exists on the same job the employer shall be bound to pay only one rate, namely - the highest for the disabilities so prevailing.

Provided that this subclause shall not apply to confined space, dirt money, height money or hot work, the rates for which are cumulative.

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

(9) An employee required to repair or maintain incinerates shall be paid $2.45 per unit.

(10) Protective Equipment -

(a) The employer shall make available a sufficient supply of protective equipment (as for example hand screens, goggles, glasses, gloves, aprons, leggings, gumboots and oilskins) for use by employees when engaged on work for which some protective equipment is reasonably necessary.

(b) Every employee shall sign an acknowledgement on receipt thereof, but such equipment shall at all times remain the property of the employer.

(c) During the time the same are on issue to the employee he/she shall be responsible for any loss or damage thereto, fair wear and tear attributable to ordinary use excepted.

(d) No employee shall lend another employee any protective equipment issued to such first mentioned employee, and if the same are lent both the lender and the borrower shall be deemed guilty of wilful misconduct.

(e) Before any protective equipment which has been used by an employee is reissued by the employer to another employee it shall, where necessary, be effectively sterilised.

(f) Protective cream shall be supplied to moulders when considered necessary by the employer.

(11) (a) Subject to the provisions of this clause, an employee whilst employed on foundry work shall be paid a disability allowance of 29 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.

(12) (a) An electronics tradesperson, an electrician – special class, an electrical fitter and / or an armature winder or an electrical installer who hold 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.

(b) 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.

(13) 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 $8.50 per week in addition to his/her ordinary rate.

18. - CAR ALLOWANCE

(1) Where an employee is required and authorised to use his own motor vehicle in the course of his duties he 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.

(2) 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 each of the separate areas traversed.

(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

AREA AND DETAILS	ENGINE DISPLACEMENT (IN CUBIC CENTIMETRES)		
DISTANCE TRAVELLED EACH YEAR OF EMPLOYER'S BUSINESS	OVER 2600cc cents per km	OVER 1600 cc -2600 cc cents per km	1600 cc & UNDER cents per km
Metropolitan Area	63.3	54.9	48.7
South West Land Division	65.1	56.5	50.2
North of 23.5° South Latitude	71.4	62.3	55.5
Rest of the State	67.3	58.4	51.8
Motor Cycle (in all areas)	21.9 cents per kilometre		

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

"South West Land Division" means the South West Land Division as defined by Section 28 of the Land Act 1933 excluding the area contained within the Metropolitan Area.

19. - HOLIDAYS

(1) The following days or the days observed in lieu thereof shall, subject as hereinafter provided, be allowed as holidays without deduction of pay namely New Year's Day, Australia Day, Good Friday, Easter Monday, Anzac Day, Labour Day, Foundation Day, Sovereign's Birthday, Christmas Day and Boxing Day. Provided that another day may be taken as a holiday by arrangement between the employer and the employee in lieu of the days in this subclause.

(2) Where any of the days mentioned in subclause (1) hereof falls on a Saturday or 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.

(3) Except in the case of continuous shift employees -

(a) Whenever any holiday falls on an employee's ordinary working day and the employee is not required to work on such day he shall be paid for the ordinary hours he would have worked on such day if it had not been a holiday.

(b) If any employee is required to work on a holiday he shall be paid for the time worked at the rate of double time and a half. Provided that in lieu of the foregoing provisions of this paragraph, and subject to agreement between the employer and the employee work done on any day prescribed as a holiday under this award shall be paid for at the rate of time and a half and the employee shall, in addition, be allowed a day's leave with pay to be added to his annual leave or be taken at some subsequent date if the employee so agrees.

(c) Payment for holidays shall be in accordance with the usual ordinary hours of work.

(4) When an employee is absent on leave without pay, sick leave without pay or workers' compensation, any day observed as a holiday on a day falling during such absence shall not be treated as a paid holiday. Where the employee is on duty or available on the whole of the working day immediately preceding a holiday, and resumes duty or is available on the whole of the working day immediately following a day observed as a holiday as prescribed by this clause, the employee shall be entitled to be paid for such holiday.

(5) Where a public holiday falls on a rostered day off duty as prescribed in Clause 13. - Hours of Duty, the following working day shall be observed in lieu of the rostered day off in the case of day workers and at a mutually convenient time within the following work cycle in the case of shift workers.

(6) This clause shall not apply to casual employees.

(7) A casual employee as defined in Clause 8. - Casual and Part-Time Employees of this award shall not be entitled to payment for any holiday referred to in this clause if not so rostered to work on that holiday.

20. - ANNUAL LEAVE

(1) (a) Except as hereinafter provided a period of 4 weeks leave to a maximum of 152 hours leave with payment of ordinary wages as prescribed shall be allowed annually to an employee by the employer after a period of twelve months' continuous service with the employer and any period of leave taken will be adjusted on the basis of hours normally worked.

(b) In respect of employees who work a 19 day four weekly cycle with the twentieth day being taken as a rostered day off, the calendar year will be divided into thirteen, twenty day work cycles. During the year the employee will be required to take one period of their Annual Leave to include the rostered day off duty for that particular work cycle. There will be no additional pay or leave in lieu of that rostered day off. Employees who work a 9 day fortnight with the tenth day being taken as a rostered day off, the calendar year will be broken into 26 ten day cycles. During the year the employee will be required to take two periods of their annual leave to include rostered days off for those work cycles.

(2) (a) "Ordinary wages" for an employee other than a shift worker shall mean the rate of wage including service pay the employee has received for the greatest proportion of the calendar month prior to his taking the leave.

(b) "Ordinary wages" for a shift worker shall mean the rate of wage the shift worker would receive under Clause 15. - Shift Work of the award according to the employee's roster or projected roster including Saturday and Sunday shifts.

(3) (a) A seven day shift worker, i.e. a shift worker who is rostered to work regularly on Sundays and holidays shall be allowed one week's leave in addition to the leave to which he is otherwise entitled under this clause.

(b) Where an employee with twelve months continuous service is engaged for part of a qualifying twelve monthly period as a seven day shift worker, the employee shall be entitled to have the period of annual leave to which the employee is otherwise entitled under this clause increased by one-twelfth of 38 hours for each completed month the employee is continuously so engaged.

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

(5) If after one week's continuous service in any qualifying twelve monthly period an employee lawfully leaves his employment or his employment is terminated by the employer through no fault of the employee the employee shall be paid 2.92 hours' pay at his ordinary rate of wage in respect of each completed week of continuous service in that qualifying period except that, in the case of an employee referred to in subclause (3) of this clause, he shall be paid 3.65 hours' pay at that rate in respect of each completed week of continuous service.

(6) In addition to any payment to which he may be entitled under subclause (5) of this clause, an employee whose employment terminates after he has completed a twelve monthly qualifying period and who has not been allowed the leave prescribed under this award in respect of that qualifying period, shall be given payment in lieu of that leave and the loading prescribed in subclause (11) hereof unless -

(a) he has been justifiably dismissed for gross-misconduct; and

(b) the gross-misconduct for which he has been dismissed occurred prior to the completion of that qualifying period.

(7) An employee may be rostered off and granted annual leave with payment of ordinary wages as prescribed prior to his having completed a period of twelve months' continuous service, in which case should the services of such employee terminate or be terminated prior to the completion of twelve months' continuous service, the said employee shall refund to the employer the difference between the amount received by him for wages in respect of the period of his annual leave and the amount which would have accrued to him by reason of the length of his service up to the date of the termination of his services.

(8) (a) Subject to subclause (3) of this clause, when computing the annual leave due under this clause, no deduction shall be made from such leave in respect of the period that an employee is on annual leave and/or holidays. Provided that no deduction shall be made for any approved period an employee is absent from duty through sickness, with or without pay, unless the absence exceeds three calendar months, in which case deduction may be made for such excess only.

(b) Approved periods of absence from work caused through accident sustained in the course of employment shall not be considered breaks in continuity of service, but the first six months only of any such period shall count as service for the purpose of computing annual leave.

(9) When operations are closed down for the purpose of allowing annual leave to be taken, as prescribed by subclause (17) hereof, during such period employees with less than a full year of service shall only be entitled to payment for the number of days leave due to them. This payment shall include the loading prescribed in subclause (11) of this clause. Provided that nothing herein contained shall deprive the employer of the right to retain such employees as may be required during the close down period.

(10) In addition to the payment prescribed for annual leave, an employee shall receive a loading calculated on the rate of wage prescribed by subclause (2) hereof. This loading shall be as follows:

(a) Day workers - an employee who could have worked on day work had he not been on leave - a loading of 17-1/2 per cent.

(i) the shift loadings prescribed by Clause 15. - Shift Work he would have received;

whichever is the greater.

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

(11) In taking annual leave, if an employee's entitlement expires part way through a day, the employee shall have the option of resuming duty for that full day or take the balance of the day as approved leave without pay.

(12) The provisions of this clause shall not apply to casual employees.

(13) (a) Annual leave shall be given and taken in one or two continuous periods. If given in two continuous periods, one such period must be of at least 20 consecutive days, including non-working days. Provided that if the employer and an employee so agree, annual leave may be given and taken in two separate periods, either of 20 consecutive days' duration including non-working days, or in three separate periods.

(b) Provided further that an employee may, with the consent of the employer, take short term annual leave, not exceeding five days in any calendar year, at a time or times separate from any of the periods determined in accordance with this subclause.

(14) (a) Annual leave shall be given at a time fixed by the employer within a period not

exceeding six months from the date when the right to annual leave accrued and after not less than four weeks' notice to the employee.

(b) Provided that, by agreement between the employer and an employee, annual

leave may be taken at any time within a period of 12 months from the date on which it falls due and with not less than four weeks' notice to the employee.

(15) (a) The employer may close down operations for one or two separate periods for the purpose of granting annual leave in accordance with this clause. If the operations are closed in two separate periods, one of those periods shall be for at least 20 consecutive days, including non-working days.

(b) Provided that where the majority of employees concerned agree, the employer may close down a work section, or sections, in one, two or three separate periods for the purpose of granting annual leave in accordance with this subclause. Provided further that if the employer closes down operations on more than one occasion, one of those periods shall be for a period of at least 14 consecutive days, including non-working days. In such cases the employer shall advise employees concerned of the proposed dates of each close down before asking for their agreement.

(c) (i) The employer may close down operations, or a section or sections thereof, for a period of at least 21 consecutive days, including non-working days and grant the balance of annual leave due to an employee in one continuous period in accordance with a roster.

(ii) Provided that, with the agreement of the majority of employees concerned, the employer may close down operations for a period of at least 14 consecutive days, including non-working days and grant the balance of annual leave due by mutual arrangement with an employee.

(16) Cashing out of annual leave is permissible in accordance with the Minimum Conditions of Employment Act, 1993.

21. - SICK LEAVE

(1) (a) An employee shall be entitled to payment for non-attendance on the ground of personal ill health or injury at the rate of 1.46 hours pay for each week of service.

(b) Payment hereunder may be adjusted at the end of each accruing year, or at the time the employee leaves the service of the employer, in the event of the employee being entitled by service subsequent to the sickness in that year to a greater allowance than that made at the time the sickness occurred.

(c) Sick leave shall not be granted in substitution for a rostered day off duty as prescribed in Clause 13. - Hours of Duty.

(2) The unused portion of the entitlement prescribed in paragraph (a) of subclause (1) in any accruing year shall be allowed to accumulate and may be availed of in the next or any succeeding year.

(3) In order to acquire entitlement to payment in accordance with this clause the employee shall as soon as reasonably practicable advise the employer of their inability to attend for work, the nature of his illness or injury and the estimated duration of the absence. Provided that such advice other than in extraordinary circumstances shall be given to the employer within 24 hours of the commencement of the absence.

(4) No employee shall be entitled to the benefit of this clause unless they produce proof to the satisfaction of the employer or the employer's representative of such sickness provided that the employer shall not be entitled to a medical certificate for absences of less than three consecutive working days unless the total of such absences exceeds five days in any one accruing year.

(5) (a) Subject to the provisions of this subclause, the provisions of this clause apply to an employee who suffers personal ill health or injury during the time when he is absent on annual leave and an employee may apply for and the employer shall grant paid sick leave in place of paid annual leave.

(b) Application for replacement shall be made within seven days of resuming work and then only if the employee was confined to his place of residence or a hospital as a result of their personal ill health or injury for a period of seven consecutive days or more and they produce a certificate from a registered medical practitioner that they were so confined. Provided that the provisions of this paragraph do not relieve the employee of the obligation to advise the employer in accordance with subclause (3) of this clause if they are unable to attend for work on the working day next following their annual leave.

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

(d) Where paid sick leave has been granted by the employer in accordance with paragraphs (a), (b) and (c) of this subclause, that portion of the annual leave equivalent to the paid sick leave is hereby replaced by the paid sick leave and the replaced annual leave may be taken at another time mutually agreed to by the employer and the employee or, failing agreement, shall be added to the employee's next period of annual leave, or if termination occurs before then, be paid for in accordance with the provisions of Clause 21. - Annual Leave.

(e) Payment for replaced annual leave shall be at the rate of wage applicable at the time the leave is subsequently taken provided that the annual leave loading prescribed in Clause 23. - Annual Leave shall be deemed to have been paid with respect to the replaced annual leave.

(6) The provisions of this clause with respect to payment do not apply to employees who are entitled to payment under the Workers' Compensation and Injury Management Act, 1981 nor to employees whose illness or injury is the result of the employee's own misconduct.

(7) (a) An employee shall accrue an entitlement of 0.4 of one hour per day whilst on sick leave towards the rostered day off prescribed in subclauses (1)(b)(i) and (2)(c) of Clause 13. - Hours of Duty. However, the sick leave entitlement shall be debited by 8 hours for each day of absence.

(b) The sick leave entitlement of an employee who works a 9 day fortnight in accordance with subclause (1)(b)(ii) of Clause 13. - Hours of Duty, shall be adjusted on the basis of the ordinary hours which would have been worked each day by the employee, had the sickness not occurred.

(8) The provisions of this clause do not apply to casual employees.

(9) CARER'S LEAVE

(1) Employees are entitled to use, each year, up to five (5) days of their sick leave entitlement for that year to be the primary care giver of a member of their family or household who is ill or injured and in need of immediate care and attention.

(2) "Member of their family" means any of the following persons –

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

(b) a child for whom the employee has parental responsibility as defined in the Family Court Act 1977;

(c) an adult child of the employee; or

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

(3) Employees shall, wherever practical, give the Mint notice of their intention to take carer's leave and of the estimated length of absence. If it is not practicable to give prior notice of absence employees shall notify the Mint as soon as possible on the first day of absence.

(4) Employees shall provide, where required by the Mint, evidence that would satisfy a reasonable person to establish the requirement to take carer's leave. An application for carer's leave exceeding two (2) consecutive working days shall be supported by a certificate from a registered medical practitioner or registered dentist.

(5) Carer's leave may be taken on an hourly basis or part thereof.

(6) An employee is not entitled to carry over unused carer's leave from one year to the next.

(7) The provisions of this clause do not apply to a casual employee.

22. - BEREAVEMENT LEAVE

(1) An employee (other than a casual employee) shall, on the death of a wife, husband, father, mother, father-in-law, mother-in-law, brother, sister, child, step-child or any other person who, immediately before that person's death, lived with the employee as a member of the employee's family, be entitled, on notice, to up to 2 days leave and such leave shall be without deduction of pay for a period of not exceeding the number of hours worked by the worker in two ordinary working days. Proof of such death shall be furnished by the employee to the satisfaction of the employer.

(2) Payment in respect of bereavement leave is to be made only where the employee otherwise would have been on duty and shall not be granted in any case where the employee concerned would have been off duty in accordance with his roster, or on long service leave, annual leave, sick leave, workers' compensation, leave without pay, holiday, or a special day off.

(3) For the purposes of this clause, the words "wife" and "husband" shall include a person who lives with the employee as a de facto wife or husband.

(4) Bereavement leave shall not be granted in substitution for a rostered day off duty as prescribed in Clause 13. - Hours of Duty.

23. – MATERNITY AND PARENTAL LEAVE

(1) Eligibility for Maternity Leave

An employee who becomes pregnant shall, upon production to her employer of a certificate from a duly qualified medical practitioner stating the presumed date of her confinement, be entitled to maternity leave provided that she has had not less than 12 months' continuous service with that employer immediately preceding the date upon which she proceeds upon such leave.

For the purposes of this clause:

(a) An employee shall include a part-time employee but shall not include an employee engaged upon casual or seasonal work.

(b) Maternity leave shall mean unpaid maternity leave.

(c) On commencement of maternity leave a sum equivalent to 6 weeks pay will be paid to the employee.

(2) Period of Leave and Commencement of Leave

(a) Subject to subclause (3) and (6) of this clause, the period of maternity leave shall be for an unbroken period of from 12 to 52 weeks and shall include a period of six weeks leave to be taken immediately before the presumed date of confinement and a period of six weeks' c leave to be taken immediately following confinement. At the discretion of a medical practitioner and on production of a weekly certificate the period of six weeks prior maybe reduced to two weeks.

(b) An employee shall, not less than 10 weeks prior to the presumed date of confinement, give notice in writing to her employer stating the presumed date of confinement.

(c) An employee shall give not less than four weeks' notice in writing to her employer if the date upon which she proposes to commence maternity leave, stating the period of leave to be taken.

(d) An employee shall not be in breach of this order as a consequence of failure to give the stipulated period of notice in accordance with paragraph (c) of this clause if such failure is occasioned by the confinement occurring earlier than the presumed date.

PARENTAL LEAVE

Definitions

(a) "Employees" includes full time, part time, permanent and fixed term contract employees, but does not include casual employees.

(b) "Replacement Employees" are employees specifically engaged to replace employees proceeding on parental leave.

Eligibility for Parental Leave

(c) Employees are entitled to a period of up to 52 weeks' unpaid parental leave in respect of the birth of a child to the employee or the employee's spouse/partner.

(d) Employees shall provide the Mint with a certificate from a registered medical practitioner confirming the pregnancy and the estimated date of birth.

(e) Where the employee applying for the leave is the partner of a pregnant spouse one (1) week's leave may be taken at the birth of the child concurrently with parental leave taken by the pregnant employee.

(f) Subject to subclause (c) of this clause where both partners are employed by the Mint the leave shall not be taken concurrently except under special circumstances and with the approval of the Mint.

(g) Employees seeking to adopt a child under the age of five (5) years shall be entitled to three (3) weeks' parental leave at the placement of the child and a further period of parental leave up to a maximum of 52 weeks.

(h) Employees seeking to adopt a child shall be entitled to two (2) days' unpaid leave to attend interviews or examinations required for the adoption procedure. Employees working or residing outside the Perth metropolitan area are entitled to an additional day's leave. Employees may take any paid leave entitlement in lieu of this leave.

Other leave entitlements

(i) Employees proceeding on parental leave may elect to substitute any part of that leave with accrued annual leave or long service leave for the whole or part of the period of parental leave.

(j) Employees on parental leave are not entitled to paid sick leave and other paid absences.

(k) Should the birth or adoption result in other than the arrival of a living child, the employee shall be entitled to such period of paid sick leave or unpaid leave for a period certified as necessary by a registered medical practitioner.

(l) Where a pregnant employee not on parental leave suffers illness related to the pregnancy or is required to undergo a pregnancy related medical procedure the employee may take any paid sick leave to which the employee is entitled or unpaid leave for a period as certified necessary by a registered medical practitioner.

Notice and Variation

(m) Employees shall give not less than four (4) weeks' notice in writing to the Mint of the date the employee proposes to commence parental leave stating the period of leave to be taken.

(n) Employees seeking to adopt a child shall not be in breach of subclause (m) by failing to give the required period of notice if such failure is due to the requirement of the adoption agency to accept earlier or later placement of a child, or other compelling circumstances.

(o) Employees proceeding on parental leave may elect to take a shorter period of parental leave and may at any time during that period elect to reduce or extend the period stated in the original application, provided four weeks' written notice is given and the Mint approves such variation.

Transfer to a Safe Job

Where illness or risks arising out of pregnancy or hazards connected with the work assigned to the employee make it inadvisable for the employee to continue in her present duties, the duties shall be modified or the employee may be transferred to a safe position at the same classification level until the commencement of parental leave.

Replacement Employee

Prior to engaging a replacement employee the Mint shall inform the person of the temporary nature of the employment and the entitlements relating to the return to work of the employee on parental leave.

Return to Work

(p) Employees shall confirm the intention to return to work by notice in writing to the Mint not less than four (4) weeks prior to the expiration of parental leave.

(q) Employees on return to work from parental leave shall be entitled to the position which the employees occupied immediately prior to proceeding on parental leave. Where the employees were transferred to a safe job the employees are entitled to return to the position occupied immediately prior to transfer.

(r) Employees will be entitled to the same position or a position equivalent in pay, conditions and status and commensurate with the employee's skill and abilities as the one held immediately prior to commencement of leave.

(s) Employees may return on a part time basis to the same position occupied prior to the commencement of leave or to a different position at the same classification level in accordance with the part time provisions of the Award.

(t) Subject to the Mint's approval, employees who have returned on a part time basis may revert to full time work at the same classification level within two (2) years of the recommencement of work.

Effect of Leave on the Employment Contract

(u) Employees employed for a fixed term contract shall have the same entitlement to parental leave, however the period of leave granted shall not extend beyond the term of that contract.

(v) Absence on parental leave shall not break the continuity of service of employees but shall not be taken into account in calculating the period of service for any purpose under the Agreement.

(w) Employees on parental leave may terminate employment at any time during the period of leave by written notice in accordance with the Agreement.

(x) The Mint shall not terminate the employment of an employee on the grounds of the employee's application for parental leave or absence on leave but otherwise the rights of the Mint in respect of termination of employment are not affected.

24. - ADOPTION LEAVE

(1) For the purposes of this clause -

(a) "Adoption" shall have the same meaning as that contained under the Adoption of Children Act 1986.

(b) "Child" refers to a person under the age of five years who has not previously lived continuously with the employee concerned for a period of six months.

(c) "Relative adoption" occurs where a child, as defined, is adopted by a parent, a spouse of a parent, or other relative being a grandparent, brother, sister, aunt or uncle (whether of whole blood or half blood or by marriage) .

(d) An employee shall include a part-time employee but shall not include an employee engaged in casual or seasonal work.

(e) "Adoption leave" shall mean unpaid adoption leave.

(2) Eligibility for Adoption Leave

An employee shall, upon production to the employer of -

(a) notification from the principal of an authorised private adoption agency of the presumed date of placement of the child for adoption purposes; or

(b) notification from the Director General of the Department for Community Services confirming that the employee is to have custody of the child pending application for an adoption order,

be entitled to adoption leave, provided that the employee has had not less than 12 months of continuous service with that employer immediately preceding the date upon which the adoption leave commences.

(3) Period of Leave and Commencement of Leave

(a) Subject to this subclause and subclause (7) hereof, the period of adoption leave shall be for an unbroken period of up to 52 weeks but ceasing, in any event, when the child attains the age of five years.

(b) Upon receiving notice of approval for adoption purposes, an employee shall notify the employer of the approval and within one month of such approval the employee shall further notify the employer of the period of adoption leave which is proposed. In the case of a relative adoption, the employee shall notify as aforesaid upon deciding to take a child into custody pending an application for an adoption order.

(c) An employee shall not be entitled to adoption leave before completion of not less than 12 months' continuous service with the employer immediately preceding the date the said leave commences.

(d) An employee shall, as soon as becoming aware of the presumed date of placement of a child for adoption purposes, but not later than four weeks before such placement, give notice in writing to the employer of such date and of the date of the commencement of adoption leave and the period of adoption leave to be taken.

(e) An employee shall not be in breach of this clause as a consequence of failure to give the stipulated period of notice, in accordance with paragraph (d) hereof, if such failure is occasioned by the requirement of an adoption agency to accept earlier placement of a child.

(4) Sharing of Leave

Parents who are both employees of a public authority/authorities may share the leave prescribed herein, subject to the following -

(a) Both employees are not to be granted leave at the same time.

(b) The leave granted to both employees in aggregate shall not exceed 52 weeks. A Chief Executive Officer, before granting adoption leave, may request the employee to provide a statutory declaration to the effect that no other employee is concurrently seeking adoption leave with respect to the same child.

(c) Where one adoptive parent has proceeded on adoption leave and the other adoptive parent (hereinafter called the second parent) wishes to share adoption leave in respect of the same child, the second parent shall notify the employer in writing of the date the first parent intends to cease adoption leave and the name of the employer of the first parent. Such notice to the employer shall be given at least 14 days prior to the date upon which the second employee intends to commence adoption leave.

(5) Variation of Period of Adoption Leave

(a) Provided the addition does not extend the adoption leave beyond 52 weeks, the period may be lengthened once only, save with the agreement of the employer, by the employee giving not less than 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 14 days' notice in writing, stating the period by which the leave is to be shortened.

(6) Cancellation of Adoption Leave

(a) Adoption leave, applied for but not commenced, shall be cancelled should the placement of the child not proceed.

(b) Where the placement of a child for adoption purposes, with an employee then on adoption leave, does not proceed or continue, the employee shall notify the employer forthwith and the employer shall nominate a time, not exceeding four weeks from receipt of notification, for the employee's resumption of work.

(7) Special Leave

The employer shall grant, to any employee who is seeking to adopt a child, such unpaid leave, not exceeding two days, as required by the employee to attend any compulsory interviews or examinations which are necessary as part of the adoption procedure. Where paid leave is available to the employee, the employer shall have the option of paying the employee out of such available leave.

(8) Adoption Leave and Other Entitlements

Provided the aggregate of leave, including adoption leave, does not exceed 52 weeks -

(a) An employee may, in lieu of or in conjunction with adoption leave, take any accumulated annual leave or long service leave, or any part thereof.

(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 adoption leave.

(9) Effect of Adoption Leave on Employment

Notwithstanding any award or other provision to the contrary, absence on adoption leave shall not break the continuity of service of an employee but shall not be taken into account in calculating the period of service for any purpose of any relevant award or agreement.

(10) Termination of Employment

(a) An employee on adoption leave may resign 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 grounds of an application to adopt a child, or absence on adoption leave, but otherwise the rights of an employer in relation to termination of employment are not hereby affected.

(11) Return to Work After Adoption Leave

(a) An employee shall give the employer at least four weeks' notice in writing prior to returning to work from a period of adoption leave.

(b) An employee, upon expiration of the notice required by paragraph (a) hereof, shall be entitled to the position held immediately before proceeding on adoption leave. Where such position no longer exists, but there are other positions available for which the employee is qualified and capable of performing, the employee shall be entitled to a position as nearly comparable in status and salary or wage to that of the former position.

(12) Replacement of Employees

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

(b) Before an employer engages a replacement employee under this subclause, that employee shall be informed 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 on adoption leave, 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 until completion of the 12 months period of qualifying service.

(13) Effect of Adoption Leave on Accrued Day(s) Off

(a) When an employee proceeds on adoption leave there will not be any accrual towards a rostered day off as prescribed in Clause 13. - Hours of Duty of this award.

(b) When an employee proceeds on adoption leave, the employer may pay an employee the amount of hours accrued towards a rostered day off, as prescribed in Clause 13. - Hours of Duty of this award.

25. - LONG SERVICE LEAVE

(1) Subject to the provisions of this clause the long service leave provisions set out in Volume 66 of the Western Australian Industrial Gazette, at pages 1 to 4 inclusive, shall apply to employees covered by this award.

(2) For the purposes of subclause (1) of this clause "13 weeks' leave" shall mean 494 hours' leave.

(3) Any long service leave accrued to an employee as at April 25, 1982 shall be adjusted in hours in the ratio of 38 to 40.

(4) In taking leave if an employee's leave entitlement expires part way through a day, the employee shall have the option of resuming duty for that full day or take the balance of the day as approved leave without pay.

(5) An employee may choose to take long service leave as an entitlement to 26 weeks of leave at half pay. In calculating the rate of pay to apply in such an instance, the provisions of subclause (14) of the General Order, referred to in subclause (1) hereof, shall apply.

(6) Employees may elect to “compact” LSL. Provision is made for a payment of 50% of LSL when the other 50% is taken as time.

26. - DEFENCE FORCE TRAINING LEAVE

(1) Subject to departmental approval and convenience, leave of absence may be granted to an employee who is a volunteer member of the Defence Forces or the Cadet Force for the purpose of attending an annual camp of continuous training, additional approved camp or course of instruction, subject to the conditions set out hereunder.

(2) (a) An employee may be granted two weeks of special leave on full pay in each period of 12 months commencing on 1 July each year. Two weeks means, in the case of five day a week employees, ten days and, in the case of six day a week employees, 12 days' pay.

(b) If the Officer in Charge of a unit certifies that it is essential for an employee to be at the camp in an advance or rear party, a maximum of four extra days on full pay may be granted in the 12 month period.

(3) (a) In addition to leave granted under subclause (2) of this clause, further leave for the purpose of attending an additional approved camp or course of instruction may be granted as leave without pay and the difference between civil and Defence Forces pay made up.

(b) In calculating Defence Forces pay for additional camps or courses, weekends and holidays should be excluded so that employees will have the benefit of any pay with respect of these days. Evidence must be submitted to the employer of the necessity for attendance at such extra camps or courses of instruction.

(4) Employees who are members of the Defence Forces and the Cadet Force may only be granted leave for attendance at one annual camp of continuous training and one additional approved camp or course of instruction.

27. - EMERGENCY SERVICES LEAVE

(1) Subject to operational requirements, paid leave of absence shall be granted by the Mint to an employee who is an active volunteer member of the State Emergency Service, St John Ambulance Brigade, Volunteer Fire and Rescue Service, Bush Fire Brigade or Volunteer Marine Rescue Service, in order to allow for attendances at emergencies as declared by the recognised authority.

(2) The Mint shall be advised as soon as possible by the employee, the emergency service, or other person as to the absence and, where possible, the expected duration of leave.

(3) The employee must complete a leave of absence form immediately upon return to work.

(4) The application form must be accompanied by a certificate from the emergency organisation certifying that the employee was required for the specified period.

28. - JURY SERVICE

(1) (a) An employee required to serve on a jury shall, as soon as possible after being summonsed to serve, notify the employer.

(b) The summons to serve must be produced when making application to obtain leave for jury service.

(2) (a) An employee required to serve on a jury shall be granted leave of absence by the employer, for the period required to enable the employee to carry out his/her duties as a juror.

(b) The employee must claim the maximum compensation available under the Juries (Allowances to Jurors) Regulations. If there is any shortfall between the amount compensated and the employee's ordinary rate of pay, the employer will pay the difference to the employee.

(c) Where jury service is required while an employee is on any form of paid leave, such leave will not be reinstated.

(3) An employee must return to duty immediately upon being discharged from jury service, if such release occurs during normal working hours.

(4) The conditions specified in subclauses (1) to (3) hereof shall also apply where an employee is required as a Crown Witness during normal working hours.

29. - SHOP STEWARDS

Subject to the recognition of properly constituted authority, shop stewards, to be appointed by the union, shall be recognised by the management. The management shall be notified in writing by the union of the stewards appointed.

30. - NOTICE BOARDS

A notice board shall be provided by the employer on all jobs where, in the opinion of the officer in charge, it is considered that notices are essential to meet the convenience of the union concerned.

31. - RIGHT OF ENTRY

Consistent with the terms of the Labour Relations Legislation Amendment Act 1997 and S.23(3)(c)(iii) of the Industrial Relations Act a representative of the Union shall not exercise the rights under this clause with respect to entering any part of the premises of the employer unless the employer is the employer, or former employer of a member of the Union.

On notifying the officer in charge, any officer of the union, authorised in writing by the President and Secretary of such union, shall have the right to enter any place or premises during ordinary working hours wherein members of such union covered by this award are engaged for the purpose of conversing with or interviewing the employees in such place or premises. Provided that such officer shall not hamper or otherwise hinder the employees in the carrying out of their work. The officer in charge shall determine whether employees are being hampered or hindered in their work.

32. - LEAVE TO ATTEND UNION BUSINESS

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

(i) who is required to give evidence before any Industrial Tribunal;

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

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

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

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

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

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

(iii) for those employees whose attendance is essential;

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

(v) the matters rate directly to the employer.

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

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

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

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

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

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

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

33. - TRADE UNION TRAINING LEAVE

(1) Subject to the provisions of this Clause:

(a) The employer shall grant paid leave of absence to employees who are nominated by their union to attend to attend short courses conducted by an accredited training provider and, approved by the Union.

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

(2) An employee shall be granted up to a maximum of five days paid leave per calendar years for trade union training or similar courses or seminars as approved. However, leave of absence in excess of five days and up to ten days may be granted in any one calendar year provided that the total leave being granted in that year and in the subsequent year does not exceed ten days.

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

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

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

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

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

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

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

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

34. - COMPLAINTS AND CHARGES AGAINST EMPLOYEES

(1) When any complaint as to the conduct of any employee is received by the employer or when any officer of the employer charges any employee with any misconduct or breach of duty the officer of the employer responsible for dealing with such complaint or charge shall first cause to be made a preliminary investigation of the circumstances. If as a result of such investigation the officer concerned is of the opinion that such complaint or charge may be true and is not of so trivial a nature as not to warrant any action, he/she shall require the employee concerned to attend before him/her to explain the incident or circumstances relating to the complaint or charge.

(2) Any employee required under the provisions of subclause (1) of this clause to explain the incident or circumstances relating to a complaint or charge may, if he/she so desires, be accompanied by an official of the union of which he/she is a member.

(3) The officer dealing with the complaint or charge shall give to the employee full particulars of the complaint or charge and, if in his/her opinion, it is of so serious a nature as likely if proved true to result in the dismissal of the employee, shall also give the employee the name and address of the person making the complaint or charge and, in any case before coming to any final decision on the matter, shall allow the employee (if desired) reasonable time to bring before such officer any employee or member of the public who may have any knowledge of the facts.

(4) Any employee aggrieved by a decision of the officer dealing with a complaint or charge shall have the opportunity to bring all the facts relating thereto before the Chief Executive Officer and in so doing may have the assistance of an official of the union of which he/she is a member.

(5) No record prejudicial to an employee shall be made on his/her conduct record card unless the provisions of this clause have first been complied with.

35. - INTRODUCTION OF CHANGE

(1) Employer's Duty to Notify

(a) Where an employer has made a definite decision to introduce major changes in production, programme, organisation, structure or technology that are likely to have "significant effects" on employees, the employer shall notify the employees who may be affected by the proposed changes and their union or unions.

(b) "Significant effect" includes termination of employment, major changes in the composition, operation or size of the employer's work force or in the skills required; the elimination or diminution of job opportunities, promotion opportunities or job tenure; the alteration of hours of work; the need for re-training or transfer of employees to other work or locations and the re-structuring of jobs. Provided that where the award makes provision for alteration of any of the matters referred to herein, an alteration shall be deemed not to have "significant effects".

(2) Employer's Duty to Discuss Change

(a) The employer shall discuss with the employees affected and their union or unions inter alia, the introduction of the changes referred to in subclause (1)hereof, the effect the change are likely to have on employees, measures to avert or minimise adverse effect of such change on employees and shall give prompt consideration to matters raised by the employees and/or their unions in relation to the change.

(b) Discussion shall commence as soon as practicable after a firm decision has been made by the employer to make the changes referred to in subclause (1) hereof.

(c) For the purpose of such discussion, the employer shall provide to the employees concerned and their union or unions, all relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on employees and any other matters likely to affect employees, provided that any employer shall not be required to reveal confidential information, the disclosure of which would be inimical to the employer's interests.

36. - REDUNDANCY

(1) Each employee identified as being surplus to Western Australian Mint's requirements and who cannot be found suitable alternative employment, shall be entitled to the following benefits -

Three weeks pay in lieu for each completed year of continuous service provided that the maximum entitlement shall be 58 weeks salary *plus* an additional payment of 12 weeks wages for notice. The total maximum payment shall not exceed 70 weeks. The employee shall also receive up to 8 hours leave for the purpose of being interviewed for further employment.

APPENDIX - RESOLUTION OF DISPUTES REQUIREMENT

(1) This Appendix is inserted into the award/industrial agreement as a result of the Industrial Relations Act 1979

(2) Subject to this appendix, and in addition to any current arrangements the following procedures shall apply in connection with questions, disputes or difficulties arising under this award/industrial agreement.

(a) The persons directly involved, or representatives of person/s directly involved, shall discuss the question, dispute or difficulty as soon as is practicable.

(b) (i) If these discussions do not result in a settlement, the question, dispute or difficulty shall be referred to senior management for further discussion.

(ii) Discussions at this level will take place as soon as practicable.

(3) The terms of any agreed settlement should be jointly recorded.

(4) Any settlement reached which is contrary to the terms of this award/industrial agreement shall not have effect unless and until that conflict is resolved to allow for it.

(5) Nothing in this appendix shall be read so as to exclude an organisation party to or bound by the award/industrial agreement from representing its members.

(6) Any question, dispute or difficulty not settled may be referred to the Western Australian Industrial Relations Commission provided that with effect from 22 November 1997 it is required that persons involved in the question, dispute or difficulty shall confer among themselves and make reasonable attempts to resolve questions, disputes or difficulties before taking those matters to the Commission.

FIRST SCHEDULE - WAGES

1 (a) per week

Level	2004	2005	2006
C6	845.81	879.64	914.83
C7	791.96	823.63	856.58
C8	759.16	789.52	821.11
C9	726.33	755.38	785.59
C10	693.61	721.35	750.21
C11	644.08	669.84	696.64
C12	612.62	637.12	662.61
C13	578.52	601.66	625.73

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

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

(2) If this award is in force following 2006, the state wage case shall apply for future wage increases

SECOND SCHEDULE – LIST OF RESPONDENTS

The Western Australian Mint

THIRD SCHEDULE – NAMED PARTIES TO THE AWARD

Australian Manufacturing Workers' Union, Western Australian Branch

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Australia, Engineering and Electrical Division, Western Australian Branch

PUBLIC SERVICE ARBITRATOR—Awards/Agreements—Variation of—

2005 WAIRC 03238

HOSPITAL SALARIED OFFICERS' AWARD 1968

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)

APPLICANT

-v-

DIRECTOR GENERAL OF HEALTH IN RIGHT OF THE MINISTER FOR HEALTH

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
COMMISSIONER P E SCOTT

DATE WEDNESDAY, 7 DECEMBER 2005

FILE NO P 31 OF 2005

CITATION NO. 2005 WAIRC 03238

Result Award varied

Order

HAVING heard Mr G Bucknall on behalf of the applicant and Ms C Osnain on behalf of the respondent, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

THAT the Hospital Salaried Officers' Award 1968 (No. 39 of 1968) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 7th day of December 2005.

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

SCHEDULE

1. Clause 15. – Meal Money: Delete this clause and insert the following in lieu thereof:

An employee required to work overtime before or after the employees ordinary working hours on any day shall, when such additional duty necessitates taking a meal away from the employees usual place of residence, be supplied by the employer with any meal required or be reimbursed for each meal purchased at the rate of $8.25 for breakfast, $10.15 for the midday meal, and $12.20 for the evening meal: Provided that the overtime worked before or after the meal break totals not less than two hours. Such reimbursement shall be in addition to any payment for overtime to which the employee is entitled.

2. Clause 25. – Removal Allowance: Delete subclause (1)(b)(iv) of this clause and insert the following in lieu thereof:

(iv) Reimbursement of reasonable expenses in kennelling and transporting of domestic pet or pets up to a maximum amount of $157.00.

Pets are defined as dogs, cats, birds or other domestic animals kept by the officer or the employee's dependents for the purpose of household enjoyment.

Pets do not include domesticated livestock, native animals nor equine animals.

AWARDS/AGREEMENTS—Variation of—

2005 WAIRC 03237

ACTIV FOUNDATION (SALARIED OFFICERS) AWARD, NO. 13 OF 1977

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)
APPLICANT
-v-
THE BOARD OF MANAGEMENT, ACTIV FOUNDATION INCORPORATED
RESPONDENT

CORAM COMMISSIONER P E SCOTT
DATE WEDNESDAY, 7 DECEMBER 2005
FILE NO APPL 832 OF 2005
CITATION NO. 2005 WAIRC 03237

Result Award varied

Order

HAVING heard Mr G Bucknall on behalf of the applicant and Mr M O'Connor on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

THAT the ACTIV Foundation (Salaried Officers) Award, No. 13 of 1977 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 7th day of December 2005.

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

SCHEDULE

Clause 15. – Meal Money: Delete this clause and insert the following in lieu thereof:

An employee required to work overtime before or after the employees ordinary working hours on any day, shall, when such additional duty necessitates taking a meal away from the employees usual place of residence, be supplied by the employer with any meal required or be reimbursed for each meal purchased at the rate of $8.25 for breakfast, $10.15 for the midday meal, and $12.20 for the evening meal. Provided that the overtime worked before or after the meal break totals not less than two hours. Such reimbursement shall be in addition to any payment for overtime to which the employee is entitled.

2005 WAIRC 03133

EGG PROCESSING AWARD 1978 NO. R42 OF 1978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE FOOD PRESERVERS UNION OF WESTERN AUSTRALIA, UNION OF WORKERS **APPLICANT** **-v-** WESTERN AUSTRALIAN EGG MARKETING BOARD **RESPONDENT**
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 24 NOVEMBER 2005
FILE NO/S	APPL 936 OF 2005
CITATION NO.	2005 WAIRC 03133

Result	Award varied. Order issued.
Representation	
Applicant	Mr T Pope
Respondent	Mr P Robertson as agent

Order

HAVING heard Mr T Pope on behalf of the applicant and Mr P Robertson as agent on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, and by consent, hereby –

ORDERS that the Egg Processing Award 1978 No. R42 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 23 November 2005.

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

SCHEDULE

1. Clause 8. – Overtime: Delete subclause (3)(a) of this clause and insert in lieu thereof the following:

(3)

(a) Where an employee is required to work overtime for more than two hours, without being notified on the previous day or earlier that he/she will be so required to work, shall be supplied with a meal by the employer or paid $8.40 for a meal. If the amount of overtime required to be worked necessitates a second or subsequent meal, the employee shall be provided such a meal or be paid the amount of $5.70 for each second or subsequent meal.

2005 WAIRC 03044

ELECTRICAL, ENGINEERING AND BUILDING TRADES (WEST AUSTRALIAN NEWSPAPERS LIMITED) AWARD, 1988

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIV. AND THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS-WESTERN AUSTRALIAN BRANCH, AND THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **APPLICANT** **-v-** WEST AUSTRALIAN NEWSPAPERS LTD & OTHERS **RESPONDENT**
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	MONDAY,, 14 NOVEMBER 2005
FILE NO/S	APPL 780 OF 2005
CITATION NO.	2005 WAIRC 03044

Result Award Varied

Order

HAVING heard Mr L. Edmonds (of Counsel) on behalf of the CEPU and Mr D. McLane from the AFMEPKIU, 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 Electrical, Engineering and Building Trades (West Australian Newspapers Limited) Award, 1988 be varied in accordance with the following Schedule and that such variation shall have effect from the first pay period on or after 26 October 2005.

(Sgd.) J F GREGOR,
[L.S.] Senior Commissioner.

SCHEDULE

1. Clause 10. – Overtime Delete subclause (6) of this clause and insert in lieu the following:

(6) Where an employee is entitled to a meal break pursuant to subclause (13) of this clause; and

(a) The employee has worked two hours or more of overtime immediately before any intermediate or night shift or immediately after a day shift, such employee will receive at least a 30 minute unpaid meal break and be paid meal money of **$9.95**.

(b) Where an employee works overtime that is continuous with their normal rostered shift and they work two hours or more overtime without a meal break, they will receive a 30 minute meal break which will be paid for at the appropriate overtime rate.

2. Clause 19. – Fares and Travelling: Delete this clause and insert in lieu the following:

Where an employee is required to work away from their shop, the following provisions shall apply:

(1) The employee shall be paid fares of **$13.40** per day.

(2) Where the employer requests the employee to use their own vehicle to transfer from one site to another and the employee agrees, an amount of $0.62 per kilometre shall be paid.

3. Clause 20. –Distant Work: Delete subclause (2) of this clause and insert in lieu the following:

(2) Where an employee is required to use their own vehicle for distant work the employer shall insure that employee's vehicle for the duration of the journey and pay the employee $0.70 per kilometre.

4. Clause 21. –Special Rates and Provisions: Delete subclause (1) of this clause and insert in lieu the following:

(1) An employee shall be paid an allowance of **$3.70** per shift, or **$2.15** per half shift, 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 or when, because of the dimensions of the compartment or space in which they are working, he/she is required to work in a stooped or otherwise cramped position, or without proper ventilation.

5. First Schedule –Wages: Delete subclause (3), (4) and (5) and insert in lieu the following:

(3) Responsibility Payment

An Engineering or Electrical Tradesperson, Special Class Electrician or Electronic Tradesperson or Building Tradesperson required to work when supervisory staff are not on duty shall receive the additional flat payment per shift -

(a)	Saturday	$8.10
(b)	Sunday	$15.90

(4) In addition to the appropriate total wage prescribed in this schedule, a leading hand in charge of not less than three or more other employees shall be paid **$47.50** per week.

(5) An Industrial Electronics Tradesperson, an Electrician - Special Class, an Electrical fitter and/or Armature Winder or an Electrical installer who holds, and in the course of this 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 **$18.10** per week.

2005 WAIRC 03126

FAST FOOD OUTLETS AWARD 1990

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA
	APPLICANT
	-v-
	AUSTRALIAN FAST FOODS PTY LTD AND OTHERS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 24 NOVEMBER 2005
FILE NO/S	APPL 932 OF 2005
CITATION NO.	2005 WAIRC 03126

Result Award varied

Order

HAVING heard Mr T Pope 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 the Fast Food Outlets Award 1990 (No A14 of 1990) 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 24 November 2005.

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

SCHEDULE

1. Clause 13. - Meal Money: Delete this clause and insert the following in lieu thereof:

Any employee who is required to work overtime for more than two hours on any day, without being notified on the previous day or earlier, that he or she will be required to work such overtime, will either be supplied with a meal by the employer or be paid $9.30 meal money.

The meal money amount prescribed in this Clause was established by way of nexus with the Shop and Warehouse (Wholesale and Retail Establishments) State Award 1971 in application 1928 of 2002.

2. Clause 20. - Wages: Delete subclause (2) of this clause and insert the following in lieu thereof:

(2) Leading Hands -

An employee who is appointed and placed in charge of other employees by the employer shall be paid the following rates in addition to the employee's normal wage per week –

		$
(a)	If placed in charge of less than 6 employees	7.20
(b)	If placed in charge of 6 to 10 employees	9.85
(c)	If placed in charge of 11 to 20 employees	11.60
(d)	If placed in charge of more than 20 employees	19.15

3. Clause 22. - Bar Work: Delete this clause and insert the following in lieu thereof:

Any employee, other than a Bar Attendant, who in addition to his or her normal duties is required to dispense liquor from a bar, shall be paid a flat rate of ninety one cents per day in addition to the rate prescribed for such normal duties.

4. Clause 24. - Uniforms and Laundering: Delete this clause and insert the following in lieu thereof:

Where uniforms are required by the employer to be worn they shall be supplied, laundered and/or dry cleaned by the employer and remain the property of the employer, provided that in lieu of the employer laundering and/or dry cleaning same, the employee shall be paid the following laundry allowance per week –

Class of Employee	Allowance per Week
	$
Employees employed on a casual basis	1.45
Employees employed on a part time basis	1.80
Employees employed on a full time basis	2.15

Provided that any employee employed as a full time Cook shall be paid $2.65 per week for laundry and/or dry cleaning. Provided further that the provisions of this clause may be altered by written agreement between the union and the employer.

5. Clause 25. - Protective Clothing: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) Employees who are required to wash dishes, clean toilets or otherwise handle detergents, acids, soaps or any injurious substances shall be supplied, free of charge by the employer, with rubber gloves or be paid an allowance of $1.45 per week in lieu.

2005 WAIRC 03134

FOOD INDUSTRY (FOOD MANUFACTURING OR PROCESSING) AWARD NO. A20 OF 1990

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE FOOD PRESERVERS UNION OF WESTERN AUSTRALIA, UNION OF WORKERS **APPLICANT**
	-v-
	ANCHOR PRODUCTS PTY LTD & OTHERS **RESPONDENTS**
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 24 NOVEMBER 2005
FILE NO/S	APPL 937 OF 2005
CITATION NO.	2005 WAIRC 03134

Result	Award varied. Order issued.
Representation	
Applicant	Mr T Pope
Respondents	Mr P Robertson as agent

Order

HAVING heard Mr T Pope on behalf of the applicant and Mr P Robertson as agent on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, and by consent, hereby –

ORDERS that the Food Industry (Food Manufacturing or Processing) Award No. A20 of 1990 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period on or after 23 November 2005.

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

SCHEDULE

1. Clause 19. – Meal Allowance: Delete this clause and insert in lieu thereof the following:

19. - MEAL ALLOWANCE

Where an employee required to work overtime for more than two hours, without being notified on the previous day or earlier that he/she will be so required to work, shall be supplied with a meal by the employer or paid $8.30 for a meal. If owing to the amount of overtime a second or subsequent meal is required the employee shall be supplied with each such meal by the employer or be paid $5.65 for each meal so required.

If an employee in consequence of receiving such notice has provided himself/herself with a meal or meals and is not required to work overtime or is required to work less overtime than notified, he/she shall be paid the amounts prescribed above in respect of the meals not then required.

2. Clause 31. – Wages: Delete subclause (3) of this clause and insert in lieu thereof the following:

(3) Leading Hands:

	Per Week Extra $
A Leading Hand in charge of:-	
(a) Less than three other employees	12.35
(b) Not less than three and not more than ten other employees	24.40
(c) More than ten other employees	35.85

2005 WAIRC 03129

HAIRDRESSERS AWARD 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE WA HAIRDRESSERS AND WIGMAKERS EMPLOYEES' UNION OF WORKERS **APPLICANT** **-v-** THE MASTER LADIES' HAIRDRESSERS INDUSTRIAL UNION OF EMPLOYERS OF WESTERN AUSTRALIA AND OTHERS **RESPONDENT**
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 24 NOVEMBER 2005
FILE NO/S	APPL 938 OF 2005
CITATION NO.	2005 WAIRC 03129

Result Award varied

Order

HAVING heard Mr T Pope on behalf of the applicant, Mr P Robertson as agent on behalf of Regent Enterprises Pty Ltd and Mr O Moon as agent on behalf of the Master Ladies' Hairdressers Industrial Union of Employers of Western Australia, the Commission, pursuant to the powers conferred under the *Industrial Relations Act, 1979*, hereby orders:

THAT the Hairdressers Award 1989 (No A32 of 1988) 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 24 November 2005

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

SCHEDULE

1. Clause 16. - Meal Money: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) The meal money required to be paid to all employees pursuant to this clause shall be $9.60.

2. Clause 22. - Tools of Trade: Delete subclause (4) of this clause and insert the following in lieu thereof:

(4) Tool Allowance

In addition to the weekly wage a tool allowance of $6.75 per week shall be payable to full time Seniors, part time Seniors, indentured apprentices and probationary apprentices.

3. Clause 32. - First Aid Allowance: Delete this clause and insert the following in lieu thereof:

An employee holding either a Red Cross or St. John Senior First Aid Certificate of at least 'A' level who is appointed by the employer to perform first aid duties shall be paid $8.05 per week in addition to the employee's ordinary rate.

2005 WAIRC 03236

HOSPITAL SALARIED OFFICERS (CEREBRAL PALSY) AWARD 1978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS) **APPLICANT** **-v-** CEREBRAL PALSY ASSOCIATION OF WA INC **RESPONDENT**
CORAM	COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 7 DECEMBER 2005
FILE NO	APPL 833 OF 2005
CITATION NO.	2005 WAIRC 03236

Result Award varied

Order

HAVING heard Mr G Bucknall on behalf of the applicant and Mr M O'Connor on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

THAT the Hospital Salaried Officers (Cerebral Palsy) Award 1978 (No. R 37 of 1976) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 7th day of December 2005.

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

SCHEDULE

Clause 13. – Meal Money: Delete this clause and insert the following in lieu thereof:

An employee required to work overtime before or after the employees ordinary working hours on any day, shall, when such additional duty necessitates taking a meal away from the employees usual place of residence, be supplied by the employer with any meal required or be reimbursed for each meal purchased at the rate of $8.25 for breakfast, $10.15 for the midday meal, and $12.20 for the evening meal. Provided that the overtime worked before or after the meal break totals not less than two hours. Such reimbursement shall be in addition to any payment for overtime to which the employee is entitled.

Meal allowance increases shall be calculated by estimating the percentage change from the appropriate CPI quarter index number nearest to the date the allowance last changed to the latest quarter index number. This percentage change is then applied to the allowance previously paid.

2005 WAIRC 03235

HOSPITAL SALARIED OFFICERS (GOOD SAMARITAN INDUSTRIES) AWARD 1990

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS) **APPLICANT**
	-v-
	GOOD SAMARITAN INDUSTRIES **RESPONDENT**
CORAM	COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 7 DECEMBER 2005
FILE NO	APPL 834 OF 2005
CITATION NO.	2005 WAIRC 03235

Result Award varied

Order

HAVING heard Mr G Bucknall on behalf of the applicant and Mr M O'Connor on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

THAT the Hospital Salaried Officers (Good Samaritan Industries) Award 1990 (No. A 8 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 7th day of December 2005.

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

SCHEDULE

Clause 11. – Meal Money: Delete this clause and insert the following in lieu thereof:

An employee required to work overtime for more than two hours shall be supplied with a meal or meals by the employer or be paid $12.20 for a meal or meals.

2005 WAIRC 03091

IRON ORE PRODUCTION & PROCESSING (BHP BILLITON IRON ORE PTY LTD) AWARD 2002

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH AND OTHERS
	APPLICANTS
	-v-
	BHP BILLITON IRON ORE PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S WOOD
HEARD	MONDAY, 15 AUGUST 2005, TUESDAY, 16 AUGUST 2005, WEDNESDAY, 17 AUGUST 2005, THURSDAY, 18 AUGUST 2005, FRIDAY, 19 AUGUST 2005
DELIVERED	FRIDAY, 18 NOVEMBER 2005
FILE NO.	APPL 338 OF 2005
CITATION NO.	2005 WAIRC 03091

CatchWords	Award variation - New classifications to be inserted - Union coverage -Wage Fixing Principles - Salary increases - Meal breaks - Industrial Relations Act 1979 (WA) ss.36A, 40 - Workplace Agreements Act 1993 s.4H
Result	Classifications not inserted; Award otherwise varied
Representation	
Applicants	Mr D Schapper of Counsel
Respondent	Mr H Dixon of Senior Counsel
	Mr A Rollnik of Counsel
	Mr R Gifford for AMMA

Reasons for Decision

BACKGROUND

1. Application 338 of 2005 is an application to vary the Iron Ore Production & Processing (BHP Billiton Iron Ore Pty Ltd) Award 2002 ("the Award"). Essentially the application seeks to bring under the Award the three remaining engine drivers who were on Workplace Agreements ("WPA"); to amend the Award to insert the classifications of Train Controller, Train Co-ordinator, Crew Development Officer and Rail Supervisor, to increase the salary for Train Controllers and WPA drivers, and there is a minor amendment to correct the abbreviation used to describe the union. The application is opposed except for the minor amendment. The grounds for the application are as follows:

> "This application seeks to extend the application of the Award to certain employees within the Company's rail road operations. Those employees are
>
> 1. engine drivers to whose employment a WPA applies
> 2. train controller
> 3. train co-ordinator
> 4. crew development officer
> 5. rail supervisor
>
> The grounds of the application are that there are various rail employees to whose employment a WPA applies. Those employees' wages are being significantly degraded by the Company by reason of those employees' decision not to enter into an AWA. Protection of those employees by way of extension of the award to them is thus required as, in any event, it is arguable that the award applies to them anyway.
>
> Those rail employees employed in the other proposed classifications are not being paid in accordance with their true worth compared either to others with whom they work or having regard to the nature of their duties. Remediation of this situation by way of extending the application of the award to them is thus sought.

2. The application was made on 29 March 2005 and sought the following variations:

> "**1**. In Schedules I — Aggregate Wages and Schedule III — Award Classifications **delete** "CMETU" where-ever it appears.
>
> **2**. In Schedule I — Aggregate Wages **vary** the denotation "Level 5" under the heading "CMETU LOCO" to read
>
> Level 5 (including WPA Fly in Fly out drivers)
>
> **3**. At the end of Schedule I — Aggregate Wages **add** the following:

Train Controller	$138,829 per annum for an average 42 hour week worked as 4 panel continuous shift work
Train Co-Ordinator	$138,829 per annum for an average 42 hour week worked as 4 panel continuous shift work

Crew Development Officer	$145,140 per annum for an average 42 hour week worked as 4 panel continuous shift work
Rail Supervisor	$157,760 per annum for an average 42 hour week worked as 4 panel continuous shift work

4. At the end of Schedule III — Award Classifications **add** the following:

6.	Train controller	A person at this level will be competent to perform train control duties over all or any part of the Company's rail road
7.	Train Co-Ordinator	A person at this level will be competent to co-ordinate train movements and organise all work at and around a junction within the Company's rail road
8.	Crew Development Officer	A person at this level will be competent to instruct and develop the skills of engine drivers in all aspects of the operation of trains on the Company's rail road
9.	Rail Supervisor	A person at this level will be competent to supervise all aspect of rail road operations on the whole of or any part of the Company's rail road

5. **Add** new subparagraph (4a) to clause 11.— Hours of Work as follows:

(4a) The ordinary hours of rail employees other than locomotive drivers shall be and average of 84 per fortnight which shall be worked in shifts of 12 hours on a continuous shift basis.

6. **Add** a new subparagraph (13) to clause 12.— Annual Leave as follows:

(13) Rail employees, other than locomotive drivers, shall be entitled to a loading of 25% payable when leave is taken.

7. **Add** a new subparagraph (4) to clause 14. — Long Service Leave as follows:

(13) Rail employees, other than locomotive drivers, shall be entitled to a loading of 20% payable when leave is taken."

3. The respondent filed a Notice of Answer and Counterproposal on 21 April 2005 in the following terms:

"1 The respondent opposes the applicants' application (**Application**), which was filed on 29 March 2005 in the Western Australian Industrial Relations Commission (**Commission**) and served on the respondent on 31 March 2005.

2 Each of the applicants' claims, unless otherwise specified, is opposed.

3 The respondent does not oppose the deletion of CMETU in Schedules I and III of the Iron Ore Production and Processing (BHP Billiton Iron Ore Pty Ltd) Award 2002, proposed in Schedule 2, paragraph 1 of the Application, except to say "CMETU" should be replaced with "CFMEUW".

4 The applicants are not entitled to make application in respect of the employee classifications listed in Schedule 2, paragraph 3 of the Application in that the Application is brought by or in association with an organisation in which those employees are not eligible to be enrolled as members.

5 Alternatively, if the employees employed under the employee classifications listed in Schedule 2, paragraph 3 of the Application are eligible to be enrolled as members of the Australian Workers' Union, Western Australian Branch, Industrial Union of Workers (**AWU**), the Commission should dismiss and/or refrain from further hearing or determining this part of the matter before it in so far as it involves a claim by the AWU, as that organisation has never represented the interests of these employees.

6 The respondent denies each and every allegation in Schedule 3 of the Application."

4. The matter was published several times, most recently in the Western Australian Industrial Gazette on 15 June 2005, 85 WAIG 1777 in the following form:

"NOTICE is given that an application has been made to the Commission by the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch, the Construction, Forestry, Mining and Energy Union of Workers, the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering & Electrical Division, WA Branch, the Australian Workers' Union, West Australian Branch, Industrial Union of Workers and the Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch under the Industrial Relations Act 1979 for a variation of the above Award.

As far as relevant, those parts of the proposed Award which relate to area of operation or scope are published hereunder.

The application seeks to vary the award by :

1) Varying Schedule I – Aggregate Wages to include:

CMETU LOCO Level 5 (including WPA Fly in Fly out drivers)

2) Inserting, inter alia, the following at the end of Schedule III:

6. Train controller	A person at this level will be competent to perform train control duties over all or any part of the Company's rail road
7. Train Co-Ordinator	A person at this level will be competent to co-ordinate train movements and organise all work at and around a junction within the Company's rail road
8. Crew Development Officer	A person at this level will be competent to instruct and develop the skills of engine drivers in all aspects of the operation of trains on the Company's rail road
9. Rail Supervisor	A person at this level will be competent to supervise all aspect of rail road operations on the whole of or any part of the Company's rail road

A result of the proposed variation, if granted, will be that the Award will apply to the employment of persons employed by BHP Billiton Iron Ore Pty Ltd in the classifications referred to above, including fly-in/fly-out locomotive drivers on lapsed workplace agreements. At present, the award does not apply to those persons.

A copy of the proposed variation may be inspected at my office at 111 St George's Terrace Perth."

5. Solicitors for the respondent wrote to Mr Schapper on 9 June 2005 seeking further particulars as follows:

"So that the respondent is not prejudiced in its preparation for the hearing, to the extent that you do not deal with these issues in the applicant's written outline of submissions, please provide the following further particulars of your clients' claim:

1 In relation to each of the variations set out in schedule 2 of the Application – Please provide full details of every fact, matter, circumstance and thing relied upon as to why each variation is industrially necessary including, but not limited to, every fact, matter, circumstance and thing in respect of the issues or areas of dissatisfaction that the relevant employees have had regarding their current terms and conditions and, in particular, any issues or areas of dissatisfaction that have been raised by the relevant employees with the respondent.

2 In relation to schedule 2, paragraph 2 – Please provide full particulars of the basis for the claim that these employees need to be incorporated into the Award level 5 classification. Further please advise:

(a) how it is intended that the other provisions of the Award apply to these employees including, but not limited to, hours of work, aggregate wages, overtime, allowances, location of work, leave entitlements;

(b) how it is intended that the current terms of their contract of employment are to apply including, but not limited to, fly in fly out operations and travel payments; and

(c) the basis upon which the applicants claim that the statutory protection afforded to former workplace agreement employees is inadequate in respect of these employees.

3 In relation to schedule 2, paragraph 5 – please provide full particulars of the basis upon which the claim for ordinary hours to be an average of 84 hours per fortnight is made."

6. Mr Schapper by letter dated 23 June 2005 also advised the respondent, with reference to the claim, as follows:

"With reference to your letter of 9 June I advise:

1. an outline of these matters is set out in the applicant's outline of submissions delivered last night.

2. Whilst I am of the view that the award presently applies to WPA drivers in relation to pay, it is necessary to put that matter beyond doubt so that your client will undoubtedly be obliged to pay level 5 rate to them. Your client does not currently pay WPA drivers in accordance with the award.

2. (a)-(c) these matters are dealt with in paragraph 22 of the outline. My clients do not propose any change to the current method of working except for the rate of pay for WPA drivers which is significantly and unjustifiably less than that of any other driver.

If your client wishes to propose a form of word so as to preserve the existing arrangements with respect to hours, shift arrangements, overtime, allowances, location of work, leave entitlements, FIFO, travel payments and the like then it is free to do so.

My view is that the Commission would not want to descend into the fine print of these matters before the parties themselves have attempted to work it out. In view of your client's blanket opposition to the application it would be futile to attempt to engage your client in discussion concerning the fine print without firstly, a decision by the Commission that the award will be amended to put its application to WPA drivers beyond doubt and, secondly, a direction that the parties have discussions concerning the fine print.

Please advise whether your client accepts that the WPA drivers are covered by the award and, if so, why they are not being paid in accordance with it. Further, if your client accepts that the WPA drivers are covered by the award please advise which of its provisions apply, in your client's view, to them and which do not.

3. Subject to what is set out in the submissions, particularly at paragraph 42, the notional ordinary hours of controllers, CDOs and supervisors are 42 per seek worked 4 on 4 off in 12 hour shifts. The claim is intended to continue that situation. Co-ordinators work a 48 hour week 6 5 6 4 12 hour shifts and they should be added as an exception to proposed 11(4a)."

7. The applicants filed an outline of submissions on 23 June 2005. The respondent filed an outline of submissions on 22 July 2005. I will deal with the content of those submissions later, except that it is clear from the applicants' submissions that for WPA drivers the Level 5 Award rate for locomotive drivers was claimed (paragraph 23) including retrospective payment (paragraph 24) and that otherwise the existing terms and conditions relating to WPA drivers would be retained (paragraph 23). For Train Controllers the applicants submitted:

"The present wages of train controllers are significantly inadequate having regard to the nature and extent of their responsibilities …… Properly seen, they are greater and more demanding than those of the engine driver or rail supervisor or CDO or rail co-ordinator" (paragraph 33).

No salary level was specified for Train Controllers in those submissions. The applicants submitted also that:

"… provision will need to be made to preserve existing accrued staff entitlements such as loading on annual and long service leave, medical benefits etc." (paragraph 42).

There was no further specification for Award changes relating to CDOs, Train Co-ordinators or Rail Supervisors.

8. On 23 June 2005 counsel for the applicants filed a document in the Commission entitled "Applicant's FIFO/Award rate Comparison" which states as follows:

"**WPA FIFO wage comparison with award rate**

Current award rate: $144,238 for 48 hour week

Current WPA rate: $123,974 for 45.94 hour week

To ascertain WPA equivalent rate at award rate: 45.94/48 x $144,238 = $138,048 for an equivalent annual rate.

Award hourly rate = $144,238/52 = $2,773.81/48 = $57.79 per hour

WPA hourly rate = $123,974/52 = $2,384.11/45.94 = $51.90 per hour

Average weekly FIFO hours calculation

FIFO 12 on 10 off. 22 days per cycle; 144 hours per block (12 shifts x 12 hours)

365/22 = 16.59 blocks per annum x 144 hours = 2389.09 hours per annum

2389.09/52 = 45.94 hours per week"

9. In this way it would seem, albeit the claim is not entirely clear, that the applicants claimed that the new classifications and classification descriptions were to be inserted, that the award provisions would apply, and that employees under these classifications would enjoy the salary and hours as specified in the application and particulars. The Train Controllers would have certain accrued benefits preserved. For WPA drivers the applicants claimed the level 5 award rate for salary and proposed no other change to their terms and conditions. I outline all this background as the actual claim became an issue at hearing and leave to amend the claim was opposed by the respondent and ultimately refused by the Commission.

AMENDMENT OF CLAIM

10. The matter was heard in Port Hedland from 15 to 19 August 2005. At the commencement of proceedings the Commission sought to ensure that the precise details of the claim were clear. Counsel for the applicants applied to vary the annual salary for the classifications in Schedule 2 of the application, by deleting the rates specified in the application for the Train Controller, Train Co-ordinator and the Crew Development Officer ("CDO") and substituting the rate of $155,000 for the positions of Train Controller and Train Co-ordinator; $150,000 for the position of Crew Development Officer. No change was sought to be made to the remuneration of the Rail Supervisor. Mr Schapper also sought to delete from Schedule 2 of the application paragraphs 6 and 7. Mr Schapper submitted that the applicants wanted to have the classifications inserted into the Award and that all of the provisions of the Award should apply. Specifically, the Award clauses relating to Overtime, Annual Leave, Long Service Leave, Superannuation were the four areas where there would be a change from the staff conditions. Mr Schapper submitted that if the Commission determined that some of the Award provisions were not to apply, if the application were granted, then the Commission would need to specify those. This was subject to a caveat being that for some staff who have accrued very substantial amounts of annual and/or long service leave the staff loading should be preserved on the accumulated amount to date. The other exception is payment of health insurance. This is limited to four employees and should continue to apply to them.

11. Counsel for the respondent opposed the applicants' request to amend the application and submitted that the amended application was substantially different from the application for which they had prepared. Counsel indicated that he had prepared cross examination on the basis of the application filed and he was not in a position to cross examine on an entirely different case, which has significant ramifications. Counsel stated that if the Commission were to grant the amendment he would seek to have the matter adjourned, as the respondent would be calling other evidence and cross examining differently. Mr Schapper submitted in reply that there was no change to the claim as it related to WPAs. There was no significant change in quantum in the classifications except for the Train Controller. The proposed increase of 55%, as opposed to the original increase of 40%, was not substantially different and he submitted that the company was put on notice that a very significant wage increase was being sought. Mr Dixon in reply submitted that it was not simply a matter of recalculation as the company rewarded its employees through a complex arrangement. The claim had been examined as to the possible impact it might have on other staff positions. The amendments sought were an entirely different proposition. Mr Dixon submitted that he was prejudiced in that he has not been able to prepare the case in relation to the amendments which are substantially different than what was raised previously. He has not prepared for the cross examination of witnesses to deal with this difference. He has not been able to call potential evidence regarding job evaluation and relativities. The Commission ruled against allowing the amendments to the claim and the reasons are expressed at page 62 of the transcript. The applicants proceeded with the application as lodged in the Commission.

12. At the commencement of closing submissions Mr Schapper for the applicants sought again to amend the application to delete the amount claimed for Train Controllers being $138,829, and replace it by $155,000. Mr Schapper submitted the respondent was not prejudiced as it was evident through questioning that the respondent's calculations do not address the actual claim of $138,829. Therefore, there is no prejudice in amending the amount to $155,000. There was no material put regarding the specific claim of $138,829. The evidence was simply in relation to general pay setting arrangements. It was submitted that the Commission pursuant to s.26(2), is not restricted to the specific claim or subject matter.

13. Mr Dixon for the respondent opposed the amendment. He submitted the Commission had earlier ruled against such an amendment. The case was conducted on that basis. He submitted the claim for $155,000 plus other benefits would put this person as an employee in an entirely different category. Exhibit R5 for the respondent was formulated principally to compare drivers. Exhibit R5 shows that they are basically comparable. Reference to s.26 of the Act does not assist the applicants and does not negate the need for procedural fairness to be afforded to parties. Mr Dixon submitted that the new scenario opens up potential for additional evidence, perhaps from outside sources. The Commission should not entertain the amendment in light of its earlier ruling. The Commission cannot overcome the prejudice issue given the basis on which the case was conducted. Mr Schapper for the applicants submitted that it was not sufficient for the respondent to merely assert that additional evidence may have been adduced. The respondent must specify and particularise how the evidence would have been different. The respondent did not specifically address the claim of $138,829. Mr Dixon submitted the test to apply was what the respondent might have done had it been able to do so.

14. The Commission declined to grant the amendment. Firstly, the case in evidence had been concluded. The case was conducted on the basis of a different claim. It is not sufficient to say that the respondent is not disadvantaged because the salary was not specifically addressed and so a higher salary is of no prejudice. The higher salary may well have caused a broader comparison to other positions. This is evident from the earlier submissions of the respondent and was covered in my earlier ruling. Additionally, the better course in my view, was for the Commission to give full consideration to the evidence. If the Commission reached the preliminary view that the classification of Train Controllers should be put into the Award, and that the job of Train Controller was undervalued, then pursuant to s.26 additional evidence and/or submission could be invited from the parties. This is irrespective of whether the amendment sought had any regard to the conditions which should apply.

THE EVIDENCE

15. Evidence for the applicants was given by Mr Warren Ronald Johncock, a locomotive driver with BHPB, Mr Ross William Ashton, a WPA/FIFO driver with BHPB, Mr Ashley Quintin James, a yard/traffic controller with BHPB, Mr Phillip David Thompson, a train controller with BHPB, Mr Stephen Blake Porter, a yard controller with BHPB, Mr David John Symons, a locomotive driver with BHPB, Mr P Gunovich, a WPA/FIFO driver with BHPB, Mr Trevor Alan Emmitt, a train controller with BHPB, Mr Brent Joseph Kara, a train controller with BHPB. Evidence for the respondent was given by Mr Errol Louis Goiack, Superintendent Train Control Operations Interface, Mr Leslie Robert Punter, Supervisor Rail Transport and Mr Michael Ian Hoare, Principal Human Resources Adviser, Port Hedland.

16. Mr Johncock's evidence is that for Award drivers to advance they need to go to a CDO, then on to a supervisor's position. Alternatively, if a position becomes available they could apply for it. The company no longer has Co-ordinator positions, they are simply AWA positions. The Co-ordinator's role at Newman is supervisory and ensures that trains go out to the appropriate mine. The Co-ordinator makes sure that when the trains are loaded they come back and are made up. He makes sure trains are ready to go at the right time. He speaks to the crews in regards to signing on and picking up their train, and he liaises between the mine and the train control. Mr Johncock says that all the current Co-ordinators were previously train drivers. In the last 5 or 6 years persons promoted to CDOs have all been ex train drivers. In the past 8 years he is not aware of any locomotive driver being promoted to a Train Controller position. There is a fear that people do not want to come to the Commission and give evidence in case of reprisals.

17. Under cross examination, Mr Johncock confirmed that he works on the mainline on 12 hour shifts. The shifts are more regulated now. Shifts still change at short notice, however, not as often as previously. Changes arise due to matters beyond the respondent's control such as sickness and death, although sometimes it is due to management not getting paperwork done in time. He says that you do not return to base every time a mainline job is completed.

18. Mr Ashton's evidence is that he commenced employment with BHPB on 28 August 1995. In February 2001 he received a workplace agreement from the company for the position of Rail Transport Co-ordinator, which was signed on 27 March 2001. Prior to this he had been employed as a Driver Co-ordinator on the Award. He held this position for two years in the Hedland yard. His duties also encompassed Boodarie and Finucane Island. He says that he looked after rostering and crew relief, incident reports and investigation, drug and alcohol testing. The job was quite varied. He was a front line supervisor but was not appointed as such. They did not have supervisors. The next person up was the yard foreman and then the superintendent. Mr Ashton believes that the Co-ordinator's position was abolished in the Hedland yard around 2003. He says that after he signed his agreement the company offered fly in/fly out (FIFO) arrangements. There were two phases and he took up phase 2 in March or April 2001. He went onto the FIFO arrangements 12 months after signing the workplace agreement and worked as a driver. He went onto FIFO for family reasons. He works 12 hour shifts on 12 shifts on/10 days off arrangement. The first six shifts are of one type, days or nights, and between the sixth and seventh shift there is a change over and you move to a different starting time for the remainder of the shifts. The majority of tours are from Port Hedland, at a 3 to 1 ratio, with Newman. At Newman before change over they would work all jobs through to Port Hedland. The work location at the mines may be Whaleback, Jimblebar ("JBJ") or Ore body 25. There is not a set sign on, you simply go where you are required. He can spend 12 hours loading the train and then return to quarters. When based at Hedland he says that he can be at the Nelson Point Yard, on the mainline away jobs, the Goldsworthy line to Yarri and Pippingarra or down at Finucane Island. He says with the introduction of change overs he does not do as much work in Hedland and is based more at Yandi, Mining Area C or Newman. The duties performed at Newman are essentially the same, mainline and train loading. In relation to Yandi or Mining Area C the duties involve mainline, loading the train, working the line, changing over and bringing the train back to origin or wherever directed. For each tour he says he is usually based at the same place, but it is possible to be based at different places. This does not occur very often. He agrees that every third block is a "HSTR" which is designed to cover for holidays, sickness, training and relief. As part of this the actual start date/finish date of the tour can be slid back or forth by 4 days. He says that for the other two tours the start date is fixed. However, if required by the company to change he seeks to be flexible. Normally he does not do overtime and is relieved after 12 hours. There are occasions when overtime is worked, which is beyond the company's control.

19. When his working arrangements changed from Co-ordinator to FIFO he does not recall signing a new WPA or AWA. He agrees that in September 2003 the company made offers of AWA's, which he declined to accept. He preferred a wait and see approach. He says that the company's attitude changed towards him. He was no longer invited to participate in meetings and was not informed of anything. He was approached on a number of occasions and asked whether he had any difficulties with the AWA. He told the company he was not interested. He tried to negotiate certain points but was told that that was not possible. With regard to the sliding of start and finish dates, if the days off on break are shortened, days off are gained on the next break. When changes occur in rostering he is not told what the changes are even though he is most affected by them. He says that they should receive the same as Award employees as they work the same hours and have greater flexibility in regards to starting time or starting locations. He would like to be covered by the Award as he prefers the Dispute Resolution Process contained in the Award. He says that the Award provides protection as far as work conditions are concerned. Mr Ashton was not cross examined.

20. Mr Ashley James gave evidence that he is employed by BHPB as a Yard Controller. He has been employed with the company since 1981. He began with the company as a janitor, moved through various positions until he reached Train Control in 1990. In 1991 he received a $12,000 pay increase which was linked to the driver's increase. He agrees that the position has always been a staff position. His salary is approximately $120,000, plus superannuation, leave loading on annual leave and long service leave. He also receives performance incentives and a subsidy for health insurance, which is a benefit the company has provided since 1990. He works two nightshifts, midnight to midday, and two afternoons, midday to midnight. The cycle is four days on/four days off for a 42 hour week. Before the start of the shift and at the end of shift he does a hand over which can take up to 15 minutes, maybe 20 minutes.

21. In train control there are three boards, Goldsworthy (GML), the Mainline (Newman) and the Yard. He has been in the Yard for 14 and a half years. He was trained on the mainline for six months in 1995. There are some people who can move between the Goldsworthy and Mainline boards as they are very similar. However, he knows of only two people who can do the Mainline and the Yard. He says that this is an unsafe practice as the jobs are totally different. All train control is handled by the train control centre in Port Hedland. In 1990 they ran 6 trains a day, with one or two rakes. It then increased to 8, then 10 and now 12 trains a day. When the Goldsworthy amalgamation took place the Goldsworthy controllers worked the Goldsworthy board and the Yard remained separate. Sometime in the late 1990's they all moved into the same location. The

Yard and the Mainline boards are manned 24 hours a day, 7 days a week. The GML board is manned 6am till 6pm, 7 days per week. On the back shift the GML board is handed over to the Mainline controller. The workload at night on the GML board is less than during the day. For the past three to four months there has been a controller available to step in if there is an emergency. In the past month a trainee has been introduced, and he has to physically show him what to do. He remains at the board during training and the trainee is squeezed in next to him.

22. Mr James says there are up to 12 trains a day now, with 2 or 3 rakes, which is up to 300 cars, and a third dumper. The number of trains has doubled and the number of rakes has increased. The workload has doubled. Twice as many trains arrive which have to be parked, squeezed through the dumpers and then prepared to leave. He eats on the run. The food is supplied by the company but he eats it when he can. Sometimes there is not enough time to get food as it is not safe to leave the board. In relation to toilet breaks he says that you need to space these out and wait for a lull in proceedings. He sometimes takes the radio to the toilet in case someone calls. He does not drink coffee or tea, but there is a bottle of water on the control board to drink. He is aware of the company's desire to move to 14 trains per day. He says that it is hectic now and 14 trains will be a bit beyond them.

23. Mr James instructs the train drivers where to go and what to do, he organises crews to meet the train and he instructs the crews as to which dumper to go to. They cannot move unless he says so. He contacts the Port to determine what they require and then has to plan to ensure he can get the product to them. It is important to maximise the usage of locomotives. If it is not done then there may be a short train, a cancelled train or a late train. There are two 300 car trains per day, but 200 cars are the usual. If there is a derailment he contacts the supervisor/ coordinator to go down and assess the situation and they liaise with one another. The coordinator will advise what is to occur and then he organises the locomotives and the drivers to get there and clean it up.

24. Mr James says that the RROPS is a computer system where data is inputted, which is given to the Mainline control and he advises departure. The system is a recording system and tracks movements, times, dumping, delays and incidents. It is part of his job to know the rules and regulations governing the railway. If anyone asks him a question about this, he needs to find the answer. At the moment he has to ring his supervisor to get a crew out to the Yard and then he will direct them from there. He advises his supervisor about any repairs to locomotives or cars and advises him of any incidents. Mr James is aware of the mid track change overs. There is an increase in the usage of men out of the yard, and that there are less drivers available in the yard. In relation to remuneration he is not really happy about it. He says that they give all the instructions, are legally liable for anything that may occur and they are sort of forgotten. He participated in some meetings in November/December 2004, at which various issues were raised, including safety, money and the cramped spaces in which they work. There is no crib room and the toilet is in the kitchen. The rate of pay remains the same when he is training.

25. Under cross examination, Mr James agreed that he was recently paid the 2004 bonus, which was around $7,000 or $8,000. Apart from his training on the mainline he has always worked on the Yard. The company went to a 9 train schedule in 1997, 10 in 2004 and 12 at the end of 2004. He is aware of plans to go to 14. He has never seen any reassessment of allocation of workload. He agrees that at the meeting of 4 November 2004 various solutions were proposed. He says of the April 2005 meeting he was working and did not pass any of his concerns along to colleagues. One of the solutions out of the 4 November 2004 meeting was the introduction of trainees to assist in administration, particularly data entry. He has been advised that there are plans to redesign the current building and to upgrade the technology. The task of allocating crews has been given to supervisors, but does not work. It is the second time this has been implemented. The only difference is that they now ring the supervisor to obtain the crew, but once they are in the yard he controls them. If he were able to take a 30 minute break, it would be a substantial benefit. He agrees that some controllers step outside for a smoke.

26. Under re-examination he agrees that people were required to attend the meetings in their time off and it was unpaid. The timeline for the upgrade in technology is 18 months to 2 years for the Mainline, and the Yard will occur after that. In regards to breaks this would have to be taken at the desk where he works.

27. Mr Phillip Thompson says that he has been a train controller since 1995 and was originally employed with the respondent in 1978. He works 12 hour shifts, 4 on/4 off, with two shifts commencing at midnight and two commencing at midday. For the afternoon shift he arrives one hour early to eat his food and to do a handover with the controller he is relieving. He has worked in the Yard since he started. Training people on all three boards is not a good idea. It has been tried previously and did not work. The jobs are like chalk and cheese. The workload has more than doubled in the time he has been there. There are double the trains and double the computer input. When the trains call the Yard he gives them permission and then supervises them to their destination and as to what is to occur with the train. He liaises also with Port production as to the performance of the dumpers and whether extra product is required. He is required to plan three to four hours in advance. He says that nothing moves in the Yard until the person has spoken to Yard control. The trains range from 100 up to 300 cars. When assembling trains he needs to check horsepower. He may use 2 or 4 men to make up the trains. In the Yard there are three reception roads and one escape road. Currently two roads are closed due to maintenance. There are about 100 switches which are controlled by the Yard controller. He sets the switches and then directs the driver where to go. There are multiple movements going on in the Yard at any one time along with data input and telephone calls. He says approximately 2700 wagons pass through the Yard in a 12 hour shift. If things go wrong on the mainline then everything banks up, which is referred to as a Tsunami. With the mid track change overs, crews are taken out to relieve drivers and he is unaware of whether he is putting people on overtime. He is not used to the system yet. He rings the supervisor to get the crews into the Yard. Once they are there he hangs onto them and keeps them working. They are under his supervision. Every locomotive movement and every person's movement in the Yard is controlled by him. He is accountable for everything. If there is an incident then the inquiry outcome is either a note or if the error has occurred on a number of occasions, then three strikes and he is out.

28. On moving to 14 trains, Mr Thompson says that it will be very difficult as he is on the go all the time now and he does not get a break. He eats before commencing shift. In relation to coffee he says that he asks the GML controller to get his as he does not usually get off the board. Sometimes he drinks the coffee cold as he cannot get to it. He needs to have a break as it is a long day. He needs to clear his head, go to the toilet or have something to eat without interruption. He takes the radio and telephone to the toilet; this keeps production up. The current safety person said that he should not do it as it was unhygienic. They are on such a tight schedule everything must keep going. He may have to hang on and set a route, so he knows what is going on, and then conduct the movements from the toilet. It is a prerequisite for train controllers to have a strong bladder. If everything is set and nothing untoward is going to occur he will fly out of the office and run as quickly as possible with the radio, go to the toilet and dart back.

29 Mr Thompson's base salary is $94,850 with a shift payment of $22,500, making a total of $117,350. He says that he is not recognised for the work he does, controlling multiple movements and multiple tasks. He supervises every movement in the yard. The telephone calls on shift are constant. He attended some meetings last year in November/December. He was told he was paid under the Hay point system, which he says a lot of people did not fully understand. Human Resources told them if there was a problem with salary to see them individually. There has been a document indicating the top level of pay would be $122,500 for someone who could operate all three boards. He receives as subsidy for his medical fund premiums, leave loading on annual and long service leave. He says he always gets the new trainees, and he battles to keep himself out of trouble. Taking someone else on slows down the Yard and production. Ergonomically it is a nightmare. The only change he has seen, in relation to upgrading systems, is a computer being put on a broken table for the trainee to run the operation. In regards to the Green Carpet System he says that it is unreliable; it works sometimes, but if it hangs up he cannot get out of it and cannot organise movements. There are some areas of the track that do not show up occupied when there is traffic on it. There is a new dead end spur and a new switch but these are not on the control system yet. In regards to the Siemens system he says that the Yard control is last and the Mainline and GML will be done in 18 to 24 months. There is a problem with radio saturation in that there are too many people on the radio and it is a very unsafe practice. He says that previously if he needed drivers he would ring the crib room and direct them to a locomotive and direct their every move. Now he says that he contacts the supervisor, explains the situation and the supervisor then contacts the crew.

30 Under questioning from the Commission he says that no one can go anywhere in the Yard with out authorisation from the Yard Controller. He needs to know what vehicles are in the Yard but he may not control all those vehicles.

31 Under cross examination, Mr Thompson agrees that his main task is to permit movements on the rail track in accordance with the rule book. The rule book sets out a number of procedures to be followed under certain circumstances. There is a radio protocol and the controller has supremacy. Once a person comes into the Yard it is his job to control and supervise him. He disagrees that the manner in which a worker carries out his task is not the controller's responsibility. He says that the controller is watching and monitoring and that they are his responsibility. In relation to whether he can make an announcement to crews that everything is on hold while he takes a relief break, he says that he does not do that. He says that everything is minute oriented and they are governed to keep everything going. He agrees that making an announcement could be adopted but they endeavour to maximise production by not doing so. He could go for a personal need break but then everyone would be screaming that no one is manning the radio or the boards. He agrees that he takes a cigarette break but says that he is still running the Yard. He agrees dark areas are where there is no circuiting and that there are particular protocols to follow. In the main yard there are areas where the circuits do not work. It has been reported for many years but has not been fixed. It has been followed up and has not been fixed. In certain parts of the Yard he does not answer the phone while he monitors a movement, see it go occupied, then unoccupied, and then he checks with the driver to confirm the driver has passed the switch. While this occurs he ignores all other moves in the Yard. The problem has been reported over the years through RROPS. He cannot recall the most recent reporting. He agrees that he does not control motor vehicles in the Yard.

32 Mr Thompson says that it is management's point of view that the allocation of train crews by the supervisor assists to reduce a controller's workload. In relation to supervisors allocating locomotives, this has never happened; there is not one supervisor that does that task. He agrees that it is a step taken by management to reduce controller's workload. The train controllers objected to the supervisors allocating the crews as it slowed production.

33 Under re-examination he says that to announce a toilet break would slow down movements as he needs every minute to try to achieve his target.

34 Mr Stephen Porter gave evidence that he has been employed by BHPB since 4 April 2005. His commencing salary was $72,000 base with a $22,500 shift allowance. After being passed out on 11 July 2005, to operate in the Yard, his base salary increased to $84,000. It generally takes 10 to 15 minutes to do a handover with the other controller. He needs the handover to gain a picture of what is going on. The Train Controller's role is a very, very challenging role, very rewarding, very intense and it is very difficult to stay on top of things. The main problem is a lack of man power. There are quiet periods, but in the main it is pretty full on and there is a difficulty getting away from the board. There is a problem with the radio system as it is only a voice system. If he steps away from the board he is unaware as to who has called; he needs to hear every radio transmission. He does not usually take the radio to the toilet. When he is sure everything is set right, he has done the toilet move, but he is not happy doing it. He says of the proposed increase to 14 trains that it will more than double/triple the workload. At the moment he struggles to get enough cars to make the trains up and obtain the right horsepower. There are also problems with putting people on track to do maintenance work. He says that the impact it will have on the train controller's work is greater than simply a numerical increase in train numbers.

35 Mr Porter says the respondent is short on locomotive power. Each rake requires 8000 horsepower. They have 8 (6000) h/p locos, 40 (4000) h/p locos and 20 (3000) h/p locos. He needs to determine what is required 3 to 4 hours before it is needed. He needs to look at what is coming in, going out and what he can get back.

36 As to supervisors making up the trains, Mr Porter says that it is good in theory but is does not occur. The train controllers continue to perform this task. The controllers have all the information as to what is coming in. They know where everything is and they make all the moves. He agrees that the supervisors are in the yard office a few kilometres away. The supervisors would have the same information as controllers through the RROPS system. Once the train is in the yard, and he breaks it up, unless the supervisors are listening on the radio and writing things down they would not know what was occurring. He says that the RROPS is a great system but its drawback is that it is slow. It takes too long and is extremely frustrating. If an error is made on the system it can take half an hour to correct as the system is slow.

37 Mr Porter says that previously when they required workers they would call the crib room and obtain them, now they need to contact the supervisor, explain the situation and he organises it. This is good in theory but he finds the process to be more difficult. Once they are in the yard it is up to the controller to direct the work. The supervisors in the Hedland yard are supposed to be desk bound and he is not sure how they are supposed to supervise. Previously they assisted when the controllers were short, but they are not supposed to.

38 In April 2005 the Train Controllers had a meeting with the superintendent and the manager of rail operations. Pay structure, technology, honesty, fairness, integrity and open policy were discussed. Mr Bartholomew made the comment that they could train a monkey to do a driver's job. He says that he queried Mr Bartholomew about his comment that train control was vital. He asked then why were Train Controllers paid much less than drivers? Mr Bartholomew mentioned the Hay point system. He knows nothing about the system. There was mention of a pay rate of $122,000 for someone who was qualified on all boards. If the schedule increases to 14 it will be tough. Experienced controllers are expressing concerns. It will be even busier and there will be less of a chance to go to the toilet.

39 Under cross examination he says that in his previous position he ran three boards in Wellington. He was a mainline controller. He agrees that he had no prior experience in Yard control. The number of trains is the issue not so much their size.

40 Mr David Symons gave evidence that he commenced employment with BHPB in November 1994 as a locomotive driver and as an instructor driver. He was offered the position of Crew Development Officer around 8 April 2005. He had a number of meetings with Mr Bartholomew and Mr Jolly. He agrees that on 3 May 2005 they wrote to him advising that the hours were 42 and unused sick leave would not be paid out if the position was accepted. The value of his sick leave is around $38,000. He spoke to Mr Bartholomew about going back to his original position if the position of CDO did not work out and was told that this could not occur. At a final meeting he was told to accept the role or he would be removed as a driver instructor. His answer was required in writing, but he did not do this. On 6 June 2005 a notice went up requesting expressions of interest for a CDO role. After discussing the matter with Mr Les Punter he put in an expression of interest, but has not heard anything since then. When he was advised that he could not switch back to being a driver if he did not like CDO, he decided that he would not accept the offer.

41 As an instructor driver he trains and assesses people at Nelson Point Yard, Goldsworthy MainLine, Newman MainLine, Yandi. He says that he also trains people in the load facilities at Whaleback, Ore body 25 and unloading at Finucane Island. If he has a driver with him, he oversees what they do, answers queries and gives them guidance. He says that assessment and passing out are part of his duties. He does not perform any class room training, although other instructor drivers do. He says that the CDO role has pretty much the same duties as the driver instructors except that the CDOs occasionally relieve in a supervisory role and perform safety inquiries. He says that about four years ago he performed the role of relief supervisor in the Hedland Yard for six to eight months. He took part in a team which drafted propelling instructions.

42 Under cross examination he says that he made pass out assessments, but this occurred a couple of years ago. He agrees that this is now a role performed by the CDOs. He does not participate in inquiries or investigation. He has no role in drug and alcohol testing or writing of policies

43 Mr Gunovich says that he has been employed by BHPB since 1995, and he has become a level 5 driver. The company initially offered workplace agreements in 1999, but he did not take one up. In March 2001 he entered into a workplace agreement for a fly in/fly out arrangement, 12 days on/10 off, with 12 hour shifts. Everything was agreed except for him residing in Melbourne. An agreement was reached outside of the contract relating to his removal cost back to Melbourne being paid by the company. As part of his working arrangements he does an HSTR tour. This means his tour can slide as far as 4 days either way. Initially he worked at Port Hedland and Newman, but now it is Yandi or MAC. He pays for his own airfares between Perth and Melbourne and the company pays between Perth and Port Hedland. At the end of 2002 he put a proposal to the company that his salary be reduced by $10,000 gross and the company take over responsibility for his travel from Melbourne to Perth. He saw the proposal as cost neutral and would relieve the stress of him having to make the bookings. He brought this matter up on a number of occasions but did not get anywhere. In September 2002 he was offered an AWA. He did not take up the offer as he had lost faith in workplace agreements. He was not interested in going down the road of workplace agreements given the company's position on his airfares request. He first became aware that his salary had increased while he was on annual leave, when he checked his bank statement. When he got back to site there was a letter for him. There has been no further explanation as to why the payment was backdated to April 2005. He is now on a common law contract. He would prefer to be under the Award as there are better outcomes in conditions and remuneration. He says that there are more protections.

44 Under cross examination he agrees that the roster clerks try and accommodate his needs. He says that they try to accommodate him and he agrees that that is not always possible.

45 Mr Emmitt gave evidence that he was employed by GML in 1990 and prior to that he had worked for Queensland Railways as a train controller. While employed by GML he was covered by the ADSTE award and was a member of that union. He says that when BHPB bought out GML he went from the award to a staff arrangement in roughly early 1992. He says that the agreement set out an annualised salary, which excluded overtime payments and penalty rates. He has worked the Mt Newman mainline control and the Goldsworthy control. He does not have any experience in Yard control and does not wish to work on a rotational basis through Yard control. He believes the practice is unsafe as Yard control is completely different and controllers may lose their touch for the boards they work on. There are a few controllers who are deemed to be qualified to work on all three boards. His duties are to run the trains and production in an efficient and safe manner. He is also responsible for keeping maintenance personnel safe. He can have up to 20 trains running during a 12 hour shift, all at various stages of their trip. There are other vehicles out on the mainline also, such as rail grinders, maintenance machines, ballast regulators and high rail vehicles.

46 When a driver advises that he has come to a stand, and has had an air dump, as Train Controller, Mr Emmitt advises the driver how many handbrakes to apply. He calls out track maintenance to provide assistance to the driver. He is also required to rearrange all rail traffic around that site and to arrange relief for the crews that may be going over their 12 hours. The details of the train are entered and the computer advises how many handbrakes are to be applied. Before the driver walks the train the driver will test his mobile radio with train control and then walk the train. There is a timing system which sets off an alarm so the train control contacts the driver every 10 minutes. If after three calls the driver has not responded assistance is sent to the driver's location.

47 The centralised train control system on the Mt Newman line is operated out of train control. The GML line is different as it is worked on a train order system in conjunction with a nodes system. Mr Emmitt agrees that the mainline is more complex than the GML board. With the CTC system, if it crashes they call out Olsens and track maintenance and they check the track for any damage. Trains cannot move over that section until the track is verified. Trains may also need to be rearranged as a result. After the track is verified a written CTC order is verbally given to drivers allowing them to pass signals at stop. During this time the radio traffic is increased; he is on the telephone as well and other trains are operating as normal.

48 The JBJ Co-ordinator coordinates between mine and train control as to the arrival of trains. The Co-ordinator discusses with mine personnel where the train is to go and where it is to load out. The train controller is responsible for all movements within Jimblebar Junction and beyond. He says that the JBJ Co-ordinators are all drivers. The Co-ordinator sometimes drives trains when no other driver is available.

49 The controllers use the RROPS system to input data about various aspects of the trains, eg. arrival, departure, load out times and delays. The main purpose is for the mine and Port to be aware of how many cars are incoming, so that they can determine what to do with the incoming product. Delays are recorded for the company's statistical purposes. Forward planning is a big part of the Train Controller's duties. He says he can plan ahead up to 6 hours. When a driver leaves Hedland the mainline controller is responsible for the driver and instructs him on what is to occur. The drivers are monitored to ensure they do not

go over their 12 hour shifts. The Controllers advise the co-ordinator that relief needs to be sent to a driver. Under certain circumstances he has the authority to advise drivers to override the ATP. There was an incident in 2003 where he refused to allow trains to run as he deemed it unsafe due to the weather; even though management wanted the trains to run. When he first started the company ran 6 trains, now it is 12 and possibly 14 or more in the future. The work is very trying and stressful. On some days he has to have a meal at his workstation. He is unable to get up and leave the board as he may receive calls on the radio or phone. On occasion he has sat with his legs crossed as he was unable to take a toilet break. His salary is approximately $121,000. Engine drivers receive more and it is an insult as the controllers have greater responsibility. He has brought this up previously and has been told by the railroad manager that the drivers are paid more as they work more hours. He received no reply when he queried Controllers rates in comparison to Co-ordinators. He received a letter giving him a lump sum payment of $3,900. When he queried this with Mr Darby he was told that he had reached the salary ceiling and increases in pay would be through one off payments. He attended a number of meetings last year where he was told that the Controllers' salaries would be reviewed, but nothing more has come of it.

50 Under cross examination Mr Emmitt says that there is a booklet issued by the company that sets out how many handbrakes are to be applied in an air dump. The Controllers have the computerised system and the drivers simply call up for the information. He agrees that the drivers have access to the book if they have it on them. The GML line has less activity than the mainline. Recently new controllers have been appointed. He denies that the trainees assist the controllers on the mainline. The trainee on the GML board is there training, not assisting. He is responsible for the trainee and for what occurs on the board. He believes the rotation of Controllers is unsafe. Controllers are responsible for all rail movements

51 Mr Kara gave evidence that he commenced employment with BHPB on 15 October 2004. Prior to that he worked at Transrail in the train control centre in Wellington from 2002. Before that he spent 14 years in law enforcement. At BHPB he started on the Goldsworthy line, but due to manning issues he went straight onto the main board. He has been doing both boards since April 2005 by himself. In train control they have a Superintendent who deals with the administration and day to day running of management. There is no direct supervisor in charge of the three controllers on shift. In New Zealand he had a direct supervisor in the form of a network controller manager who would oversee all the train controllers. The manager would step in and take control if there were any incidents. The manager would call out staff and notify relevant managers. At BHPB they do not have that level of supervision or assistance and Controllers have to do that role themselves.

52 In the case of a derailment the company has a roster of people who can be notified. His role is basically to contain, supervise and control until the incident controller comes on site. The incident controller still has to contact the train controller to make any moves on the network. With the introduction of mid track change overs, his workload has increased as he now has to plan for the meets. He forward plans 6 to 8 hours and there is an increased workload through more communication with drivers. There is a difficulty with drinking coffee while at work due to the workload. Coffee can be brought in at 11:30am and still be there 4 hours later. The work is flat out and he has heard experienced controllers going berserk due to the workload. The radios are getting to a dangerous point. He has not seen a system like the one at BHPB where it is an open channel. He can have people speaking over him on the radio and two people transmitting at the same time, hence he can be unaware as to what is happening. It is important to have clear communication as he needs to know where everyone is and that they are working in a safe environment.

53 The rosters on the mainline are midday and midnight. He works 12 hour shifts and does a hot seat changeover. One of the requirements when he starts shift is that he must know the whereabouts of all trains, equipment and personnel. In order to achieve this he needs to come in early. This adds 15 minutes on either end of a shift.

54 He attended some meetings this year and last year. At those meetings they were told that the Train Controllers' remuneration was set under the Hay point system. They were told there was a ceiling for the Train Controllers' salary and that was it. The wage of Train Controllers comparative to others was a main point of contention. He says the justification given for the difference between drivers and Controllers was that drivers worked more hours, they worked away from home and there were other allowances. The Train Controllers were told they were at the top in terms of salary, and given the hours they worked they should not complain. The relocation of train control was also discussed. Nothing has happened about relocation.

55 Mr Kara is working currently on a project to assist BHPB in reducing down time and to improve track maintenance. He is a team player evidenced by the fact that when BHPB were short of staff he went onto the Newman mainline. If he has an issue he speaks to Mr Goiack.

56 Of the pay structure he says that Mr Goiack, at the meeting, put a proposal for four levels with P & D personnel at the top rate. The Train Controllers put forward a proposal based on the upper limit they had to work with. They had to specify where each person would sit comparable with their skills and abilities. This was done at the workshop and taken away by Mr Goiack. They have not heard anything further. He says that the upper limit was set by Mr Goiack and Mr Hoare.

57 He says he was recently involved in an incident concerning the mismatch of switch locations. He informed Mr Goiack of the situation. He believed that an investigation should occur, and that the person concerned had to stand down and take a drug and alcohol test. He was not stood down and did not have to take a drug and alcohol test. He heard no more about the incident. Mr Goiack came in and they discussed the matter. Mr Goiack agreed that he should be stood down and an investigation should occur. Mr Goiack made a call to get another controller in, could not do so, and was told to keep working. This occurred even though he told Mr Goiack he should have a drug and alcohol test.

58 He says of the meeting in April 2005 that Mr Bartholomew made a derogatory comment about train drivers, to the effect that they could train monkeys to do the job. At the same time he said that Controllers were critical to the operation in terms of increasing production.

59 Under cross examination Mr Kara says of his previous work in New Zealand that they did not have the same number of trains as BHPB. It was quite lax in comparison to the work he performs now. He disagrees that the boards were put into a multi desk arrangement on the weekends. In New Zealand, on day shift, there were nine boards and nine staff plus the network control manager.

60 He has ultimate authority on the whole network, including the radio, but he says that people may just turn up and start using the radio. They do not have a good system where they can control the radio. As to whether he can authorise a person not to cut in, he says that he can only do that after the person has made a radio transmission. It is difficult to tell someone not to use the radio if he is not aware of the person on site. He says that if someone was acting in an unsafe manner that person would not be on the track.

61 Mr Goiack gave evidence that he has been employed with BHPB since 17 January 2005. Prior to this he spent 33 years working for Queensland Rail in a variety of positions, including Train Controller, Project Manager, Manager of train crewing and Manager of train planning and scheduling. At BHPB he is responsible for management of the railroad control operations. His duties include the safe operation of all vehicles on the network, daily scheduling to meet production targets, workforce planing and recruitment, liaising with various departments, conducting safety and disciplinary investigations, training and accreditation of Controllers and special projects. He says that the workforce comprises currently 19 Controllers, 2 trainees and one other person. As a Train Controller in Townsville he operated five control boards, with each board dealing with a variety of products. As a Train Controller in Brisbane he had a similar job to Yard Control in Hedland. The boards at BHPB are no busier than those he worked on in Brisbane and Townsville. There are times when the boards are extremely busy, eg. when things go wrong it can get very busy. He says that there are peaks and troughs. The GML line is quieter than the Yard and Mainline.

62 The Train Controllers sole responsibilities are to manage the network he is controlling, provide for the safe and efficient movement of trains and provide safe access to maintenance persons. If an incident occurs the Train Controller activates emergency services, contacts management, gets the response and recovery teams in place and manages the other traffic. The Train Controller and drivers are totally different positions and he has never compared their rates of pay. Train Controllers supervise to an extent. They give the drivers direction and the authority to move on the track. The Controller does not have authority to deal with drivers on disciplinary matters. After hours the Supervisor is in charge of Train Controllers. He does not stand over the Controller, but if there is an incident the Controller will contact the Supervisor in the first instance. During the day the Supervisor manages the train crews and locomotives and the Yard. If a Controller requires a driver he contacts the Supervisor. BHPB is looking at increasing the number of Controllers. They are also trying procedures to reduce the workload of Controllers and evenly distribute responsibilities.

63 Mr Goiack says that he wrote a discussion paper [Exhibit R1, Tab 18] which addressed the need to develop a structure for Train Controllers, the number of controllers required, a career path and various other aspects of the role. The proposal for the structure was to have both the Mainline and the GML boards operated 24/7 once they had sufficiently qualified staff, the Yard board would continue to operate independently. He says that once the trainees are trained and a Controller's position becomes vacant they will fill the role. The trainees at the moment are learning the job and assisting Yard control in administrative functions. The P&D officers have a number of duties, including developing and monitoring Controllers train plans, training and other miscellaneous duties. The P&D positions will be filled by existing Controllers, familiar with all three boards who can step in during an emergency or in cases of sickness. The Controllers are currently responsible for data entry in the RROPS system.

64 When Mr Goiack first arrived the Train Controllers in the Yard were allocating persons to particular jobs. He says that as a management team it was discussed that the Supervisor was the best person to efficiently manage the crews. The Train Controller was to contact the Supervisor with their requirements and the Supervisor would allocate a person. This arrangement may be marginal but is somewhat reducing the Controllers' workload. In relation to locomotive allocation, the idea was the same as crew allocation, the Controller would facilitate the move, and the Supervisor would manage it. This is not occurring at the moment and there are a few reasons for this. He says that having persons trained on all three boards provides flexibility to the company. There have been instances due to sickness where persons have been called in on their days off, as the Controller on relief days is unable to operate a particular board. He has worked five different boards at one location. He does not see why it would be unsafe if you were to work three or four boards on a rotating basis. There would be additional pay for Controllers trained on all three boards.

65 There was a workshop in April that dealt with a number of issues. These included the development and expansion of the company, integrated planning, the upgrade and new train control system. The integrated planning system is a new unit designed to sit above mines, rail and port production which interfaces with marketing in Singapore. They develop an 18 month plan which filters down to integrated planning in Port Hedland, to a 6 week plan, then into a 72 hour plan which is discussed every morning. When the integrated people are fully functional it will provide information to the mines on what product to load and advise the Port what products are on trains. They will have overall management of product flow. This will have a small impact on Train Controllers, as the Controllers previously were involved in this task. There is a new program to replace RROPS which is slow and cumbersome. The new system will be windows based and the inputs will be electronically captured off the new train control system. The new Siemens system will feed information from the signals back to the E to E system. Trains will be automatically tracked and information stored in a database. This system will relieve the Controller of having to input the data. They are in the design specification for the train control system. The Mainline and GML control will be operational in July 2006, and 12 months after that the Yard will be converted to the new Siemens system. There will be new train control boards in January 2006. In relation to the control centre nothing has been finalised but he expects the current area will be gutted and redesigned. There will be four new control panels. The pay proposal put by the Train Controllers in the workshop was taken to Human Resources for their consideration and he understands the pays are being reviewed. The upper and lower limits of pay were set by the existing rates of the Controllers. He says that there is one Controller and one other person who currently can operate all three boards.

66 In relation to meal breaks Mr Goiack says that the proposal is that once they have sufficient qualified people in place they will advertise and attempt to fill the P&D officer's role, who will probably work a four on/four off roster. In Yard control, the P&D officer will commence at 5:30 am to relieve the Yard Controller to allow him to have his 30 minute break. For the Yard Controller working the midday to midnight shift the P&D officer will relieve him from 5 – 5:30. When the GML board is running 24/7 it could be coupled with the Mainline board between 5:00 and 6:00am to enable both controllers to have a break. The same process would occur from 5:00 to 6:00pm. The implementation of the proposal depends upon the staffing levels and the staff being fully trained and operational 24/7. At this stage the proposal is unable to be implemented. By the end of this year people should be trained. He says that the P&D officers, fully trained on all three boards, would be able to provide relief, in cases of emergency or when persons needed urgent relief. This is a flexibility the company is looking to achieve. The P&D position descriptions should be finalised in the next couple of months and then internal expressions of interest will be sought. The workload of Train Controllers can be heavy, incidents disrupt the traffic flow and this in turn increases the Controller's duties. The workload is not a safety concern. Having 14 slots in one day provides flexibility to the company. This will increase the workload somewhat for the Controllers. The workload of Controllers is no different to other busy boards at other locations. The Siemens system will make the workload easier as the system will automatically set the road and the Falco system will physically set the signal. The Controller therefore does not have to do this if Falco is running.

67 Mr Goiack says that trainees are learning how to use the RROPS system, how to input data and to assist the Train Controllers. The process of locomotive allocation is not operating as efficiently as it should and that is being looked at. The Controllers did not think that it was a good idea for the Supervisors to do crew allocation. BHPB is trying to reduce the radio usage but it is an ongoing task of education and developing other means for persons to communicate. The radio protocol is a problem at times. In relation to the incident involving Mr Kara he says that he made the call to leave Mr Kara on the board. He was unable to obtain any Controller relief, and having reviewed the situation he determined that Mr Kara had not made an error. He believes that if a person needs to go to the toilet, the GML Controller can monitor the Newman line and vice versa. As for the Yard he takes the radio to the toilet. There is no difficulty with a Controller saying "everything is on hold I am taking a short break", as long as if there is an emergency someone can respond to it.

68 Under cross examination Mr Goiack says that it is not necessary for the Controllers to take the radio to the toilet. He has been aware of the practice since February 2005. In his opinion it requires attention and he has hired additional staff. He does not know of any other steps he could take. The Controllers are responsible people who can determine whether to take the radio to the toilet or not. He says that it is not a good practice and it is not very hygienic. He agrees that it is not reasonable and is inappropriate. He does not believe that he can do anything further at this stage. He agrees that an option is for the Controller to announce that the board will be unattended for a short time. He agrees this would be a better option than taking the radio to the toilet. Mr Goiack says that he could instruct the Controllers in these terms. He will review the operation as movements in the field would continue while the Controller is absent. This is why there needs to be a procedure in place for a person to monitor the radio. He agrees that they are understaffed and this is being addressed. He expects that if one Controller goes for a toilet break, the others would be able to monitor that board. He agrees that the Controllers need a break and he has put forward a proposal. This proposal should be in place by the end of the year and the current situation will prevail until then. The P&D officers will relieve in Yard control and the Mainline and GML Controllers will relieve one another. He agrees that the 30 minute break for the GML and Mainline could be achieved now, but he does not propose that happen, because "during the day is when the gangs are moving around" (Transcript p.248). GML is to be a 24 hour operation and from 5:00 – 6:00am, before the gangs come on, the GML and Mainline Controllers will take their breaks. The shifts will no longer be 6:00am – 6:00pm, they will be from midnight to midday and midday to midnight. The proposal was drawn up a few days before, but has been discussed for a number of weeks. He denies that the proceedings currently on foot have been a catalyst for that. He agrees that under the proposal the P&D officers could provide 15 minute relief breaks to the Yard Controllers. During annual leave the P&D officers would be relieved by one of the Controllers. He agrees that it has taken a year to make a provision for Controllers to have a 30 minute break. He denies that this shows a callous disregard for the Controllers welfare.

69 Mr Goiack says that safety is not compromised under normal circumstances. However, during peak times he is not satisfied that the safety standards are not compromised. This is due to the volume of work. He denies that the peak demands mean that the safety standards are not observed. Controllers are professional enough to slow the workload. He does not agree that the demands of production and demands on Controllers during peak periods compromises the safety of the operation. He does not believe any of the processes in train control are unsafe. He says that the processes should be reviewed constantly.

70 Mr Goiack agrees that the operation is capital intensive. The investment is represented by locomotives, rolling stock and track and is worth hundreds of millions of dollars. The equipment should be utilised as much as possible. The Controllers have a crucial role in ensuring that the equipment remains productive. The company is in the process of purchasing an electronic locomotive management system. Currently it is a manual system carried on in the Controllers head. He does not know who will operate this new system, but it will not be Controllers, as they will not have the time to do it.

71 Mr Goiack says the locomotive allocation system, an electronic system, will have inputs and outputs that the company does not have at the moment. The process will maximise productivity and improve the management of locomotives. It is something that is not being done at the moment; it is in the process of being ordered. The new system will assist the Controllers with a plan detailing what is to occur with the locomotives. He agrees that train schedules can change on a daily basis. If there are changes somebody will need to input the data into the new system. The system will require information regarding the train schedule, number of rakes and number of locomotives. The Controller may provide information to the system but he does not envisage the Controller using it. The Controllers and Supervisors have different roles that complement one another to produce a final outcome. There is no comparison in the roles of Mainline Controller and JBJ Coordinator.

72 The procedure for crew allocation changed recently. He has received comments that the process is not working as well as envisaged. The Supervisor would pass on the instruction that the Controller gives him to the crew. The process is designed to improve the train crew utilisation and productivity. Prior to the change the Controllers kept a list of drivers on duty and they managed that task if they were in the yard. The Supervisor in the yard is in charge of the drivers and he is responsible for them and allocates tasks to them. Mr Goiack has discussed with the Controllers the process. He believes that it should be less work for the Controllers as they do not have to manage train crew allocation. In regards to locomotive allocation he agrees that the Controllers are performing this role not Supervisors. It is the role of Supervisors and they should become responsible for the locomotives. Once the driver enters the yard he takes instruction from the Controller. The Controllers are very important to the efficient operation of the rail system. Their level of remuneration is significantly less compared with others (Supervisors, Drivers, Co-ordinators), however, it is difficult to compare roles.

73 Mr Goiack has attempted to put in place a structure regarding remuneration levels for the Controllers. The only discussion with Human Resources has been in relation to whether the upper and lower limits move with CPI. In regards to the document at [Exhibit R1, Tab 18] he agrees that the average dumps in April 2005 were 2290 cars. He agrees the fleet has 3100 ore cars and 68 locomotives. He says that switch 423 is a problem and that there are procedures in place to remedy this. In relation to radio saturation, he says that from what he has heard it does appear to be a problem. He has spoken to various parties regarding the matter and advised them to follow correct radio procedure. There have been announcements and bulletins issued in the last six months dealing with the issue. The idea of splitting the yard board in two would be very difficult. As for creating a second position, that is what they are doing with the trainee.

74 Handovers between Controllers are important, given the location of trains, high rail systems, outstanding track authorities and any problems with locomotives. The handover should take 15 minutes but may take longer if there is a major problem. The teams are very good to come in early and that their hours are increased to around 44 hours a week as a result. With regard to interchanging on the three boards, he says that there is no safety issue as long as Controllers are given refresher courses on any changes that have occurred during the period. The Train Controllers job descriptions [Exhibit R1, Tab 19] are both comprehensive and accurate.

75 Under re-examination he says that the memorandum of 16 May only relates to the Yard, Up-track the Controller has complete authority over the crews and operations. The memorandum of 16 May should be read in conjunction with the position description. He says that the Train Controller's salaries are currently being examined by Human Resources. There is no reason why a trainee could not answer an emergency call while the Controller is going to the toilet.

76 Mr Punter is currently employed by BHPB as a Supervisor, Rail Transport. He has 25 years experience in rail. From 1971 to 1975 he was a general hand at Westrail and from 1975 to 1988 he was a locomotive driver at Westrail. He worked for 11 years as a locomotive driver with GML from 1988 to 1999. In 1999 he took up a position with BHPB for 2 years. He had responsibility for all rosters on the company's railway. In 2001 he was appointed to the Supervisor position where he has the responsibility for crew performance and rostering, allocation of duties to locomotive drivers and involvement in safety and disciplinary inquiries. In relation to safety he usually takes statements and coordinates with the superintendent. He stands people down when required. He is involved in projects that are usually related to rostering. Part of his performance role requires him to carry out performance reviews. He assists Mrs Sulin in relation to scheduling in her absence or if she asks for support. He performs the role of shift supervisor approximately once a month. In the performance review, supervisors have a fair amount of input. Supervisors sit down with the Superintendent and assess each driver's performance and determine what marks the driver should receive. There is a supervisor at Yandi who sometimes undertakes performance reviews.

77 There are currently 13 drivers in training. The schedule for the drivers is updated on a daily basis to cover for sickness and short term absences. Schedules change when the number of trains is increased or an award decision changes them. Start times and destinations can vary depending on the roster requirements and absences. Hedland based drivers work 6 on/5 off, 6 on/4 off. FIFO drivers work 12 on/10 off. Hedland drivers work a 48 hour week. FIFO drivers work 45.6 hours per week. Mrs Sulin tries to accommodate the travel needs of FIFO drivers by getting them the first available flight in order to maximise their time away. If there is an emergency, drivers are released so they can get away. He is not permitted to work drivers for more than 7 night shifts out of their 12.

78 Mr Goiack supervises the Train Controllers between Monday to Friday, and during the day. When Mr Goiack is not there, the supervisor takes up the role. Train Controllers control the movement of the trains as per the rule book. He does not believe that they supervise the drivers. The position description of the Driver Co-ordinator at Jimblebar Junction [Exhibit R1, Tab 24] accurately reflects that role. One part of those duties relates to assisting crews with locomotive faults. If there are problems on the track, or at the mine or anywhere in their area, they are called on to assist and offer advice as to the solution. It is an important function of the Driver Co-ordinator to allocate duties to the rail crew. Driver Co-ordinators direct crews where to take the trains and advise the location of trains when drivers come on shift. He says that 10 to 15 per cent of the Driver Co-ordinators' time is spent driving on the mainline and they also do train loading when required. The Supervisor at Jimblebar Junction works Monday to Friday 6 am till 3 or 4 pm and outside of these hours the Supervisor's role is performed by the Driver Co-ordinator. In respect of training, the Driver Co-ordinator passes out drivers at the mines and arranges for their induction. The Driver Co-ordinator also takes employees for drug and alcohol testing in the absence of the Supervisor, and in the event of an incident, takes statements, takes employees for drug and alcohol testing and stands employees down when required. There was previously a position of Driver Co-ordinator in Port Hedland but this was taken over by the Supervisors. If the Award provisions are applied to Train Controllers it may restrict flexibility. He says that it could be inflexible for the company and the drivers concerned. The Driver Co-ordinators are fairly flexible and they call them in on days off to cover for sickness or to relieve the Supervisor when required.

79 Mr Punter says that it is his role to allocate tasks to the Crew Development Officers. The position description [Exhibit R1, Tab 21] reflects their role. The CDOs ride with drivers at least twice a year to ensure that they are performing their tasks and are aware of all changes. CDOs are involved in safety and disciplinary investigations. They carry out most of the investigations. CDOs are responsible for the induction of new drivers, classroom training for the rule book and radio procedures, and when the driver believes he is competent, assessing his competency on the track. Passing out is done predominately by the CDOs. However, supervisors do perform this role, but usually when a problem has occurred during the first assessment. On most Tuesdays the CDOs run a class in railroad induction and radio procedures for persons required on track, including contractors. CDOs spend 10 to 15 per cent of their time on driving. Mr Punter is responsible for allocating tasks to the CDOs, as the role of Supervisor of Rules and Accreditation is vacant. The Driver Instructors may have previously passed out drivers. The CDOs' role is different to Driver Instructors as the CDO writes procedures, passes people out on track and performs classroom training. It does not make a difference if the position is award or otherwise. CDOs work 42 hours per week on a roster that is separate from the main roster. There is the ability to change their rosters if certain circumstances occur.

80 There are seven maybe eight Rail Supervisors. They cover operations 24 hours a day, 7 days a week on a four on/four off, 42 hour week basis. The day shift Supervisor at Port Hedland would supervise the CDOs. Due to shortages a CDO may be required to perform some yard work. Part of the duties of the Rail Supervisor is to ensure that crews are fit and ready to perform their duties. In relation to performance management the Supervisor is there to fix the problem. If it is unable to be resolved it is passed along to the Superintendent. For incidents Supervisor stand people aside, take them for drug and alcohol tests and take statements. Their number one priority is to ensure that everyone is safe and in a fit condition to work. Supervisors also provide relief to the Superintendent.

81 In relation to a memorandum dated 16 May 2005 [Exhibit R1, Tab 17] Mr Punter says that the two changes are still in the early stages, but Train Controllers are now required to contact Supervisors to obtain a crew. The supervisor then organises the crew and assigns them a task. However, once the crew is in the field they become the responsibility of the Train Controller and he allocates any further tasks. This was designed to reduce the work load of the Train Controllers. The task of Supervisors allocating locomotives has not progressed as far as the first point, and is mostly still performed by Train Controllers. Supervisors do not play a role in training. Supervisors have more dealings with the crews than do Train Controllers. The Supervisor allocates tasks whereas Train Controllers just coordinate movements of the trains.

82 Under questioning from the Commissioner Mr Punter says that all Supervisors in Rail are initially termed Rail Transport Supervisors and then some are appointed to specific areas. There are about 7 or 8 Supervisors and the one position description covers all of them. He can do the basics of each of the 8 positions, but he does not drive on the mainline. He could basically relieve in any of the positions. All the Supervisors have locomotive drivers certificates of competency except for himself. He says that his has probably expired.

83 Under cross examination he says that he believes that the Co-ordinators at Jimblebar Junction are on AWA's. The FIFO arrangements provide the company with flexibility as drivers can be placed at a number of locations and their tours can be changed. The JBJ Coordinator works 48 hours per week. Training on the mainline and the yard has been performed by Driver Instructors. He says that they have also performed classroom instruction when on light duties. CDOs perform inquiries from time to time. CDOs drive trains primarily to keep their skills up. They perform 2 to 3 trips per year on the mainline and two trips per year to Yarri. They also work in the Yard if the company is short or there is a problem up on the track. They are required to relieve for a few hours. CDOs' involvement in drug and alcohol testing occurs when the Supervisor is unavailable. Anyone working on the track needs to undertake radio coverage training. He has heard of a comment in relation to radio saturation in the yard. There is a lot of radio traffic and in some instances speaking over people occurs while they are performing their duties. He is aware of others interrupting discussions between control and operational staff. He agrees that

this is a potentially dangerous situation. He agrees that clear uninterrupted communication is essential for safety. He is not aware of any plans to resolve the issue. The issue of the number of handbrakes to be applied changed in March 2005. Tests were conducted in certain areas of track to determine how many handbrakes were required to hold the train and as a result the number of handbrakes needed to be applied changed. The driver when coming to a halt would get handbrake information from the Train Controller or Supervisor. Drivers do not have the handbrake charts reflecting the March changes. A reduction in handbrakes may reduce the time the train is stationary. When drivers come to a halt they have to contact Train Control.

84 Mr Punter agrees that the workload of Train Controllers is at times extreme. He agrees that with increased production this will become more extensive. Supervisors have not taken over the role of making up the locomotives. If the Supervisors know where the locomotives are, performing the role should be no more difficult than if the Train Controllers were performing it. In a way the Train Controller is the best person to allocate trains to various destinations, but the Supervisor should know what is going on as it is part of his duties. It is easier for the Train Controller to perform the role. A locomotive allocation sheet is to be drawn up for the Supervisors so that it will be easier to track the locomotives. Eventually the role of locomotive allocation will become part of the Supervisor's role. He agrees that has taken three months to draw up the locomotive allocation sheet which would only be one page.

85 Mr Hoare is the Principal Human Resources Advisor, Port Hedland, and has been employed with the company for 6 years. He was initially employed by the company as a senior human resources officer in the Northern Territory. He has been at Port Hedland since 2002. He provides advice to managers and supervisors in regards to human resources matters, including recruitment and the terms and conditions of employment. There are a number of advisors in the Hedland team and his customer group is Rail; that includes operations, workshops and traffic signals. He also has business improvement, health and safety and other service areas. Mr Hoare provided a document [Exhibit R5] setting out the cost of the total package of remuneration. The remuneration for Train Controllers has increased by 17 percent since August 2001, it has increased from $100,000 to $117,800. A bonus is paid which has averaged $8,200 per annum. Train Controllers receive two components, a shift component of $22,500, plus their base salary, and that makes up the total of $117,800. The shift component is reviewed as part of the salary review process. The current remuneration for the three FIFO drivers is approximately $134,000 which is an increase over the four years since 2001 of just under 25 percent. In compiling his calculations in [Exhibit R5] Mr Hoare says that he went to the ADSTE award and took the rates for train controller and senior train controller versus the shovel driver and made a percentage calculation. The rates for the FIFO drivers were adjusted recently. Following the recent award decision a commitment was made to WPA employees, when AWA's were rolled out, that WPA rates would be maintained. The adjustments were backdated to April 2005 when the rates were approved by the Office of Employment Advocate. The WPA rates were adjusted up to those rates. He says that WPA FIFO drivers work 12 on/10 off for an average of 45.82 hours per week.

86 He attended a meeting on 4 November last year. He was asked to explain remuneration generally. He advised that if individuals wanted to talk about their individual circumstances he was happy to do that. He talked generally about the system and he explained the Hay Point system and the annual salary review process. He was asked to go away and review the Hay points. Upon review he felt that the points were correct for the position although the skills in the Train Controller group were a bit out. There are Controllers at the high end of the scale that do not operate all the boards. The company is very competitive in terms of the rates of pay. The factors taken into account when setting staff rates are the job size and the Hay points, which incorporate input and outputs, depth of knowledge, impact, accountability and responsibility. He says that the Supervisors have a greater Hay point than Train Controllers as Supervisors are more accountable and responsible. In relation to annual reviews, they take into account market movements. BHPB receives a general remuneration survey from McDonald Dermott, information from the Hay Group, CPI, Bureau of Statistics information and also talks to companies in their industry, like Woodside and Alcoa. At the last review three drivers were given a lump sum payment as they were at the higher end of the scale and operated a limited function in training. He agrees that the assessment would be different if they had additional skills. He agrees that shifts and work patterns affect the way persons are remunerated.

87 He attended a workshop on 12 April 2005, but not for the whole day. Mr Goiack put forward a proposal on a pay structure as an incentive for Controllers to increase skills and train across other boards. In response the Controllers put up an alternative. This proposal was similar to Mr Goiack's proposal except that the level of $122,500 for P&D Officers should be the top level for all three boards and the P&D Officers above that. He indicated that there needed to be broad ranges for the bands to account for performance differences and performance reviews. The proposal was taken away to be discussed. Mr Goiack approached him some months ago and they decided not to look at the matter until the salary review was performed. They would then know how much money they had to use in terms of a percentage increase and they could then work towards a structure being put in place. The salary review is currently taking place and preliminary numbers have been provided to the Vice President for him to sign off. It should be payable by 5 September 2005. Having a standard minimum for Controllers would mean that there would be no incentive to train on the other boards, and that is what gives the company flexibility. Skills are examined in an annual salary review, whereas the incentive bonus is a result of the performance review which looks at achievement of goals and behaviours. Supervisors are the persons who solve problems. If Train Controllers have a problem they go to Supervisors. He cited examples of dumps on the mainline or locomotive failure. In relation to air dumps, the Train Controllers will handle that as it is an easy decision but if there are problems Train Controllers are unable to resolve then they would go to the Supervisor for advice. He does not believe that having the Train Controllers under the Award would promote flexibility. In regards to Supervisors he says that it is not appropriate to have them under the Award as it is a management/supervisory role. When an award employee takes up an AWA, sick leave is paid out. When it is a common law contract employee, sick leave is not paid out. The sick leave benefits for staff are up to 12 months.

88 Under cross examination he says that the undertaking given to WPA employees was that their rates would not fall below award employees and that is the reason behind the rate being back paid to April 2005. It was back paid as BHPB believed that was the date it was applicable from. He does not know why the rate was not increased from September 2004 when the award was increased. He does not believe that the company was in breach of its undertaking between September 2004 and April 2005 as the incentive bonus is on top of the calculation so they are receiving above award rates.

89 He agrees that there is a large amount of documentation concerning the workings of the Hay Point system. Offers are structured in a certain way and that is why Award employees who move to AWAs have their sick leave paid out. There is no difference in the sick leave scheme for AWAs and staff. He does not know why one situation is paid out while the other is not. If the Award covers a position then an AWA needs to be offered to override the Award. Annual leave and long service leave loadings are incorporated into AWA staff base rate. This is a result of a differently structured offer. He is unable to explain why it is different. He would be surprised if recently employed Train Controllers had loadings built into their base rate. Additional flexibilities are one factor for paying a premium to staff (WPA/Common law). The Award is a minimum rates Award and he agrees that if the company wanted to pay more to senior drivers it could. The company chooses not to exercise the flexibility of paying above the minimum award rates.

90 He was contacted in relation to Mr Symons and his advice was that a guarantee could not be given that he could switch back to his old position. He needed to commit to the role and, 6 months down the track, if he did not enjoy it he could approach his Supervisor, but he may have to wait for a vacancy. It would be conditional upon Mr Symons signing an AWA. The general movement between collective and individual arrangements is one way. Mr McShane is on the top level of $122,500 and others are on different levels of remuneration due to a range of factors, the compounding of annual salary reviews and their performance in those salary reviews. He says that award employees had the opportunity to participate in the award incentive scheme, and a small number did, but that option is no longer open.

91 Of the salary range difference between Controllers, CDOs and Supervisors he says that it is due to the different jobs, different Hay points and accountabilities and responsibilities. The Supervisors are the most important as they have more people responsibility, then the Rail Co-ordinators in Newman, the CDOs and finally Train Controllers. If a Supervisor is away a CDO takes up the position. If a Supervisor is attending an incident on track he is still in radio contact. If the Train Controller is absent there are no rail movements. The impacts are different as the Supervisor and Controller have different jobs. He agrees that the Train Controller decisions are crucial to operations. He does not believe it is very acceptable for Controllers to take the radio to the toilet, but they choose to do it and they must think it is acceptable. He says that the company has allowed it to occur and so it continues. It could be seen as the company condoning the practice, but he says that controllers control how they conduct themselves. He agrees that the company should provide for the Controllers to go to the toilet without having to work. Controllers have the flexibility to manage their workload to achieve this. He agrees that the company is obliged to provide breaks for its employees. He does not know why this has not occurred for Controllers.

THE ISSUES

92 Mr Gifford appeared representing Australian Mines and Metals as a party to the application. He submitted that in relation to the insertion of the new classifications, the State wage fixing principles apply, in particular principles 1 and 11. He submitted that the application does not meet the requirements of these principles. Principles 1 and 11 state:

> **"1. Role of Arbitration and the Award Safety Net**
>
> Existing wages and conditions in awards and relevant agreements of the Commission constitute the safety net which protects employees who may be unable to reach an industrial agreement.
>
> Wages and conditions of employment maintained in awards in accordance with these Principles and through the operation of section 40B of the Act is the safety net.
>
> These Principles do not have application to Enterprise Orders made under section 42I of the Act.
>
> **11. New Awards (including interim Awards) and Extensions to an existing Award**
>
> The following shall apply to the making of a new award (including an interim award) and an extension to an existing award:
>
> (a) 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.
>
> (b) Subject to section 36A(3) in the making of an interim award the Commission shall ensure 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.
>
> (c) A new award (including and interim award) shall have a clause providing for the minimum award wage [see Clause 9 of this Section] included in its terms.
>
> (d) In the extension of an existing award to new work or to award-free work the rates applicable to such work will be assessed by reference to the value of work already covered by the award, providing structural efficiency considerations including the minimum rates adjustment provisions where relevant have been applied to the award."

93 Mr Gifford submitted that the application does not create a new safety net. When the Commission made the new BHPB Award they (at paragraph 107) stated:

> "The enterprise specific award must fulfil the dual requirements of protecting employees as a safety net and providing the employer with a structurally efficient framework within which efficiencies and productivity improvements can be pursued."

The new classifications reflect nothing or very little of the structure already reflected in the Award. What is sought is not a safety net; hence the claim is not consistent with the principles. The onus is on the applicants, under principle 11(d), to ensure that sufficient evidence is brought forward to prove the work volume of the new classifications in relationship to the existing locomotive driver structure. The applicants acknowledged the inherent obligations to meet the structural efficiency considerations. To extend the award, which is a minimalist award, to incorporate the new classifications would not promote an efficient and productive outcome. The application also does not satisfy the minimum rate adjustment process. There is no indication or relevance to any percentage relativities with the other classifications in the Award.

94 Mr Gifford queried also the appropriateness of including staff positions in the Award. He submitted the overwhelming practice in the mining industry is that staff type positions, that is those in co-ordinating and supervising grades, are not covered in an award. Staff employees have an inherent capacity to deal with their own interests with management. This separateness has traditionally been seen as appropriate and ought to remain so. There is virtually the complete absence of supervisory employees in awards in the mining industry. He cited specifically the Dampier Salt Award 2004, the Kalgoorlie Consolidated Gold Mines Award 2002 (83 WAIG 276), the Argyle Diamonds Production Award 1996 (76 WAIG 4159), the Mining Industry Rio Tinto Iron Ore Award 2004, the Aluminium Industry Worsley Alumina Pty Ltd General Award 1996, the Greenbushes Mining and Processing Award 2000. The Commission then should be very cautious in assessing whether to include staff classifications in the Award. An Award which was recently made and which the unions party to this application sought and were granted. Mr Dixon adopted the submissions made by Mr Gifford.

95 Mr Schapper submitted that the employees covered by the application are award free and do not have an award safety net as contemplated by the wage fixing principles. Principles 1 and 11 are relevant. Those principles, including structural efficiency considerations, were applied by the Commission in making the BHPB Award. In this way the principles are no barrier to this application.

96 Mr Schapper submitted that the main principle in this matter is Principle 11(d), which relates to the extension of an existing Award. The main consideration being the needs of the industry or enterprise whilst ensuring the employees' interest are also taken into account. The Commission must have regard in assessing the value of work to the rates applicable to the value of work directly covered by the Award, providing structural efficiency considerations have been applied. The Commission should also have regard to the considerations set out in s.26 of the Industrial Relations Act 1979 including the value the employer attaches to other classifications. The structural efficiency considerations would be met by introducing a career path for drivers. There is no barrier to incorporating staff or supervisory positions in a modern award.

97 I will deal with the wage fixing principles as I deal with the classifications. However, principles 1 and 11(d) apply to this application and it is mandatory that these principles be considered when deciding whether the claim may be granted. I would say that, whilst I understand the submission of Mr Gifford in relation to supervisory staff not being in the same award, I do not consider this to be a general barrier to incorporating such classifications in a modern award, if good and sufficient reasons exist for doing so.

98 The applicants argued that s.36A of the Act apply to these proceedings. The importance of this submission being that, if correct, the respondent bears the onus to prove that extending the coverage of the Award to the new classification is not in the public interest. The respondent submitted that s.36A does not apply and the applicants bear the onus to prove that the Award should be amended pursuant to s.40 of the Act. Section 36A of the Act reads as follows:

> **"36A. Application for award coverage for non-award employees**
>
> (1) 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.
>
> (2) The Commission may make an interim award that extends to the employees pending the making of the new award.
>
> (3) An interim award may be made if the Commission considers —
>
> (a) that it would provide a fair basis for the application of the no-disadvantage test provided for by Part VID Division 6 Subdivision 1;
>
> (b) that it would protect the existing wages and conditions of employment of the employees until the new award is made; or
>
> (c) that it would be appropriate for any other reason."

99 Mr Schapper submitted, in the applicants' outline of submissions, as follows:

> "4. Section 36A(1) 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.*
>
> 5. S36A(l) extends to "…any proceedings..." and is not limited to proceedings which seek the issue of a discrete award. The phrase "..... is considering the making of an award ..." encompasses the making of a variation to an existing award which has the effect of extending the award to award free employees. For those employees, an award is made by way of the variation.
>
> 6. Should there be any doubt as to correctness of the submission in paragraph 3 it is resolved by section 18 of the Interpretation Act 1984 which provides:
>
> *In the interpretation of a provision of a* written *law, a construction that would promote the purpose or object underlying the written law … shall be preferred to a construction that would not promote* that *purpose of object.*
>
> 7. It is apparent from s36A that the legislative intent was that, on application, awards are to apply to non-award employees unless it would not be in the public interest to do so.
>
> 8. Common sense also dictates that the submission in paragraph 3 is correct. That is, had a discrete award been sought for the classifications in question it would be quite clear that s36A would apply to that application. The only difference between an application for a discrete award and an application to vary the existing award, is one of form, not substance. It is against common sense that the respondent would bear the onus in one case and not the other."

The applicants say also that the application to vary, rather than apply for a new award, was made to accommodate the respondent's expressed desire to avoid a multiplicity of industrial instruments.

100 Mr Schapper says that s.36A of the Act applies as this application in substance is for a new award. New classifications are being inserted into the award hence, for all practical purposes, the application is as per a new award. The onus is therefore upon the respondent to say why in the public interest the application should not be granted. There was nothing put by the respondent to discharge this onus. If the Commission finds against the applicants on this point then the submission of the applicants is that there has been good reason shown by the applicants as to why industrially the application should be granted.

101 The respondent opposes this submission and submitted that s.36A did not apply. The application was simply an application to vary an existing Award, under s.40 of the Act, to insert new classifications. The onus therefore falls to the applicants to prove the merits of their case. In my view s.36A is plain. The section relates to the "making of an award ("the new award")". The section deals specifically with the making of a new award, not the amending of an existing award to insert new classifications. The onus of proof in the application must fall to the applicants, as per s.40 of the Act, to prove the merits of the claim.

102 Mr Dixon submitted that in accordance with s.29(1)(a)(ii) only an organisation in which the persons to whom the industrial matter relates, and are eligible to be enrolled, may refer the matter to the Commission. The AMWU may have eligibility in regard to supervisors, foremen and railway operation controllers. However, there is only one employee, of the target employees, in that category who is a member of the AMWU, or who has any interest in the representation by that organisation. The question is whether the unions have legitimately brought the proceedings and whether they have conducted themselves in such a manner as to entitle them to relief, where constitutional rights have been ignored. The AWU does not represent the interests of the relevant persons in any way and the CEPU and the TWU are not entitled to refer the present claims.

103 Mr Dixon submitted that the CFMEU was only entitled, under its rules, to represent the FIFO drivers and those drivers who are entitled to the train co-ordinators allowance. The evidence is that about 10 Train Controllers made application to join a company called the Pilbara Mine Workers Union ("PMWU"). They are not members of a company in a legal sense. The PMWU is not a union. Mr Johncock's evidence is that through this arrangement the Train Controller becomes a "member" of the CFMEU, although they are not eligible to become members. The PMWU scheme disregards the rules registered in the Commission. The PMWU is not a registered organisation. The evidence of Mr Johncock, taken together with the PMWU document, makes it plain that it is the PMWU which looks after the industrial interests of the employees. It is not the point that Mr Schapper has been authorised to act on behalf of the unions. Mr Johncock's evidence is that Mr Wood of the CFMEU authorised the application. The CFMEU has undoubtedly enrolled persons contrary to its eligibility rules. An application should be underpinned by proper constitutional coverage and it is not for the unions to ignore this. This should weigh against the applicants in considering whether any relief should be granted.

104 The applicants submitted that the classification of Train Controller and Rail Supervisor are covered by the AFMEPKIU. The eligibility rules of this union (see tab 4, volume 1, at page 4, paragraph 2(g)(i)) provides for supervisors and foremen in the iron ore mining and processing. At 2(g)(iii) it specifies railway operation controller engaged in the iron ore mining and processing industry (i.e. Train Controllers).

105 The CDOs, FIFO drivers and Co-ordinator positions are covered by the CFMEU by reason of that union's coverage of engine drivers (see tab 7, page 6, paragraph 6). The core duties for CDOs and Co-ordinator are engine driving. If the Co-ordinator can be said not to fall within this definition, then the Co-ordinator is in a limited sense a supervisor, and so would be covered by AFMEPKIU.

106 In my view the applicant unions are clearly able to bring the claim before the Commission. They are named parties to the Award. However, for the reasons expressed by Counsel for the applicants, the employees covered by the claim are subject either to the constitutional coverage of the AFMEPKIU or the CFMEU. These unions have properly authorised Mr Schapper to act for them in bringing the claim and pursuing the claim before the Commission. The evidence as to the operations of the PMWU does not in my view negate this basic right to authorise claims for persons within the coverage of the relevant union. It is not necessary or relevant to deal with any of the financial aspects of the PMWU arrangement. As to the arrangement for representation under the PMWU, this cannot override, and has not in this matter overridden, the eligibility rules of the registered union. It is of course open to a registered union to properly warrant a person to act on their behalf.

WORKPLACE AGREEMENT (WPA)

107 The first argument relating to the WPA/FIFO drivers is whether they are covered already by the Award. During the course of closing submissions by the respondent, Counsel for the applicants intimated that this matter received some attention in the earlier Commission in Court proceedings (applications 1246 and 157 of 2003). I have reviewed the applications and submissions in these earlier matters and it is not readily apparent to me that the question of existing award coverage received any direct attention. The Schedule and Particulars to application no. 157 of 2003 (lodged in the Commission on 10 February 2003) stated in part:

> "Notwithstanding any other provision of this award, the terms and conditions of employment of the employees, including any existing arrangements relating to hours of work, shift length, shift patterns, fly in fly out and remuneration, shall continue. ……
>
> A number of those employees wish to maintain their fly in fly out etc arrangements on expiry of the workplace agreement but also seek the security of their employment being underpinned by the award. …….
>
> The award was delivered on or about 19 July 2002. Subsequently, on 1 August 2002, the Industrial Relations Act was extensively amended to provide for the cancellation of workplace agreements and the incorporation of the terms of the workplace agreement into the contract of service but subject to the award: see Part 1A of the Workplace Agreements Act. This is turn gives rise to the circumstances which this application addresses." (my emphasis)

108 It is clear also from considering these applications and submissions that the issue of the meaning of s.4H of the Workplace Agreements Act 1993 was addressed in those applications. The respondent in their reply submissions covered this matter extensively and argued, as they have in this application, that the WPA is preserved and protected by statutory force under that Act as a contract.

109 Section 4(H) of the Workplace Agreements Act 1993 states as follows:

> **"4H. Employment conditions if workplace agreement or arrangement terminated or employee ceases to be a party**
>
> (1) This section applies where —
>
> (a) a workplace agreement or an arrangement under repealed section 19(4)(b) ceases to have effect as provided by section 4C, 4D, 4E or 4F; or
>
> (b) an employee ceases to be a party to a collective workplace agreement as provided by section 4G.
>
> (2) The employment of an employee becomes subject to a contract of employment under this section.
>
> (3) If —
>
> (a) the workplace agreement that ceased to have effect was an individual workplace agreement; or
>
> (b) the arrangement under repealed section 19(4)(b) that ceased to have effect followed on the expiry of an individual workplace agreement,
>
> the contract of employment is one containing —
>
> (c) the same provisions as those of the workplace agreement or arrangement that has ceased to have effect, other than the provisions implied by section 18; and
>
> (d) if the employee had an existing contract of employment relating to the workplace agreement or arrangement, the provisions of that contract.

(4) If —

(a) the workplace agreement that ceased to have effect was a collective workplace agreement; or

(b) the arrangement under repealed section 19(4)(b) that ceased to have effect followed on the expiry of a collective workplace agreement,

the contract of employment is an individual contract —

(c) applying to the employee such of the provisions of the collective workplace agreement or arrangement that has ceased to have effect, other than the provisions implied by section 18, as were applicable to the employee; and

(d) containing, in addition, the provisions of the existing contract of employment that the employee had relating to the workplace agreement or arrangement.

(5) A contract of employment referred to in subsection (3) or (4) has effect, and may be varied or terminated, as if it were a contract entered into between the employer and the employee.

(6) Despite subsection (2) the employer and the employee are bound by —

(a) any award that extends to them; or

(b) any employer-employee agreement under Part VID of the *Industrial Relations Act 1979* to which they are parties.

(7) Where subsection (6)(a) applies, the award ordinary rate of pay (howsoever described in the award) shall, for the purposes of the award only, be the rate of pay as prescribed in the award and not that prescribed in the contract of employment.

(8) Where subsection (6)(a) applies, nothing in this section or in any other enactment or law requires an employer to pay an employee more than the greater of —

(a) the employee's entitlement arising under the contract of employment; or

(b) the employee's entitlement arising under the relevant award,

whichever is the greater when assessed on a yearly basis.

(9) This section does not apply to —

(a) a workplace agreement that was registered under repealed section 40I; or

(b) an arrangement under repealed section 19(4)(b) that followed on the expiry of such a workplace agreement.

Note: For the position when an agreement or arrangement referred to in subsection (9) ceases to have effect, see section 152 of the *Workplace Relations Act 1996* of the Commonwealth.

[Section 4H inserted by No. 20 of 2002 s. 31.]"

110 Mr Schapper submitted that the Labour Relations Reform Act of 2002 amended the Workplace Agreements Act 1993 to abolish WPAs, and provided under s.4H that, whilst the contract continued, it became subject to the Award. He submitted that the WPAs, covering the employment of Mr Ashton, Mr Gunovich and Mr Stromme, became subject to the Award on 1 August 2003.

111 Mr Dixon submitted that the Award was never made with a view that it applied to FIFO drivers. It has never applied to these drivers. Application no. 157 of 2003 was in contemplation of the fact that the WPA/FIFO driver arrangement would come to an end. This application sought that drivers were to be covered by the Award but the arrangements would remain unchanged. There are differences in the conditions of WPA/FIFO drivers to those of engine drivers under the Award. The respondent has correctly taken the view that the Award does not apply to FIFO drivers and their conditions are not spelt out in the Award. The Commission in application no. 157 of 2003, at paragraph 306 and 307, decided that there was no sufficient basis to include the FIFO drivers into the Award. Section 4H inserted by the Labour Relations Reform Act 2002 gives statutory force to the preservation of the WPA as a contract. The Workplace Agreements Act 1993 protects that contract from being altered other than by agreement between the parties. Subsection (6) only applies if there is an Award which is intended to and does cover the employment of those drivers. This is not the case.

112 In my opinion the arrangement of the Act is as follows. Section 4H clearly provides for the protection of the WPAs once expired (see s.4H(2)). The question is whether those contracts are bound by the Award, courtesy of s.4H(6), and whether the terms of that contract remain the same or are the terms of the Award. The last point has not received any attention in submissions. Depending on the answer to these questions, the contract can then be varied either by agreement between the parties (s.4H(5)) and/or by the Commission under the Act. On its face, the wording in s.4H(6) would appear to bind BHPB and the WPA drivers to the Award. The section indicates that irrespective of subsection (2), which gives statutory force to the continuation of the contract in its terms, the 'employer and the employee are bound by … any award that extends to them'. The words 'extends to them' must then be assessed.

113 Clause 3 – Area and Scope of the Award states:

"(1) This award extends to and binds:

BHP Billiton Iron Ore Pty Ltd ("the Company") and no other employer and the following unions:

(a) the Australian Workers' Union, Western Australian Branch, Industrial Union of Workers;

(b) the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch;

(c) the Communications, Electrical, Electronic, Information, Postal, Plumbing & Allied Workers' Union of Australia, Engineering and Electrical Division, WA Branch;

(d) the Construction, Forestry, Mining and Energy Union of Workers;

(e) the Transport Workers Union of Australia, Industrial Union of Workers, Western Australian Branch; and

all employees employed by the Company in the classifications mentioned in this award. (my emphasis)

(2) This award is restricted in its operations to the land and premises occupied and controlled by the Company between the 18th and 26th parallel of South latitude."

114 The relevant classification mentioned in the Award is contained in Schedule III – Award Classifications and stipulates:

> "5. CMETU Loco Level 5
>
> A person at this level will have completed a level four (4) competency pass out and shall be qualified to operate all trains under Driver Only Operation over the BHP Iron Ore Pilbara District Railroad."

115 The contracts of Mr Ashton, Mr Gunovich and Mr Strommer [Exhibit R1, Tab 15] indicate that they are employed in the staff position of Rail Transport Technician. There can be little doubt, and I do not consider it to be in dispute, that these employees operate as locomotive drivers. On its face then the Award would seem to apply. However, I consider that a broader approach must be taken. There is no stipulation in the Award which actually specifies the FIFO drivers, or conditions which relate to them. Their conditions, as displayed at [Exhibit R1, Tab 15] are different to those relating to locomotive drivers under the Award. On this basis it might be said that the WPA/FIFO drivers are a specific group of employees and that the Award, as made, does not 'extend to them'. I consider this to be the better interpretation of the Workplace Agreements Act in concert with the Award. I find that the WPA/FIFO drivers are not already covered by the Award. I note also that these drivers do not seek in this claim, and have not sought previously, that the terms and conditions for locomotive drivers in the Award be applied to them. This is of course with the exception of the Level 5 salary rate in this application.

116 If it can be said that ambiguity exists in interpreting clause 4H, and I do not find so, then the Minister in the Second Reading which led to s.4H being passed into law, in the Hansard of Tuesday, 19 February 2002 stated:

> "On expiry of a workplace agreement, or its prior cancellation by the parties, new arrangements will come into effect for both the employer and the employee. The provisions will ensure that no employee, other than by agreement, will be worse off following the expiry of his or her workplace agreement. Every employee will retain a contract of employment comprising their workplace agreement and common law contract of employment. An employee's employment will also be subject to the relevant award when one exists. An employer will be required to comply with all the terms and conditions contained in the provisions of the relevant award, including penalty rates, allowances and rates of pay."

In other words, if I am wrong as to the interpretation of S.4H, then from the time s.4H came into law, the WPA/FIFO drivers have been covered by the Award and all of the Award provisions should have been applied. The contract would have been altered by virtue of this section.

117 Mr Dixon submitted that the respondent had been vexed by the applicants' previous attempt to insert WPA drivers into the Award, and should not so soon thereafter be again subject to this claim. He submitted that this is an abuse of process, and not in the public interest, and that the claim should be dismissed. I return to the earlier decision of the Commission. In the Commission in Court's decision CFMEU & Others v BHP Billiton Iron Ore and AFMEPKIU & Others v BHP Billiton Iron Ore Pty Ltd & Another 84 WAIG 3219 at paragraph 130 to 134, the Commission stated:

> "130 The evidence of Mr Tracey was that there are approximately 40 to 50 WPA employees who do not accept the AWA offer and all of these employees wish to have their terms and conditions of employment determined exclusively by the award. Mr Tracey's evidence did not extend to WPA employees employed in rail.
>
> 131 The evidence of Mr Harbud, an engine driver was that he wishes to have his conditions of employment protected by the award. Mr Harbud is a rail co-ordinator and is a FIFO employee who commutes between Victoria and the Pilbara.
>
> 132 BHPB's evidence was that as of early December 2003 only 36 WPA employees, a significant proportion of whom are apprentices, had not signed an AWA. Seven of the 36 are FIFO locomotive drivers.
>
> 133 The evidence of Mr Goodwin was that there are three remaining former WPA employees in the port maintenance department and one has advised Mr Goodwin that he does not wish to have his employment conditions determined by the award. Mr Dunbar's evidence was that none of the six employees in the Mining Department on WPAs suggested to him that they would prefer to be on the award. Five of the six WPA employees in Mr Slocombe's section have been spoken to by Mr Slocombe and none advised that they wished to be covered by the new award.
>
> 134 The Commission has reservations about this claim arising from the conflicting evidence as to the wishes of the WPA employees themselves. We consider the claim would have had greater strength had there been evidence directly before the Commission, rather than indirectly, about the wishes of the employees. The claim is refused.

118 The Commission went on at paragraphs 306 and 307 to say:

> "306 In the Commission's view, it is clear from Mr Harbud's evidence, particularly under cross-examination, that his contract already covers some of the overtime requirements for which he makes claim. This is different to the Operational Component 2 of the AWA contracts whereby they may work past 12 hours in certain circumstances. We have limited evidence to allow us to conclude whether or not the requirements contained in the Operational Component 2 could be valued at a differential of $10,000 in the salary packages. However, it is the case that the Operational Component 2 is not the only condition of employment which differentiates the AWA and FIFO contracts. This is clear from the evidence of Mr Ireland.
>
> 307 Mr Harbud's evidence also challenged the variations to his start times. This concern is similar to award drivers and will be covered later. The difference for Mr Harbud is in relation to the sliding of his tour. He did not object to sliding his tour as long as he receives sufficient notice so as to make appropriate travel arrangements. For Mr Harbud this means being advised, before he leaves site, of the commencement of his next shift. This is a practical issue, which on the evidence does not happen frequently, and in the Commission's view does not require an amendment to the award. It is the Commission's view that the evidence does not support any award changes for FIFO drivers, including the coverage of FIFO drivers within the award as mentioned earlier."

119 It can be seen from those Reasons that the claim for the WPA/FIFO drivers to be covered by the Award was not granted. The earlier claim extended also to other employees under WPAs. The issue of the effect of s.4H did not receive any mention. The claim now comes to the Commission in a slightly different form and there has been additional evidence led as to the wishes of other WPA drivers. For these reasons I do not accept the submissions of the respondent, that the claim should be dismissed as an abuse of process, or not in the public interest. In saying this I understand that ultimately the present claim seeks the same result (with a salary increase) as was sought in the earlier application.

120 As to the merits of the Award amendment, Mr Schapper submitted that in respect of the drivers under workplace agreements the applicants have shown that there are powerful considerations why the Award amendment should be made. There is a

manifest unfairness to be corrected by the Commission. He submitted that a dispute between the parties existed as to the coverage of those employees. The Commission needed to resolve the dispute. He submitted also that, "it is believed that the WPA drivers' wages have been suppressed by BHP by way of punishment for them refusing to enter into AWAs" (paragraph 25 of the outline of submissions).

121 Mr Schapper submitted that these drivers had been on a remuneration package of $123,974 in September 2004 for a 46 hour week. They received a $5000 bonus in June 2005 which all employees received. The Award drivers are paid $144,238 for a 48 hour week. Then in July 2005 the company without explanation gave these drivers a $10,000 pay increase, backdated to 11 April 2005, in anticipation of these proceedings. Mr Schapper submitted that those drivers are not paid the Award rate as they should be, hence the Commission should insert a provision in the Award to reference the WPA/FIFO drivers in the Level 5 classification in Schedule 1. This will remove any doubt as to the applicability of the Award. Other than this change, which will apply the Level 5 pay rate of $144,238, no other change is sought to their terms and conditions. The parties can be left to work out the detail of wording to give effect to this. This increase should be applied with retrospective effect. This retrospectivity is justified by the respondent's failure to maintain WPA drivers' wages at a reasonable level.

122 Mr Schapper submitted that further to the evidence presented to the earlier Commission in Court, the two remaining WPA drivers have now given evidence of their desire to come under the Award. It is clearly the intent of the FIFO drivers that their conditions not be altered but also that they receive the protection of the Award. It is not clear from Mr Hoare's evidence why the employer, when applying the last increase to WPA drivers, backdated the increase to April 2005 and not September 2004 in line with Award drivers. Notwithstanding the slight difference in hours worked per week, the pay rate should be the same, as the increased flexibility offered by the WPA drivers justifies this.

123 Mr Schapper tendered a comparison document for those drivers. They work 12 hour shifts on a 12 on/10 off roster. He submitted this amounts to 45.94 hours per week. If the Level 5 rate was compared to the same hourly base per week the salary would be $138,048. By preparing the mode of working arrangements for their drivers, albeit under the Award, the flexibilities enjoyed by the company will be enjoyed. Mr Schapper compared these flexibilities to those of AWA drivers who enjoy an 8.5% pay margin over Award drivers due to the additional flexibilities. Mr Schapper submitted that the comparison the applicant sought to use in application 157 of 2003 was between WPA and AWA drivers and the claim was rejected. The comparison the applicants now seek to make is between WPA and Award drivers.

124 Mr Dixon submitted that Mr Ashton's evidence is that he was looking for some security. He already has this in his contract which can only be altered by mutual agreement. Mr Dixon submitted that the conditions for Award engine drivers and WPA/FIFO drivers are different in terms of hours, superannuation, bonus, rostering, and the increased flexibility of FIFO drivers. The respondent's submitted that there has been no case made out for the Commission to alter the present position of FIFO drivers when a proper evaluation of the relative value of the two packages is made. The principle concern of the FIFO drivers was that their terms and conditions not be altered. This cannot happen without their consent. There is no justification to alter their rates of pay.

125 The evidence of Mr Ashton is that he went on to FIFO arrangements for family reasons. The majority of tours are from Port Hedland, at a 3 to 1 ratio, with Newman. Although with the introduction of change-overs he works mainly from the mines. He simply goes where he is required. He says the company's attitude changed towards him when he did not sign an AWA. He believes he should receive the same as Award employees as he works the same hours but displays greater flexibility in terms of starting times and locations. He prefers also the Dispute Resolution Process contained in the Award. In his mind the Award provides protection of work conditions.

126 Mr Gunovich entered into a workplace agreement for fly in/fly out in March 2001. Mr Gunovich resides in Melbourne. He tried unsuccessfully to make an arrangement with BHPB whereby they would book and pay for his Melbourne – Perth travel on a cost neutral basis. He did not take up an AWA in September 2002 as he had lost faith in workplace agreements given the company's position on his airfares request. He would prefer to be under the Award as, in his mind, there are better outcomes in conditions and remuneration and there are more protections. He agreed that the roster clerks try to accommodate his needs regarding travel but that this is not always possible.

127 As to the working arrangements and conditions for WPA/FIFO drivers there appears to be no complaint except that Mr Gunovich did not like the company's response to his travel arrangements proposal. I do not give this complaint any weight as the evidence of Mr Gunovich is that he wished to reside in Melbourne and reached an agreement with the company for payment of relocation costs by the company. It would appear that the contract as entered into included Mr Gunovich arranging his own Melbourne – Perth travel. The only change both employees seek to their terms of employment is a salary increase and to enjoy the protection of the Award. Mr Ashton likes the Disputes Resolution Process contained in the Award.

128 There can be no argument that the contract of employment for those employees can be unilaterally altered. Section 4H gives clear protection to the contract. The arguments for the claim must then rest on the desire by both employees to be under the Award and any disadvantage they may suffer in terms of pay rates. Their working arrangements are not an issue.

129 The comparison of pay rates which the applicants put forward is displayed earlier in the decision. The comparison the respondent puts forward is displayed in paragraphs 28 to 31 of their Outline of submissions. The applicants also complain that these drivers did not enjoy their latest pay increase from September 2004 as did drivers under the Award. The applicants submit that the Commission should ignore the difference in hours worked as WPA drivers provide more flexibilities. I discount this argument as these arrangements are what the drivers sought and wish to remain on. The remuneration packages should be compared on a like with like comparison, as far as is possible. The applicants submit also that if the WPA drivers' hours of 45.94 per week average are compared to those of the Award drivers (i.e. 48 hours per week average) then the salary comparison would be 45.98/48 x $144,238 = $138,048 for an equivalent annual rate. The respondent uses a slightly different hourly figure, on a fortnightly basis, of 91.64 hours per fortnight. They submit that taking account of the difference in hours worked the equivalent Award salary would be $137,350.18. The WPA drivers are currently paid $134,760 per annum. The respondent submits that the difference in superannuation contributions must be factored into the remuneration package. If this is done then the base salary plus superannuation package for WPA drivers amounts to $149,818.40 per annum. The true comparison, salary plus superannuation and using equivalent hours, for an Award driver are $147,505.78. In other words the applicants submit that there is approximately $10,000 per annum difference in salary in favour of Award employees. If hours worked are equated then the difference remains about $6,000 per annum. The respondent maintains that hours worked and superannuation must be factored in and this displays that WPA drivers are advantaged in the comparison by approximately $2,000 per annum.

130 Mr Hoare's unchallenged evidence is that the weekly average hours worked by WPA drivers is 45.82. He says that the WPA drivers' salary when converted to a 48 hour average per week basis would be $141,171 per annum. Mr Hoare under cross-examination also says that if one looks at the group certificates for WPA drivers, which is total remuneration, they are paid above the Award for 2004/05 financial year and were above the Award for September 2004 to April 2005. These figures were inclusive of bonus payments (Transcript p.341)

131 I accept the calculations of the respondent as being correct. I accept also the argument that a salary versus salary comparison should not be made. The comparison should be in respect of remuneration. I have omitted references to other differences in conditions as those are not necessary for the purposes of these calculations. It would appear that on a proper comparison of remuneration between WPA drivers and Award drivers, the WPA drivers are slightly advantaged. The only remaining disadvantage that has been argued is that the pay increase for WPA drivers was delayed. Award drivers got an increase in September 2004 and WPA drivers had to wait until April 2005. There is no explanation by the respondent as to why this occurred.

132 In short, I find no reason to increase the salary of WPA drivers. Except for their expressed desire to be covered by the Award there is no real evidence to substantiate a claim for the Award to be amended to insert those employees. Their expressed desire appears to be for the protection of the Award which at least for Mr Ashton seems to relate to the Dispute Resolution Process. The only disputes referred to, which the employees have had with the employer, relate to pay or arrangements for travel. I have covered already those issues. I am not satisfied that the applicants have made out the claim and would hence dismiss this claim.

CREW DEVELOPMENT OFFICER (CDO)

133 Mr Schapper submitted that both the Co-ordinator and the CDO positions are already covered by the Award in terms of an allowance. However, by bringing them directly into the Award as a discrete classification this "will strengthen the position for the engine drivers who are on the Award to seek to perform other duties with the benefit and under the protection of the Award." (transcript page 385)

134 Mr Schapper submitted that there is no material difference between a driver instructor and a CDO. A driver instructor instructs and demonstrates driving and driving techniques in actual conditions; either on the mainline, in the Yard or at the mines. CDOs do a little more than that in that they do classroom instruction. The driver instructors and CDOs' duties overlap. Significantly, engine drivers who perform as driver instructors generally have a high level of skill. The CDO's position is the natural progression for drivers but some do not want to go on AWAs. Mr Symons was offered a CDO position and sought to negotiate with the respondent to remain on the Award, but as a CDO. This was rejected and Mr Symons declined the CDO position. This is unfortunate for the company given his level of skill. The company's attitude to AWAs is inflexible. The Award should be amended to incorporate the CDO position to ensure greater flexibility regarding the movement between classifications so the best people can do the job.

135 Mr Symons' and Mr Punter's evidence is that both CDOs and Training Instructors instruct on the mainline, in the Yard and in all other engine driver duties. Mr Schapper submitted that Mr Punter "balked a little" as to whether a Training Instructor assessed and passed out, but Mr Symons was unshaken that he was competent to and had assessed and passed out trainees. Mr Symons had not carried out class room instruction. Mr Punter's evidence is that the CDOs may conduct investigations or assist from time to time in the conduct of safety and disciplinary enquiries. This is not a central function of a CDO position. Mr Hoare's evidence is that the company uses AWAs if the original position is an Award position.

136 Mr Symons says that he was involved in a team for writing up procedures for propelling. The respondent maintains that the writing of procedures is part of the CDO task. There is no reason, in the applicants' view, why a highly competent driver like Mr Symons, who wants to remain on the Award and wants to contribute to the company, should not be able to do so.

137 The CDOs work a 42 hour week on 4on/4off basis. The applicants submit that the rate for CDOs, in the Award, should be $144,238 (engine driver salary) plus the annual driver instructor allowance which then gives a salary of approximately $147,000. This is nearer to the bottom level of the CDO range.

138 The respondent adopts the view that the CDO position is different to the Training Instructor position. The CDO is a staff position and is not on an AWA. Mr Dixon referred to the allowance in the Award for a Driver Instructor. He submitted this role could not be equated with that of a CDO. Mr Symons is a locomotive driver. His evidence is that once in the last 6 months he had undertaken a pass out. Five years ago he wrote up a programme. Mr Punter illustrated the difference in the two roles. A CDO drives for about 15 per cent of his work time and for a limited purpose. A CDO performs a much wider role than simply driving.

139 In my opinion, if one considers the evidence and looks at the position description for the Crew Development Officer [Exhibit R1, Tab 21] there appears to be a fair degree of overlap in the task of Training Instructor and the role of CDO. The basic functions of the CDO in the position Description are stated to be:

> "Observe, monitor, assess, educate and promote the competency of Rail Crew employees on BHP Billiton Iron Ore's Pilbara District Railroad System for purposes of ensuring safe and effective train operations, in accordance with Railroad Safety Regulations and company requirements.
>
> Operate trains over the entire BHP Billiton Iron Ore Railroad.
>
> Pass out drivers who satisfy all requirements in accordance with the progression training and driver level matrix, according to the instruction being undertaken."

140 The difference in the two jobs is described by Mr Punter. He says that the CDOs are involved in safety and disciplinary investigation; the Training Instructor is not. He says that CDOs carry out most of the investigations. CDOs are responsible for induction and classroom training. Mr Symons has certainly taught new drivers how to operate. I am not clear whether this is a full induction but I assume a similarity exists. However, Mr Symons has not been involved in classroom activities. Mr Punter says that CDOs do most of the passing out of drivers. Mr Symons says he has done this but clearly the frequency of the task is not high. Mr Punter does not deny this has occurred. Mr Symons says he has taken part in writing instructions, but this was limited and some 5 years ago. Mr Punter says that writing procedures is the responsibility of CDOs. Given this evidence there would appear to be a clear difference in the jobs in terms of writing procedures, conducting investigations, classroom teaching and the amount of actual driving done by CDOs. Mr Punter says that CDOs drive about 15% of their work time. I would add the Training Instructors, on the evidence of Mr Punter, have performed classroom instruction when on light duties. This suggests a capability to do the task rather than an integral part of the job. In summary, having weighed this evidence, I am persuaded by Mr Punter's view that the jobs of Training Instructor and CDO are in fact different and designed for a somewhat different purpose. The CDO jobs would appear to have a reasonable component of additional development and supervisory support work.

141 I should add that I have separately had before me a dispute involving Mr Symons concerning the fair allocation of work and an allegation of discriminatory practice. I do not need to cover that matter in any depth other than to say that the allocation of work is, of course, different to whether a new classification should be inserted into the Award. For the reasons given I accept that the CDO is a different classification with a role different to that of Training Instructor, albeit with some overlap of duties. I therefore reject any arguments that this classification is somehow already part of the Award and the Commission, by its actions, would simply be clarifying or making more certain the situation. I had heard no evidence that any disadvantage exists by the CDOs not being part of the Award, or that any CDO wishes to be part of the Award.

142 The evidence of Mr Symons and Mr Hoare is that Mr Symons could not try a CDO position, i.e. a staff position, to ascertain whether he liked it, and if not, then return to the Award. Mr Hoare says Mr Symons would need to be committed to the new position, and if it did not work out then apply for vacancies as an engine driver. If he did so he would be required to sign an AWA. In short, it can be said that the company's policy is not to offer any employment under the Award except for those who are currently covered by this instrument. Once an employee signs a new contract they cannot return to the Award.

143 The argument for the applicants is that the claim should succeed as it is necessary for career structure purposes and because of the respondent's attitude to AWAs. I note that Mr Symons has had the opportunity to act in such a role without having to go away from the Award. It is the case that the engine drivers have various levels of skills and pay. Largely engine drivers operate at the level 5 rate of pay and, but for allowances for certain duties, do not have a career structure in the Award. If they are to progress into supervisory, co-ordination or training/development roles they must progress to positions covered by AWAs or as staff positions. It is the case that Mr Hoare's evidence, in conjunction with the evidence of Mr Symons, means that BHPB will only accept a one-way approach to AWAs. An employee may take up an AWA but may not revert to the Award. The fact is that the company is legally able to offer AWAs and to follow their announced policy or preference for this form of industrial instrument. As indicated in previous Commission in Court decisions it is not for the Commission to seek to counter this approach. A dual stream of industrial instruments is legally available and operates differently. Having regard to the evidence, the objects of the Act and s.26 of the Act, I can find no reason to grant this claim. I am not persuaded that the applicants have made out a case for the Award amendment as sought.

TRAIN CO-ORDINATOR

144 The applicants submitted that there has not been any direct evidence of an unfairness operating in respect of CDOs, Co-ordinators and Supervisors. However, they should be added to the Award as the evidence is that there is considerable movement between the various positions and the engine drivers, who are already covered by the Award. This would provide a career path for engine drivers under the Award. This possibility was open to engine drivers prior to the industrial disputation of 1999. Mr Hoare's evidence is that once a driver goes to a staff position he/she is not able to go back to the Award. The Award will enhance the freedom of movements between the classifications.

145 Mr Schapper submitted that the Award already provides for a Co-ordinator's allowance, which a driver may receive whilst performing that role. The application merely seeks to make that provision a proper classification within the Award. The applicants submitted that clearly the positions are otherwise covered by the Award, given that Co-ordinators are on AWAs and given Mr Hoare's evidence; namely that AWAs are offered where the Award might otherwise apply. Additionally, if one looks at the duty statement of the Co-ordinator the duties are mainly those of an engine driver. The value of the position under the Award puts a value of the job at $150,249, i.e. $144,238 for an engine driver plus the allowance of $6,011.77. The rate for the Rail Co-ordinator is $155,000 through to $162,960. The claim is for a 48 hour week on a 4 panel shift operation.

146 Mr Dixon submitted that the Award provided for a driver co-ordinator's allowance; there is no position in the Award of driver co-ordinator. The JBJ Co-ordinator position is materially different to the engine drivers position. There is no case made out for incorporating a broader duty of co-ordinator in the Award and no evidence that any Co-ordinator wants the Award coverage.

147 In my view, the application in relation to the classification of Train Co-ordinator must fail. There is no evidence to support the application. The only Co-ordinators exist at JBJ. Previously there were other co-ordinators. There is no evidence that any Co-ordinator wishes to be covered by the Award. The salary of the JBJ Co-ordinator cannot be seen as in anyway inadequate. There is no disadvantage which has been alluded to for those employees. The applicants' case is built on the proposition that this position is largely that of an engine driver who co-ordinates a range of driving operations. This is the case. The applicants then propose that the engine drivers require a career structure in the Award and are prevented from achieving one. I have covered this argument above as it relates to the use of AWAs.

148 The drivers under the Award are not restricted from performing such duties and being paid for their work under the Award. The Commission in application 1246 of 2003 responded in part to restrictions on Award drivers being able to fully perform their role. This is not the case in this application.

RAIL SUPERVISOR

149 Mr Schapper submitted that supervisory positions are positions that engine drivers naturally aspire to. All of the company's supervisors are ex-engine drivers. It is a natural career path. The structural efficiency considerations under the wage fixing principles required the establishment of career paths. The company only offers these positions under AWAs, and some drivers want to remain under the protection of the Award. This artificial constraint should be removed by introducing the classification into the Award.

150 Mr Dixon submitted that the applicants had made no case for incorporating supervisors into the Award except that the decision is a natural career progression for engine drivers. The company adopts the submissions of Mr Gifford that it would be unusual to make supervisors subject to the same Award as employees they supervise. There is no apparent dissatisfaction with their terms and conditions or desire to be part of the Award on the evidence. There is no evidence that career movement is restricted by not being part of the Award.

151 The submission of Mr Gifford, adopted by the respondent, is that historically and typically supervisors, who are responsible for supervising and disciplining personnel are not covered in the same award as those personnel. The applicants complain that this is not a modern notion for an award and there is no reason why this rationale should apply. The respondent submits that, on the evidence of Mr Punter, supervisors are part of the management teams and need to assess the performance of other personnel. I must say that I am not wedded to any notion that it is necessarily inappropriate to place supervisory positions, who may discipline personnel and assess performance, in the same award as those who are subject to their decisions. I have not performed an exhaustive search, but I note that there are awards in the mining industry which include duties of training, assessment, co-ordination and assisting in supervising (Mineral Sands Industry Award 1991; Iron Ore Production and

Processing (Hamersley Iron Pty Ltd) Award 1987). Those duties may be said not to be full supervisory positions, but in any event there are awards of this Commission and the Federal Commission, not in the mining industry, which include supervisory categories of employment in the same award as subordinate classifications. The issue in my mind is more whether there is an adequate rationale for inserting the classification of supervisor in the Award.

152 The evidence of Mr Punter is that there are 7 or 8 supervisors in Rail. His evidence and the position description display that each supervisor is required to be certificated as a locomotive driver. Mr Punter was previously a driver for Goldsworthy and then the respondent. He is no longer passed out to drive on the mainline. Mr Punter's evidence is that the position description serves commonly for each supervisor, albeit they perform different roles. He has performed a variety of supervisory roles and some additional training may be required if one is to perform in the role of another supervisor. Supervisors act in the position of Superintendent, Rail. Mr Punter was acting in that role prior to taking annual leave. He says also that CDOs can act in supervisor positions. The duties of a supervisor are stipulated in the position description. In short the main common duties, i.e. non position specific duties, are to schedule work, conduct safety and disciplinary investigations, stand down personnel when required, accompany personnel for drug and alcohol testing.

153 The applicants' submissions with respect to incorporating a classification of supervisor in the Award rely not on any disadvantage or unfairness which they experience currently. The submission is that engine drivers should enjoy a career structure in the Award to which they can aspire. The applicants submit also that on the evidence of Mr Hoare the option for an engine driver, in terms of instrument of coverage, is all one-way. Therefore if an engine driver wishes to seek career advancement he/she cannot do so and remain under the protection and coverage of the Award, and seek redress via the Commission. The evidence of Mr Hoare is that there is an open ended offer to award personnel to sign on AWA at any time. If they do so then they attract the terms and conditions of the AWA and are entitled to have their accrued sick leave paid out. No new drivers, or in fact any rail personnel, are employed pursuant to the Award. There have on occasion been acting arrangements, whereby an award driver may act in another position, and when that acting or short term arrangement concludes, they resume their conditions pursuant to the Award.

154 In my view, the applicants have led no evidence as to whether any supervisor seeks to be covered by the Award. The applicants have also not led any evidence as to any disadvantage suffered by any supervisor. The evidence of Mr Punter is that he is 'quite happy as he is'; meaning as a supervisor he does not seek any change. There is no evidence of disadvantage in terms of working arrangements or salary for existing supervisors.

155 In essence the sole basis upon which the applicants support the claim is that engine drivers should have a career structure and not have to leave the protection of the Award to get one. For reasons expressed earlier, I am not persuaded by this sole argument. I will not go to all the differences in terms and conditions relating to a supervisor under present arrangements as compared to the Award, or the argument that these differences in conditions are a matter which the Commission could address separately if minded to include supervisors in the Award. I am not minded to include a Rail Supervisor classification in the Award. Irrespective of the question of onus, there is no evidence which supports a change to the existing arrangements which apply.

TRAIN CONTROLLER

156 The situation, evidence and arguments in relation to Train Controllers are different and more complex to those described above for the other classifications. Mr Schapper submitted as follows. The Train Controllers are the prime interest of the application and most of the evidence was directed towards them. They are presently classified as staff. There is an unfairness operating for these employees that should be corrected by the Commission in the form of incorporating them formally into the Award.

157 The value of their work must be compared to the value of work in the Award of those they work most closely with, i.e. engine drivers. The broad functions of Train Controllers are to control and direct the safe and efficient movement of locomotives and rolling stock. This is performed in accordance with the Railway Rules. This is a complex task involving train crossings, maintenance gangs, work trains, high rails and incidents. Train Controllers also supervise train crews on the mainline and in the Yard, excluding disciplinary matters. The Train Controller also authorises the overriding of the ATP system. This is a supervisory task.

158 Train Controllers perform a planning function. The controller has to disassemble, cut out, send to maintenance, and reassemble a very large number of cars and engines daily. The controller has to ensure the efficient operation and utilisation of this capital stock. The instructions of Mr Bartholomew to assign supervisors to do locomotive allocation had not proceeded. This is because the Train Controller is in the best place to know what is going on and to do the task of locomotive allocation. The engine driver, supervisor, co-ordinator, and CDO do not have such a responsibility to co-ordinate this capital usage efficiently and safely. On this comparison the value of Train Controllers exceeds that of engine drivers. They are responsible for a much larger stock of equipment than an engine driver at any one point in time. Mr Bartholomew recognises that Train Controllers are at the heart of the system. The JBJ co-ordinator's role is limited to driving and to co-ordinating at JBJ and beyond to the mines. These movements still have to go to train control for them to set the switches. The JBJ co-ordinator's job is far less onerous than that of the Train Controller. Yet the salary comparison of a maximum of $122,000 compared to over $160,000 is grossly inadequate.

159 Train Controllers are required to know the rules and regulations for the rail system, like engine drivers. They are also required to have a detailed understanding of the railway, the track, and various conditions that apply on various parts of the railway, locomotive requirements in terms of the work required and when they are required, rolling stock, and available labour and resources. The Train Controllers who are at the heart of the system, with extensive authority and responsibility, have a major impact on the efficiency of the system. The comments of Mr Bartholomew about drivers and Train Controllers support this view. Yet their salaries are a minimum of $50,000 off the pace. The aim of bringing Train Controllers under the Award is to ensure they receive a fair level of pay in comparison to all those employees with whom they work.

160 Train Controllers had discussed the issue of pay with the company, the result being that the company placed a maximum salary cap on the Train Controllers of $122,500. This has meant that Train Controllers like Mr Emmitt can receive no adjustment to his base salary. He received a one-off lump sum payment which did not count towards his superannuation and leave. The incorporation of Train Controllers into the Award at a fair level of salary will correct the situation. The company can continue this unfairness because Train Controllers do not need to be qualified engine drivers and the market provides a higher level of pay for engine drivers.

161 Train Controllers need the protection of the Award so that they could go to the toilet. The workload and working arrangements of Train Controllers is such that they cannot leave their board. They cannot get a crib or meal break. The two new Professional Development Officers (PDOs) will not provide the coverage required to provide breaks to Train Controllers who operate a 24 hour, 7 day a week arrangement. Manning the GML and mainline boards will not provide for breaks because

those boards are directly manned separately during the day, and breaks are not able to be taken. Train Controllers have been complaining for some considerable time about the lack of breaks, but to no effect. The company has now only belatedly recognised that something has to be done. The lack of adequate toilet facilities and the inadequate layout of accommodation, particularly as trainees are now being instructed, are also problems which need to be addressed.

162 The company's approach to the Train Controllers' needs to take toilet breaks, meal breaks and occasional breaks is slack and 11th hour in nature. Management has the responsibility to redress this serious problem and has not acted with any urgency. Management has left it to Train Controllers to accommodate the work pressures of ramping up production. This has left Train Controllers in a very difficult position. Common sense, safety and decency dictate that Train Controllers should be able to take these breaks and evidence indicates clearly that they are currently not able to do so. They need the protection of the Award so that the company will be made to act to correct the problem. The dedication and commitment of Train Controllers is apparent in their giving of evidence. Mr Schapper pressed the point that there are real safety issues apparent in the workload of Train Controllers.

163 Some of the Train Controllers receive staff leave loadings on their annual and long service leave, and the company pays their health insurance. The applicants seek preservation and continuation of these conditions. The applicants seek a direction from the Commission that the parties discuss the preservations of these entitlements, which apply to some Train Controllers. The claim for $138,829 is based on a 42 hour week. The hours are more properly 44 hours per week given the additional time spent on shift changeovers. Therefore, the work value should be based on a 12.5 hour shift.

164 Mr Dixon submitted that the company intends, as soon as it is able, to provide relief for train controllers so they are able to take a 30 minute break between the 5th and 7th hour of their 12 hour shift. This is to be achieved by a number of measures; including two new PDOs who will perform the relief required for Train Controllers. Additionally, with the employment of additional 8 Train Controllers the company will man the GML and mainline boards separately. These boards can then be coupled together to achieve relief breaks for Train Controllers.

165 He submitted that the company accepted that there has been an increase in workload for Train Controllers and hence the issue of breaks has become more significant in recent time. Mr Johansson's summary of changes for Train Controllers (Tab 18) lent support to this view. He concluded, "with the increased workloads it is becoming more difficult to find time to either take time within the shift to partake of a meal or go to the toilet." Mr Goiack's evidence is that, when everyone is trained, he is hopeful that the issue of breaks can be rectified by the end of the year. This applies also for shorter breaks. Structured breaks of 15 minutes raised an issue of an increased number of hand overs. This causes a lack of continuity. The incoming Train Controller must be briefed by the outgoing Train Controller as to what is happening on the board and operational requirements. The solution to this is not as simple as the applicants present, i.e. the company needs more people. Mr Goiack acknowledged that the issue of toilet breaks needs to be addressed and the measures mentioned will address this. The issue of breaks, however, does not justify a general Award prescription.

166 Mr Dixon submitted that other measures will also reduce the workload of Train Controllers. These measures include the introduction of new technology, and a new physical layout for the work area. This will enable Train Controllers to more easily look after each other's boards. The training of more staff to be confident on all boards will also assist. The yard supervisors have taken responsibility for the overall management of train crews and locomotives. The locomotive allocation by supervisors is still being pursued. Integrated planning will help these logistics. There have been steps to reduce the use of the radio train control channel. Mr Goiack accepted that more work needs to be done on this. The remote access road travel will be allocated to the Emergency Services Department. The company does not accept that the workload of Train Controllers is excessive. The evidence before the Commission is that there is a 15 minute handover period prior to the start of the shift for Train Controllers. The only Train Controller equipped presently to handle all three boards is Mr Maurice Ritchie.

167 Mr Dixon submitted that it is important that the Commission assess the proper value of the Train Controller package in determining this matter. The Train Controllers in a series of meetings with management, culminating in a meeting on 12 April 2005, agreed that a greater structure for a Train Controller was desirable. This recognised that there is a different set of skills and responsibilities required if one is to operate all the Boards. The operation of all Boards would be at Level 4. There is distinction between a Train Controller who is 6 months qualified and one with lengthy experience. The regular shift pattern of Train Controllers compared to the irregular pattern of locomotive drivers needs to be considered. Engine drivers frequently operate away from home.

168 There is no requirement for Train Controllers to be qualified as locomotive drivers. They possess a different skill set. Mr Goiack, through his experience, is well qualified to make an assessment of how to utilise the skills of Train Controllers. The company rejects the suggestion that the functions of the Train Controllers are more important than others in the operation. The operation is an integrated one and depends on input and expertise from many people. There has never been a link between the terms and conditions of Train Controllers and locomotive drivers. The only time the Train Controllers have been subject to an Award was through GML and the ADSTE Award. This award operated for a short period of time and the link for Train Controllers were to shovel operators [Exhibit R5].

169 The Train Controllers are rated as part of and relative to other staff positions and responsibilities. The supervisor has the significant role in co-ordinating performance management activities, managing people, allocating work to crew members and in grievance matters. Mr Dixon submitted that the responsibilities of Train Controllers and train drivers are different; they have different roles. The Train Controllers have received regular pay increases and bonuses in recent years. In terms of comparisons to market rates, the evidence supports the view that Train Controllers at BHPB are at the top end of the payments for such a role. The Commission should pay particular regard to the imposition the Award would have on existing flexibilities that exist with Train Controllers. Mr Dixon submitted that there, "can be no suggestion that the absence of an award is a deterrent to anyone taking up the position of Train Controller".

170 Mr Dixon outlined the range of issues arising from the imposition of Award terms to staff conditions. It is difficult to weigh the components of each package. However, when all the terms and conditions of Train Controllers are assessed, those experienced controllers at the upper level compare favourably with engine drivers at Level 5 [Exhibit R5].

171 In my view, the case for Train Controllers centres heavily on the increased workload and, complexity of the job which they undertake. It is alleged also that they undertake supervisory and planning tasks and this has to be factored into their levels of salary. The lack of meal and toilet breaks would seem to be a direct result of the progressive increase in workload, perhaps most notably over the last year or two (the time period is not completely clear), as production has ramped up and the number of trains per day has increased. Mr Johansen's written comments support this view. This document was introduced on behalf of the applicants. He compares production for the period April 2003 to April 2005. The evidence is that the cycle is to increase further from 12 to 14 trains a day. It is the case that when production demands were at a lesser level, the company and the

Train Controllers relied on less busy times, in terms of locomotive and other movements, to go for a break, have a meal or go to the toilet. These are effectively not programmed into the work arrangements of Train Controllers. It was left to their discretion as to when and how they took breaks. The weight of evidence is clearly that now the workload is such that not only do some Train Controllers take the radio to the toilet on occasion, but it is hard to find time to eat a meal, drink a cup of coffee or be away from the board for any length of time. Clearly a Traffic Controller can be away from the board at times, but must either be covered or still be able to monitor the radio traffic, eg. when the Traffic Controller leaves the board to have a cigarette.

172 There is a difference of evidence, about whether the workload is excessive, between the Train Controllers who came forward and Mr Goiack. Mr Punter agrees that the workload of Train Controllers is at times extreme and that this workload will increase with increased production. Mr Goiack says that the workload of Train Controllers at BHPB is not excessive. He says the workload is no different to other busy boards at other locations. He makes this comparison having regard to his experience with Queensland Rail. Mr James says that his workload has doubled; he eats on the run and waits for a lull in proceedings to go to the toilet. He sometimes takes the radio to the toilet. He considers the move to 14 trains will be a bit beyond the Train Controllers' capacities. Mr Thompson says that the workload has more than doubled in the time he has been a Train Controller. He has been a Train Controller with the respondent since 1995. He says it will be very difficult to move to 14 trains as he does not get a break now, albeit he does take a cigarette break but is still running the Yard. He takes the radio to the toilet. Mr Porter's evidence is that the Train Controllers' job is very intense and the main problem is the lack of personnel. There are quiet periods, but in the main the job is pretty full on and there is a difficulty in getting away from the board. He is not happy going to the toilet in case he misses a radio transmission. He believes the increase to 14 trains will likely double/triple the workload. He says experienced controllers are expressing concerns about this forecast change to 14 trains. Mr Emmitt says his work is very trying and stressful. On some days he has to have a meal at his workstation. On occasion he has sat with his legs crossed as he was unable to take a toilet break due to the volume of traffic. Mr Kara says his workload has increased with the introduction of mid-track change-overs. He works flat-out and he has heard experienced controllers going berserk due to the workload.

173 In terms of salary for Train Controllers there are essentially two themes running in the evidence and submissions. Firstly, the applicants maintain that the salary level is grossly inadequate when compared to other positions employed by BHPB, especially locomotive drivers. The complexity, workload and other requirements of the Train Controller's job are far greater than that of at least the engine driver and the JBJ Co-ordinator. The Train Controller's job incorporates both supervisory and planning requirements. The respondent, largely through the evidence of Mr Hoare, but also through Mr Goiack's evidence to some extent, says that the pay structure for Train Controllers is being considered, but having regard to the market rates, job size and the Hay point assessment, BHPB pays very competitive salary rates for Train Controllers. Added to this approach by the respondent is an argument that somehow the minutes of the meetings with Train Controllers, culminating in the meeting of April 2005, support a view that the Train Controllers were happy with the pay levels arising from the proposals put forward at that meeting. I dismiss this last argument as it appears to me that the more correct view is that those salary levels, or at least the upper level, were dictated by the respondent and that Mr Goiack and the Train Controllers accordingly worked within given limits to attempt an agreed solution. Certainly the evidence is that the pay levels for Train Controllers compared to drivers were brought up as an issue (see the evidence of Mr Emmitt and Mr Kara). The evidence is that the justification given for the difference is that drivers worked more hours, worked away from home and that there were other allowances. These are factors which are relevant and which are different for the two jobs.

174 Secondly, the conditions under which the work of Train Controllers is performed justifies the increase in salary sought, and the intervention of the Commission. The applicants in their submissions have not differentiated these points precisely in this way but I understand their submissions to mean this. The salary is too low compared to others in the workplace, but also the salary is too low given the working conditions. Both the low salary and the disadvantages of the working conditions warrant the Commission intervening to insert the classification of Train Controllers into the Award and to provide the Train Controllers with a substantial pay increase. The respondent, in relation to working conditions, concedes through Mr Dixon that, "there has been an increase in the workload of Train Controllers and the question of breaks has become more significant in recent times". Mr Dixon submitted that "there has been an ongoing change" and he reinforced the steps being taken by the company to address this. These included extra manning (in terms of recruitment of PDO Officers and trainees), office redesign, administrative re-arrangements, new technology and cross-skilling of Train Controllers. In an exchange with the Commission as to whether BHPB accepted that the workload of Train Controllers is excessive Mr Dixon responded as follows:

> "It's accepted that there is a need for a structured break. It is not accepted that the workload is excessive. In other words, that whilst people are in the normal performance of their duties the workload is excessive, but the outcome of these discussions was that there was - - it was necessary to recruit more people - that was back in November - and that occurred and is ongoing."

175 The evidence of Mr Goiack is that he commenced in his position, which is responsible for the work of Train Controllers, in January 2005. The discussions to address a number of the problems [Exhibit R1, Tab 23] commenced before he started with the company. Some of the solutions are in an early stage (office layout) or will take some time to complete. The new technology for the Yard will not be operational before July 2007. The manning and skilling components will not be complete before the end of 2005. The administrative changes relate mainly to reallocation of tasks whereby the supervisors are to do crew allocations and locomotive allocations. The evidence of the Train Controllers and Mr Punter is that locomotive allocation is still done by Train Controllers. There was some doubt expressed by Train Controllers also about the real workload reduction involved in the crew allocation changes. The trainees are to assist with data entry and other tasks.

176 Mr Punter's evidence is that the directive by Mr Bartholomew of 16 May 2005 has not been implemented properly. This directive affects the work of Train Controllers and Supervisors. Train Controllers were to telephone supervisors if they required a driver for a job. The supervisor was then to organise the driver. The task would appear to be happening but some Controllers query its effectiveness. The task which clearly has not been implemented is that supervisors were to organise the locomotive requirements in the yard. Mr Punter says this has not happened as the locomotive allocation sheet has not been drafted. The sheet is a one page sheet and he does not know why this task has not been completed. The evidence of the Train Controllers, not contradicted by Mr Punter, is that it is more efficient for the Train Controllers to perform this task as they have the information readily at hand. The directive by Mr Bartholomew was an attempt to reduce the workload of Train Controllers. Given the lack of implementation some three months later, it would seem that the directive has not achieved its purpose.

177 There is a difference in evidence as to the extent of supervisory work undertaken by Train Controllers in respect of locomotive drivers, crews and others. I would understand from the evidence that Train Controllers become aware of requirements on the mainline, they notify the relevant people, arrange for a crew to attend at site, monitor and control the movements of personnel and goods to both keep operations going while the problem is addressed and to get assistance to the site. The supervisor actually supervises the work at site.

178 I do not seek to cover the issues mentioned in evidence which relate to radio procedure or switches that malfunction or are not recorded on the system. Some of the Train Controllers have expressed difficulties with these operational matters, and as far as radio procedure is concerned it is clear that the respondent accepts that this must be addressed.

179 I return to the two main themes of salary and working conditions. It is the case for reasons mentioned previously, that the valid comparison must be between remuneration packages and not simply salary levels. Exhibit R5 attempts those comparisons and this document was not damaged, in my view, by the applicants' submissions. This is with the exception that clearly the Train Controllers' shifts are not typically 12 hours in length, but are extended by 15 minutes (approximately) in hand over at the start of each shift. Principle 11(d) states, in part, that the rates of pay for classifications which are to be inserted in an award "will be assessed by reference to the value of work already covered by the award". The assumption has been that Train Controllers work in concert with locomotive drivers and others and hence these are the rates which Train Controllers legitimately or otherwise have an eye to. This view point is understandable.

180 It is clear that, irrespective of any reference to [Exhibit R5], Train Controllers have been assessed by the company as justifying a salary less than locomotive drivers. If one compares the salaries paid to AWA drivers (I am mindful of evidence in application 1246 of 2003) then they clearly have a salary greater than Train Controllers, and seemingly at least some other benefits which Award drivers do not. In saying this I am not seeking to make an exact comparison of conditions applicable to AWA drivers and Train Controllers. The point is simply that the company assessed the salary level for Train Controllers irrespective of the industrial instrument, to be of a lower level than locomotive drivers. Mr Hoare gave a good explanation as to how jobs are valued; specifically he referred to Train Controllers. Part of the assessment process includes the Hay point rating. Part of the assessment concerns market rates. The evidence unchallenged is that BHPB pay at the top end of the salary range for Train Controllers, compared to the market. I am aware from other proceedings (application A3 of 2005) that BHPB appears to pay at the top end of the salary range also for locomotive drivers. There is no evidence that BHPB has had difficulty in recruiting Train Controllers and there are a number of Train Controllers in training at present. The point is that if Train Controllers are undervalued by the company in comparison to locomotive drivers, irrespective of the Award, this has been so for some time. Hence the allegation would be that the company has got it wrong for sometime and the Commission should step in to correct the situation. Alternatively, there are matters which the company has unfairly not factored into their calculations, or ignored, which the Commission should entertain. The further option is that there are matters within the work of Train Controllers which have changed so significantly that they now justify a salary increase from a level of $117,500 to $138,829. The applicants' real position, by the amendments which they sought, is that the salary should be $155,000.

181 There are, of course, a range of salaries applicable to Train Controllers. This is clear from the evidence of the Train Controllers and the proposals discussed at their meetings with management. I do not need to deal with each of those salary levels other than to say that, if I were minded to include the classification in the Award, for structural efficiency considerations, and in accordance with the objects of the Act and s.26 of the Act, and in light of the proposal put forward by the Train Controllers (exclusive of the salary levels), I would need to give careful consideration to levels of pay for Train Controllers, rather than simply one salary rate.

182 I am not presented with any historical comparisons in evidence. I am told that the complexity of the job, the supervisory, planning and other responsibilities of the job are greater than locomotive drivers. I am not told that the actual job of Train Controllers has changed, I am told that the workload is excessive and the working conditions are poor.

183 In my opinion, the applicants have clearly made the case that the workloads of Train Controllers are at times excessive and that their working conditions need correction. This is in so far as increasingly the Train Controllers do not feel able, during a 12 hour shift, to take a break for a coffee, a meal or to go to the toilet. The practice of needing to take the radio to the toilet to ensure operations are covered is self-evidently not adequate. The company can be rightly criticised for allowing this to happen and for placing the onus on Train Controllers to self-regulate when clearly the pressure of work, and the commitment of Train Controllers, is such that they are caught at times with no other practical option. The only other option is to declare across the radio that they will be taking a break and hope that an emergency does not arise. Similarly, having weighed the evidence, the problem that Train Controllers have increasingly been unable to eat a meal over a 12 hour shift has not been addressed with sufficient urgency by the company. My comments are not designed to be critical of any individual. However, it is one matter to recognise a problem and attempt a solution. It is another matter to attempt the solution with sufficient priority. It would seem that the issue of breaks is directly related to having sufficient coverage or back-up of qualified Train Controllers to enable the breaks. This is directly related to the level of manning.

184 It is not apparent to me from the evidence or submissions that the level of skill or responsibility required of Train Controllers has changed. The basic skills and responsibilities, as do the duties, remain the same. The situation is that the volume of traffic has added pressure and complexity to the job. The respondent is seeking to add to the skills and responsibilities of Train Controllers, in the future, by training them to be competent on all three boards. This is said also to increase the potential for relief and redress the pressure of work. Some doubt as to the practicality of this cross-skilling was expressed by some experienced Train Controllers. The task for the company is to more urgently alleviate the pressures of the job, so that adequate breaks and relief can be obtained. Each of the measures to be taken are changes to operational matters, not changes to comparative salary levels. That is of course with the exception of the cross-skilling.

185 There is one other pay matter which has arisen during the hearing which should receive some comments. There is evidence that suggests that a Train Controller, at the top of the salary scale, can receive a salary increase, not a bonus, and yet have that salary increase not account for leave and superannuation purposes. If this is the case then it would lead to a view that the salary scale for Train Controllers is frozen or capped. I do not understand, if this is the case, why this should be so, given other salaries paid by BHPB are seemingly at times increased and not capped. This would lead to an unfairness.

186 I am aware of arguments by the applicants in the 6% case, AFMEPKIU & Others v BHP Billiton Iron Ore Pty Ltd & Other 83 WAIG 1672 and in application 1246 of 2003 whereby the workload of other employees at BHPB has increased due to increased production. The arguments, including arguments about changed work practices, have been used to justify wage increases. Those arguments have sometimes included arguments about breaks. In this way it would seem that Train Controllers are not the only employees who have been affected by the increased production demands. Albeit Train Controllers experience some specific problems in terms of breaks.

187 There is the evidence unchallenged about the comment made by Mr Bartholomew in relation to drivers and Train Controllers. It is the case that drivers also are essential to the operation and it is difficult to give this comment much weight in the context of justifying a substantial wage increase. For the reasons expressed I do not consider that the applicant has made out the case for a salary increase for Train Controllers. There is no evidence or submission about other existing conditions of Train Controllers which would cause disadvantage or justify the insertion of the classification into the Award. The applicants wish to retain certain accumulated conditions. This is a neutral point. The only condition which has received real attention is that of breaks. As stated, this is due directly to increased workload by increased traffic on the BHPB railway system. I take from the actions of the Train Controllers who came forward that they wish to be covered by the Award; albeit no Controller gave direct evidence as to the rationale for seeking the change (unlike the WPA drivers). It is my assessment that the Train Controllers seek the Award coverage to achieve a salary increase, to force the company to act to address the breaks issue and to have potential redress for future issues which may arise in dispute.

188 My reasoning displays that I consider the strongest argument for the inclusion of Train Controllers in the Award to be that the Commission's intervention is warranted to redress the unsatisfactory situation concerning breaks. I must weigh this issue against the evidence of the respondent in terms of changes being undertaken to correct the position. Albeit I have criticised the pace of some of the changes, I do not consider that given the history of coverage of Train Controllers and the circumstances that now present, the Commission should act to amend the Award as claimed. I am not persuaded by the applicants that having balanced the needs of the company and the employees, and having regard for s6(af) and 6(ca) of the Act, the relief sought is warranted. I would dismiss the claim.

189 The claim other than the changing of the name of the CMETU to the CFMEU in Schedule I and III, is otherwise dismissed.

2005 WAIRC 03110

IRON ORE PRODUCTION & PROCESSING (BHP BILLITON IRON ORE PTY LTD) AWARD 2002

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH & OTHERS
	APPLICANTS
	-v-
	BHP BILLITON IRON ORE PTY LTD & THE AUSTRALIAN MINES AND METALS ASSOCIATION INC
	RESPONDENTS
CORAM	COMMISSIONER S WOOD
DATE	TUESDAY, 22 NOVEMBER 2005
FILE NO	APPL 338 OF 2005
CITATION NO.	2005 WAIRC 03110

Result	Classifications not inserted; Award otherwise varied
Representation	
Applicants	Mr D H Schapper of Counsel
Respondents	Mr H Dixon of Senior Counsel and with him Mr A Rollnik of Counsel on behalf of BHP Billiton Iron Ore Pty Ltd Mr R Gifford on behalf of the Australian Mines and Metals Association Inc

Order

HAVING heard Mr D H Schapper, of counsel on behalf of the applicants and Mr H Dixon, of senior counsel and with him Mr A Rollnik of counsel on behalf of BHP Billiton Iron Ore Pty Ltd, and Mr R Gifford on behalf of the Australian Mines and Metals Association Inc, the Commission, pursuant to the powers conferred on it under section 40 of the Industrial Relations Act, 1979, hereby orders:

(1) THAT the *Iron Ore Production & Processing (BHP Billiton Iron Ore Pty Ltd) Award 2002* be varied in accordance with the attached schedule with effect from the date of this order.

(2) THAT the application otherwise be and is hereby dismissed.

(Sgd.) S WOOD,
Commissioner.

[L.S.]

SCHEDULE

1. SCHEDULE 1 – AGGREGATE WAGES:

Delete the abbreviation CMETU wherever it appears and replace it with CFMEU.

2. SCHEDULE III – AWARD CLASSIFICATIONS:

Delete the abbreviation CMETU wherever it appears and replace it with CFMEU.

2005 WAIRC 02953

MINERAL SANDS INDUSTRY AWARD 1991 NO. A3 OF 1991

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-
	CABLE SANDS (WA) PTY LTD & OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 3 NOVEMBER 2005
FILE NO/S	APPL 783 OF 2005
CITATION NO.	2005 WAIRC 02953

Result	Award varied. Order issued.
Representation	
Applicant	Mr L Edmonds of counsel
Respondents	Mr M Borlase as agent
	Mr L Edmonds as agent on behalf of the Australian Workers' Union, West Australian Branch, Industrial Union of Workers
	Mr D McLane on behalf of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch

Order

HAVING heard Mr L Edmonds of counsel on behalf of the applicant and as agent on behalf of the Australian Workers' Union, West Australian Branch, Industrial Union of Workers, Mr D McLane on behalf of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch and Mr M Borlase as agent on behalf of the other respondents, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby –

ORDERS that the Mineral Sands Industry Award 1991 No. A3 of 1991 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.

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

SCHEDULE

1. Clause 8. – Overtime: Delete paragraph (e) of subclause (3) and insert in lieu thereof the following:

(e) An employee who without notification on the prior day or shift is required to work overtime shall be entitled to be supplied with a meal (or $8.65 in lieu) when that employee works more than six consecutive hours from the commencement of the overtime or from the previous meal break.

2. Clause 9. – Shift Work: Delete subclause (2) of this Clause and insert in lieu thereof the following:

(2) A shift employee, in addition to the employee's ordinary rate, shall be paid an additional flat payment of $1.15 per rostered ordinary hour or part thereof worked when on rostered afternoon or night shift.

3. Clause 13. - Wages: Delete subclauses (5), (6) and (7) of this Clause and insert in lieu thereof the following:

(5) (a) Leading Hand - General

A leading hand is an employee who receives some supervision and in turn, assists and co-ordinates the work of other employees, who is appointed as such and who can exercise a limited discretion in making decisions, conducting of work, and matters affecting safety. Rate per week - $21.20.

(b) Leading Hand - Shift Supervisor (Westralian Sands Only)

Is fully responsible for plant and site operations and who ensures compliance with safety standard rules as required in the Mine Safety and Inspection Act 1994 (as amended) and/or by the Quarry or Registered Mine Manager in the absence of salaried staff. Rate per week - $69.20.

(6) Tool Allowance

(a) (i) Where an employer does not provide a tradesperson with the tools ordinarily required by that tradesperson the employer shall pay a tool allowance of $12.10 per week to such tradesperson for the purpose of such tradesperson supplying, maintaining and insuring tools ordinarily required in the performance of the employee's work as a tradesperson.

(ii) The list of basic tools tradespersons are required to supply is as agreed at an enterprise level. Any additional tools shall be supplied by the employer.

(b) (i) The employer shall supply an apprentice with a basic apprentice tool kit upon engagement in lieu of a tool allowance being paid during the apprentice's first year of employment.

(ii) The basic apprentice tool kit supplied to an apprentice shall be appropriate to the trade(s) of the apprentice and the content shall be agreed at an enterprise level.

(iii) An apprentice who has completed one full year of employment shall be paid an allowance in the employee's second and subsequent years of employment. The allowance paid to an apprentice shall be a percentage of the rate paid to a tradesperson being the percentage which appears against the employee's year of apprenticeship in subclause (3) of this clause.

(iv) The allowance paid to an apprentice is for the purpose of the apprentice supplementing, maintaining, and insuring tools ordinarily required in the performance of the employee's work as an apprentice.

(7) Construction Allowance Per Week

The amount of $20.70 to be paid to an employee when engaged on any work directly related to major capital expenditure in connection with the construction/demolition of plant. This allowance is paid in recognition of special disabilities and conditions that are not normally associated with plant maintenance and operations. Such construction work will be as agreed between the employer and the union or unions concerned or, in the event of disagreement, the Western Australian Industrial Relations Commission declares to be construction work for the purpose of this award.

4. Clause 15. – Special Rates and Provisions: Delete subclause (1) of this Clause and insert in lieu thereof the following:

(1) Special Rates

(a) Electrical Licence

(i) An employee who is required to hold, and in the course of the employee's duties may be required to use during the course of employment, current "A" or "B" Grade Electrical Workers' Licences issued pursuant to the relevant regulation in force under the Electricity Act 1945, shall be paid an allowance of $17.30 (flat) per week.

(ii) An electrical tradesperson who holds a licence as prescribed in subparagraph (i) where such licence is endorsed for both fitting and installing work shall, in addition to the allowance prescribed in subparagraph (i), be paid an additional allowance at the rate of $17.30 (flat) per week.

(b) Travel Allowance

(i) If transport to and from the job is not provided by the employer, a travelling allowance of $1.75 per day shall be paid when an employee's home is more than eight kilometres from the job by the shortest practicable route.

(ii) The allowance specified in this clause shall be paid to an employee to compensate for excess travelling expenses from the employee's home to the employee's place of work and return.

(c) Clothing Allowance

(i) (aa) Each full-time or part-time employee shall be paid an allowance of $2.20 per week for the purpose of purchasing and replacement of appropriate work clothing; or

(bb) Each full-time or part-time employee shall be provided with two sets of appropriate work clothing each year.

(ii) Working conditions vary from site to site and as a result the method and timing of provision of appropriate clothing will be determined at an enterprise level.

Provided that only one of the options specified in placitum (aa) or (bb) of subparagraph (i) shall be available.

(iii) The laundering and repairs of all clothing is the responsibility of the employee.

(iv) A casual employee shall be paid an allowance of $2.20 per week.

(d) Spray Painting - Painters

(i) Lead paint shall not be applied by spray to the interior of any building.

(ii) All employees (including apprentices) applying paint by spraying shall be provided with overalls, head covering and respirators by the employer.

(iii) Where from the nature of the paint or substance used in spraying, a respirator would be of little or no practical use in preventing the absorption of fumes or materials from substances used by an employee in spray painting, the employee shall be paid a special allowance of $0.67 per day.

(e) First Aid

(i) The employer shall at each main place of employment provide a suitable first aid outfit.

(ii) Each employee being the holder of a current St. John's First Aid Certificate shall be paid an allowance of $4.40 per week.

2005 WAIRC 03215

MINERAL SANDS MINING AND PROCESSING (ENGINEERING AND BUILDING TRADES) AWARD, 1977

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISION
	APPLICANT
	-v-
	CABLE SANDS (WA) PTY LTD AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S WOOD
DATE	FRIDAY, 2 DECEMBER 2005
FILE NO	APPL 205 OF 2005
CITATION NO.	2005 WAIRC 03215

Result	Award varied
Representation	
Applicant	Mr L Edmonds
Respondent	Mr D McLane on behalf of the AFMEPKIU

Order

HAVING heard Mr L Edmonds on behalf of the applicant and Mr D McLane on behalf of the AFMEPKIU, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Mineral Sands Mining and Processing (Engineering and Building Trades) Award, 1977 as varied, be further varied in accordance with the following Schedule and that such variation shall have effect from the first pay period commencing on or after the date of this order.

(Sgd.) S WOOD,
[L.S.] Commissioner.

SCHEDULE

1. Clause 9. – Overtime: Delete paragraph (g) of subclause (3) and insert in lieu thereof the following:

(g) Subject to the provisions of paragraph (h) hereof, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid **$9.10** for a meal and if, owing to the amount of overtime worked, a second or subsequent meal is required, they shall be supplied with such meal by the employer or be paid **$6.25** for each meal so required.

2. Clause 10. – Shift Work: Delete subclause (5) of this Clause and insert in lieu thereof the following:

(5) A shift employee, in addition to the employee's ordinary rate, shall be paid per shift of eight hours at the rate of **$9.40** when on afternoon or night shift.

3. Clause 13. – Special Rates and Provisions:

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

(1) General Disabilities:

(a) All employees shall be paid an allowance at the rate of **$20.30** per week in consideration of the general disabilities in the industry to which they may be subjected from time to time in the performance of their duties.

(b) Such payment prescribed in subclause (a) above shall be in lieu of all disabilities not enumerated in this subclause including working in wet process plants and with/and in proximity to toxic substances.

(c) An employee shall be paid an additional allowance at the rate of **30 cents** per hour when working in a "beneficiation" plant.

B. Delete paragraph (c) subclause (10) of this Clause and insert in lieu thereof the following:

(c) Where from the nature of the paint or substance used in spraying, a respirator would be of little or no practical use in preventing the absorption of fumes or materials from substances used by the employee in spray painting, the employee shall be paid a special allowance of **70 cents** per day.

C. Delete subclause (11) of this Clause and insert in lieu thereof the following:

(11) An electrician - special class, an electrical fitter and/or armature winder or an electrical 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 **$17.60** per week.

D. Delete paragraph (b) subclause (12) of this Clause and insert in lieu thereof the following:

(b) Each employee being the holder of a current St. John's First Aid Certificate shall be paid an allowance of **$4.50** per week.

4. Clause 24. – Travelling Allowance: Delete subclause (1) of this Clause and insert in lieu thereof the following:

(1) If transport to and from the job is not provided by the employer, a travelling allowance of **$1.90** per day shall be paid where an employee's home is more than eight kilometres from the job by the shortest practicable route.

5. Clause 25. – Clothing Allowance: Delete subclause (1) of this Clause and insert in lieu thereof the following:

(1) Each employee shall be paid an allowance of **$2.30** per week for the purpose of purchasing overalls.

6. Clause 26. – Wages: Delete subclauses (1) to (6) inclusive of this Clause and insert in lieu thereof the following:

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

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

Increases in 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.

(1) Metal Trades:

		Rate Per Week		
		Base Rate	Arbitrated Safety Net Adjustment	Total Rate
		$	$	$
Electrician Special Class		442.82	161.00	603.82
Scientific Instrument Maker and/or Repairer		435.66	161.00	596.66
Automotive Electrical Fitter		417.20	161.00	578.20
Boilermaker		417.20	161.00	578.20
Electrical Fitter		417.20	161.00	578.20
Electrical Installer		417.20	161.00	578.20
Fitter		417.20	161.00	578.20
Fitter and Turner		417.20	161.00	578.20
Fuel Injection Fitter		417.20	161.00	578.20
Machinist - First Class		417.20	161.00	578.20
Motor Mechanic		417.20	161.00	578.20
Tradesperson working alone (Westralian Sands)		434.43	161.00	595.43
Welder - First Class		417.20	161.00	578.20
Machinist - Second Class		371.11	159.00	530.11
Rigger and Scaffolder -				
(a) who is a licence holder for the purpose of the Inspection of the Scaffolding Act		395.38	159.00	554.38
(b) who holds a licence under the said Act or whom the Foreman and the licence holder under (a) agree is fully experienced as a Rigger		382.63	159.00	541.63
(c) Other		378.49	159.00	537.49
Rubber Employee Grade I	*	411.27	159.00	570.27
Rubber Employee Grade II	*	385.65	159.00	544.65
Tool Storeperson		364.95	159.00	523.95
Lube Bay Serviceperson		359.47	159.00	518.47
Tradesperson's Assistant		352.09	159.00	511.09
Greaser		355.89	159.00	514.89

* Such rate includes provisions for working with potentially toxic substances.

(2) Building Trades:

(a)	Bricklayers	417.20	161.00	578.20
	Carpenters and Joiners	417.20	161.00	578.20
	Plasterers	417.20	161.00	578.20
	Plumbers	417.20	161.00	578.20
	Painters, Glaziers and Signwriters	417.20	161.00	578.20
	Builders' Labourer	352.87	159.00	511.87

(b) Tool Allowance Per Week -

Bricklayers	4.10
Plasterers	4.70
Carpenters and Joiners	5.50
Plumbers	5.50
Painters, Glaziers and Signwriters	1.40

(c) One-third of the amount payable to a tradesperson shall be paid to an apprentice to that trade in the first year of apprenticeship and of two-thirds of that amount in the second year and of the same amount as is payable to a tradesperson in the remaining period of his/her apprenticeship.

(d) Construction Allowance Per Week:

$11.30 shall be paid to an employee engaged in any work in connection with the erection or demolition of a building.

(e) Where an apprentice works in circumstances which would entitle a tradesperson to the construction allowance prescribed in subclause (d) of this subclause, the following extra rate shall be paid to such apprentice:-

		Percentage of Construction Allowance Per Week
(i)	Five Year Term -	
	First year	37
	Second year	53
	Third year	72
	Fourth year	95
	Fifth year	100
(ii)	Four Year Term -	
	First year	40
	Second year	72
	Third year	95
	Fourth year	100
(iii)	Three and a Half Year Term -	
	First six months	40
	Next year	72
	Next following year	95
	Final year	100
(iv)	Three Year Term -	
	First year	58
	Second year	95
	Third year	100

(3) Leading Hands:

In addition to the appropriate wage rates 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	21.20
(b)	If placed in charge of more than ten and not more than 20 other employees	32.70
(c)	If placed in charge of more than 20 other employees	42.00

(4) Apprentices (wage per week expressed as a percentage of the tradesman's rate).

Five year term -	%
First year	40
Second year	48

Third year	55
Fourth year	75
Fifth year	88
Four year term -	%
First year	42
Second year	55
Third year	75
Fourth year	88
Three and a half year term -	%
First six months	42
Next year	55
Next year	75
Final year	88
Three year term -	%
First year	55
Second year	75
Third year	88

For the purposes of this subclause "Tradesperson's Rate" means the sum of the total wage for the classification "Tradesperson" in subclause (1) or (2) of this clause.

(5) Tool Allowance:

Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of work as a tradesperson or as an apprentice, the employer shall pay a tool allowance of -

(a) **$12.30** per week to such tradesperson, or

(b) in the case of an apprentice a percentage of **$12.30** 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 work as a tradesperson or as an apprentice.

(6) Additional Payment:

(a) In addition to the rates of wages prescribed in subclauses (1) and (2) of this clause, adult employees shall be paid an additional payment at the rate of **$81.40** per week.

(b) In addition to the rates of wages prescribed in subclause (4) of this clause, apprentices shall be paid an additional payment equivalent to the appropriate percentage contained in that subclause of **$81.40** per week.

(c) The additional payment prescribed in paragraphs (a) and (b) of this subclause shall not be for all purposes of the award.

(d) The rates of wages in this clause are not varied by the provisions of this subclause and shall not for the purposes of any other award, order, industrial agreement or any other agreement or arrangement be deemed to have been varied.

(e) The provisions of this subclause shall not apply to a casual employee.

7. Clause 27. – Service Pay: Delete subclause (1) of this Clause and insert in lieu thereof the following:

(1) All employees, including apprentices, shall be paid a Service and Attendance Allowance in conformity with the following scale:-

	Per Week $
Upon completing continuous service of -	
Six months	1.70
Twelve months	10.90
Two years	14.50
Three years	18.50
Four years	22.00
Five years	27.40
Six years	31.00
Seven years	35.00

2005 WAIRC 03128

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE SHOP DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA
	APPLICANT
	-v-
	MYER STORES LIMITED AND OTHERS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 24 NOVEMBER 2005
FILE NO/S	APPL 949 OF 2005
CITATION NO.	2005 WAIRC 03128

Result	Award varied

Order

HAVING heard Mr T Pope on behalf of the applicant and Mr P Robertson as agent on behalf of Houseworks Co Pty Ltd and Bunnings Group Limited, the Commission, pursuant to the powers conferred under the *Industrial Relations Act, 1979*, hereby orders:

THAT the Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977 (No R32 of 1976) 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 24 November 2005.

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

SCHEDULE

1. Clause 7A. - Nightfill Duty: Delete subclause (9) of this clause and insert the following in lieu thereof:

(9) (a) A full-time, part-time or casual worker employed in a "General Retail Shop" or "Special Retail Shop" pursuant to this clause shall be paid an additional loading as prescribed hereunder:

(i) Monday to Saturday prior to 7.00 am

(aa) Full-time and Part-time Workers

- a loading of $2.70 per hour in addition to the ordinary hourly rate of a full-time or part-time worker.

(bb) Casual Workers

- a loading of $2.70 per hour in addition to the ordinary casual rate as laid down in paragraph (a) of subclause (4) of Clause 7. - Casual Workers.

(ii) Saturday between 5.00 pm and Midnight

(aa) Full-time and Part-time Workers

- a loading of $3.84 per hour in addition to the ordinary hourly rate of a full-time worker as prescribed in column (i) of subclause (1) of Part I of Clause 28. - Wages.

(bb) Part-time Workers

- a loading of $8.35 per hour in addition to the ordinary hourly rate of a full-time shop assistant as prescribed in column (i) of subclause (1) of Part I of Clause 28. - Wages.

(cc) Casual Workers

- a loading of $10.00 per hour in addition to the ordinary casual rate as laid down in paragraph (a) of subclause (4) of Clause 7. - Casual Workers.

(b) Junior workers shall be paid the appropriate percentage as laid down in Part II of Clause 28. - Wages.

(c) The loadings referred to in (i) and (ii) above shall be paid for the purpose of superannuation calculations.

2. Clause 12. - Meal Money:

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

(1) When a worker is required to continue working after the usual finishing time for more than one hour he/she shall be paid $9.80 for the purchase of any meal required.

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

(2) Late Night Trading Meal Allowance:

A worker who commences work at or prior to 1.00pm on the day of late night trading and is required to work beyond 7.00pm on that day shall be paid a meal allowance of $9.80.

3. Clause 28. - Wages: Delete Part III of this clause and insert the following in lieu thereof:

Part III –

In addition to the rates prescribed elsewhere in this clause the following allowances and rates shall be paid to a worker where applicable:

(1) (a) A worker required to operate a ride-on power operated tow motor, a ride-on power operated pallet truck or a walk beside power operated high lift stacker in the performance of his duties shall be paid an additional 58 cents per hour whilst so engaged.

(b) A worker required to operate a ride-on power operated fork lift, high lift stacker or high lift stock picker or a power operated overhead traversing hoist in the performance of his duties shall be paid an additional 65 cents per hour whilst so engaged.

(c) The allowances prescribed by this subclause shall not be payable to an employee engaged, and paid, as a "Storeman Operator Grade 1" or a "Storeman Operator Grade 2".

(2) Any workers, whether a junior or adult, employed as a canvasser and/or collector shall be paid the adult male wage.

(3) Where a canvasser provides his own bicycle he shall be paid an allowance of $1.24 per week.

(4) (a) A worker shall receive an additional payment for every hour of which he spends 20 minutes or more in a cold chamber in accordance with the following:

In a cold chamber in which the temperature is:

(i) Below 0º Celsius to -20° Celsius - 70 cents per hour

(ii) Below -20° Celsius to -25° Celsius - 83 cents per hour

(iii) Below -25° Celsius - 94 cents per hour.

(b) Workers required to work in temperatures less than -18.9° Celsius shall be medically examined at the employer's expense.

(5) (a) A worker (full time, part time or casual) who is required to work any of his or her ordinary hours between 6.00p.m. and 11.30p.m. Monday to Friday inclusive in a "small retail shop" as defined or a "special retail shop" (pharmacy) as defined shall be paid at a loading of 20% for each hour worked after 6.00p.m.

For casual workers such loading shall be paid in addition to the rates prescribed in Clause 7 (4) of this award.

(b) A worker (part time or casual) who is required to work any of his or her ordinary hours between 6.00p.m. and 11.30p.m. on Saturday in a "small retail shop" as defined or a "special retail shop" (pharmacy) as defined shall be paid at a loading of 20% for each hour worked after 6.00p.m.

(i) A casual worker employed under paragraph (b) of this subclause shall be paid the 20% loading as calculated on the rates as determined by subclause (5) of Clause 7. - Casual Workers.

(ii) A part time worker employed under paragraph (b) of this subclause shall be paid the 20% loading as calculated on the rates as determined by paragraph (b) of subclause (7) of Clause 8. - Part Time Workers.

(6) (a) An employee in a "Section 42 shop" as defined who is required to work any of his or her ordinary hours between 6.00pm and midnight Monday to Friday inclusive shall be paid a loading of 20% for each hour so worked.

Provided that for casual workers such loading shall be paid in addition to the rates prescribed in Clause 7. - Casual Workers subclause (4) of this award.

(b) An employee in a "Section 42 shop" as defined who is required to work any of his or her ordinary hours between 6.00pm and midnight on Saturday shall be paid a loading of 20% for each hour worked after 6.00pm.

(i) A casual employee employed under paragraph (b) of this subclause shall be paid the 20% loading as calculated on the rates as determined by subclause (5) of Clause 7. - Casual Workers.

(ii) A full or part-time employee employed under paragraph (b) of this subclause shall be paid the 20% loading as calculated on the rates as determined by paragraph (b) of subclause (7) of Clause 8. - Part-Time Workers.

(c) An employee in a "Section 42 shop" as defined who is required to work any of his or her ordinary hours before 7.00am on any day Monday to Saturday inclusive shall be paid a loading of 30% for each hour so worked.

Provided that for casual workers such loading shall be paid in addition to the rates prescribed in Clause 7. - Casual Workers subclause (4) of this award.

(7) An automotive spare parts or accessories salesman qualified (i.e. one who has passed the appropriate course of technical training) shall be paid the sum of $21.90 per week in addition to the rates prescribed herein.

4. Clause 28A. - Structural Efficiency Agreement – Cold Storage Industry: Delete this clause and insert the following in lieu thereof:

P. & O. Cold Stores and Clelands Cold Stores shall pay $21.21 per week in addition to the rates prescribed by Clause 28. - Wages of this award from the beginning of the first pay period commencing on or after 1 November 1989 and $3.51 in addition to the rates prescribed by Clause 28. - Wages of this award from the beginning of the first pay period commencing on or after 1 December 1989 on account of agreement reached for a structural efficiency package which the parties anticipate will result in the creation of a Cold Storage Award being negotiated in accordance with the objectives and content of the Structural Efficiency Principle.

5. Clause 32. - Motor Vehicle Allowance: Delete this clause and insert the following in lieu thereof:

Where a worker maintains a motor vehicle and is authorised by the employer to use the vehicle in the performance of his duties, he shall be paid in accordance with the following schedule:

AREA AND DETAILS	ENGINE DISPLACEMENT (IN CUBIC CENTIMETRES) RATE PER KILOMETRE (CENTS)		
Distance Travelled Each Year on Employer's Business	Over 2600cc	Over1600cc - 2600cc	1600cc & Under
Metropolitan Area	65.2	58.4	50.8
South West Land Division	66.7	59.9	52.1
North of 23.5 Degree South Latitude	73.3	66.1	57.4
Rest of the State	69.0	61.8	53.7
Motor Cycle (in all areas)		22.5 cents per kilometre	

6. Clause 46. - First Aid Allowance: Delete this clause and insert the following in lieu thereof:

A worker holding either a Red Cross or St. John Senior First Aid Certificate of at least 'A' level who is appointed by the employer to perform first aid duties shall be paid $8.46 per week in addition to the worker's ordinary rate.

7. Clause 48. - Additional Loading for Late Night Trading Establishments:

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

(1) A full-time or part-time worker employed in a "General Retail Shop" or "Special Retail Shop" who works ordinary hours between 6.00 p.m. and 9.00 p.m. on the day of late night trading shall be paid a loading of $3.39 per hour in addition to the ordinary hourly rate of a full-time or part-time worker.

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

(2) A casual worker employed in a "General Retail Shop" or "Special Retail Shop" who works ordinary hours between 6.00 p.m. and 9.00 p.m. on the day of late night trading shall be paid the amount of $3.39 per hour in addition to the ordinary casual rate as laid down in paragraph (a) of subclause (4) of Clause 7. - Casual Workers.

2005 WAIRC 03127

STOREMEN IWD PTY LTD AWARD 1982

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA
	APPLICANT
	-v-
	INDEPENDENT WOOLDUMPERS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 24 NOVEMBER 2005
FILE NO/S	APPL 933 OF 2005
CITATION NO.	2005 WAIRC 03127

Result Award varied

Order

HAVING heard Mr T Pope on behalf of the applicant and Mr P Robertson as agent on behalf of IWD Pty Ltd, the Commission, pursuant to the powers conferred under the *Industrial Relations Act, 1979*, hereby orders:

THAT the Storemen IWD Pty Ltd Award 1982 (No A36 of 1982) 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 24 November 2005.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

SCHEDULE

1. Clause 10. - Wages:

A. Delete subclause (4) of this clause and insert the following in lieu thereof:

(4) Seventy two cents per hour in addition to the above rates shall be paid to any employee who actually handles "dead" wool.

B. Delete subclause (5) of this clause and insert the following in lieu thereof:

(5) If a worker is required by his/her employer to act as a first aid attendant in any store, for so acting he/she shall be paid in addition to his/her ordinary rate of pay the sum of $1.60 per day.

2. Clause 12. - Meal Hours and Meal Money: Delete subclause (2)(a) of this clause and insert the following in lieu thereof:

(2) (a) An employee shall be entitled to meal money of $9.70 in the following circumstances:

(i) where he is required to work for more than one hour before his normal commencing time or to continue to work for more than one hour after his normal ceasing time; or

(ii) where he is required to continue working after 12.00 o'clock midnight for more than one hour; or

(iii) where he is required to continue working after midday on Saturday, Sunday or public holiday for more than one hour; or

(iv) where he is required to continue overtime after 5.00 p.m. on a Saturday, Sunday or public holiday for not less than one hour.

2005 WAIRC 03125

SUPERMARKETS AND CHAIN STORES (WESTERN AUSTRALIA) WAREHOUSE AWARD 1982

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA
	APPLICANT
	-v-
	WOOLWORTHS SUPERMARKETS PTY LTD AND COLES SUPERMARKETS AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 24 NOVEMBER 2005
FILE NO/S	APPL 931 OF 2005
CITATION NO.	2005 WAIRC 03125

Result Award varied

Order

HAVING heard Mr T Pope 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 the Supermarket and Chain Stores (Western Australia) Warehouse Award 1982 (No A26 of 1982) 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 24 November 2005.

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

SCHEDULE

1. Clause 13. - Meal Money: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) When an employee is required to continue working after the usual finishing time for more than one hour, he/she shall be paid $9.30 for the purchase of any meal required.

2. Clause 30. - Additional Rates for Saturday Work: Delete this clause and insert the following in lieu thereof:

Hours of work performed before 12 noon on Saturday (except in the case of casual employees employed on Saturday morning only in any week) shall be paid the following amounts in addition to ordinary rates –

	$
In the case of adult employees	3.70
In the case of junior employees	2.91
or in each week of any cycle of two consecutive weeks -	

In the case of adult employees	1.83
In the case of junior employees	1.47

3. Clause 43. - First Aid Allowance: Delete this clause and insert the following in lieu thereof:

An employee holding either a Red Cross or St John Senior First Aid Certificate of at least 'A' level, who is appointed by the employer to perform first aid duties shall be paid $8.20 per week in addition to the employee's ordinary rate.

AWARDS/AGREEMENTS—Application for variation of— No variation resulting—

2005 WAIRC 03149

CLEANERS AND CARETAKERS (GOVERNMENT) AWARD, 1975

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION OF WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	HON PREMIER OF WESTERN AUSTRALIA AND OTHERS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 28 NOVEMBER 2005
FILE NO/S	APPL 855 OF 2001
CITATION NO.	2005 WAIRC 03149

Result Application to vary award discontinued

Order

WHEREAS on 18 May 2001 the applicant applied to the Commission for an order pursuant to the *Industrial Relations Act, 1979*; and

WHEREAS the Commission contacted the applicant on numerous occasions about progressing the matter; and

WHEREAS on 7 March 2003 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties were given time for further discussions; and

WHEREAS the Commission set down a report back conference for 6 June 2003 however the conference was vacated to allow the parties further time to consider their positions; and

WHEREAS the Commission contacted the applicant on numerous occasions about the status of the matter; and

WHEREAS on 27 October 2005 the applicant advised the Commission that it did not wish to proceed with the matter; and

WHEREAS on 2 November 2005 the applicant lodged a Notice of Discontinuance in respect to the application; and

WHEREAS on 3 November 2005 the respondents consented to the matter being discontinued;

NOW THEREFORE pursuant to the powers vested in it by the *Industrial Relations Act, 1979,* the Commission, hereby orders:

THAT the application be, and is hereby, discontinued.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

AGREEMENTS—Industrial—Retirements from—

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. 960 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

Noon Holdings Pty Ltd t/as Action Ceilings will cease to be a party to the Action Ceilings/CFMEUW Industrial Agreement 2002, AG 38 of 2003 on and from the 18th day of December 2005.

DATED at Perth this 7th day of December 2005.

J.A. SPURLING,
Registrar.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. 969 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

Broad Construction Services Pty Ltd will cease to be a party to the Broad Constructions/CFMEUW Industrial Agreement AG 37 of 2003 on and from the 31st day of December 2005.

DATED at Perth this 6th day of December 2005.

J.A. SPURLING,
Registrar.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. 970 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 Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch will cease to be a party to the Public Transport Authority Railway Employees Enterprise Agreement 2004, AG 110 of 2004 on and from the 2nd day of January 2006.

DATED at Perth this 7th day of December 2005.

J.A. SPURLING,
Registrar.

CANCELLATION OF—Awards/Agreements/Respondents—

2005 WAIRC 03220

RAILWAYS OFFICERS' AWARD 1985

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION (COMMISSION'S OWN MOTION) **APPLICANT** **-v-** PUBLIC TRANSPORT AUTHORITY AND WESTERN AUSTRALIAN RAILWAY OFFICERS' UNION **RESPONDENT**
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	FRIDAY, 2 DECEMBER 2005
FILE NO/S	APPL 964 OF 2005
CITATION NO.	2005 WAIRC 03220

Result	Award cancelled
Representation	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 26th day of October, 2005 of an intention to make an Order cancelling the award;

AND WHEREAS at the 25th day of November, 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:

RAILWAYS OFFICERS' AWARD, 1985

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

PUBLIC SERVICE ARBITRATOR—Matters dealt with—

2005 WAIRC 02684

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF JUSTICE
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER S J KENNER
HEARD	THURSDAY, 8 SEPTEMBER 2005
DELIVERED	FRIDAY, 23 SEPTEMBER 2005
FILE NO.	PSAC 39 OF 2005
CITATION NO.	2005 WAIRC 02684

Catchwords	Industrial law - Application for an interim order to preserve status quo - Whether Commission should exercise discretion - Principles applied - Interim order issued - – *Industrial Relations Act 1979* (WA) s 26(1)(a), s 44, s 44(6)(ba), s 44(6)(bb), s 66; *Federal Court of Australia Act 1976* (Cth) s 23; *Public Sector Management Act 1994* (WA) s 64(1)(b)
Result	Interim order issued
Representation	
Applicant	Ms S Thomas
Respondent	Ms Z Gillam

Reasons for Decision

1 The substantive claim in the present matter is one brought by the applicant to seek on behalf of their member Ms Thorley conversion from fixed term contract employment to permanent employment status. Ms Thorley is presently engaged under a fixed term contract as a juvenile justice officer at the respondent's Killara Youth Support Service.

2 In addition, the applicant has sought an interim order pursuant to s 44(6) of the Industrial Relations Act 1979 ("the Act"), to preserve Ms Thorley's employment, pending the hearing and determination of the matter by the Commission.

3 Following a conference convened pursuant to s 44 of the Act, the parties have filed submissions in relation to the claim for interim relief and it is that matter that the Commission now considers.

4 The applicant contends that as Ms Thorley's current contract of employment expires on 28 September 2005, and that there is a serious issue to be determined as to whether Ms Thorley should be converted to permanent employment status, an interim order should issue preserving the status quo. In general terms, the applicant submitted that Ms Thorley satisfies the criteria for conversion from fixed term contract to permanent employment status, as set out in a Premier's Circular 2002/17 ("the Circular") dealing with conversion to permanency in public sector employment. This is disputed however by the respondent.

5 In relation to whether the discretion for an interim order should be exercised by the Commission, the applicant submitted that given the impending expiry of the fixed term contract of employment for Ms Thorley, if an interim order is not made, the foundation for any possible conversion of her employment to permanent status will dissolve. Against this, it was submitted that there would be little impact on the respondent resulting from the grant of an interim order, given that Ms Thorley has been employed for some years on continuous fixed term contracts, indeed since in or about June 2002. The applicant further submitted that there are no irreversible consequences in granting an interim order, and the applicant has not been tardy in bringing these proceedings.

6 On the other hand, the respondent opposes the making of any interim order preserving Ms Thorley's employment. Its submission was that the terms and conditions of Ms Thorley's fixed term employment, pursuant to 64(1)(b) of the Public Sector Management Act 1994 ("the PSM Act"), render Ms Thorley ineligible for conversion from fixed term contract to permanent status, even if the Circular applies, which is denied. The respondent submitted that given the history of Ms Thorley's engagements on successive fixed term contracts, each being to assist while a vacant position was being filled permanently, then there is no case for conversion in this instance. The respondent also submitted that even if the Circular has application, then various other criteria set out in it are not satisfied in Ms Thorley's case.

Consideration

7 The claim is for an interim order to preserve the status quo pursuant to s 44(6) of the Act. Whilst it is not expressly put as such by the applicant, in my opinion, most appositely, s 44(6)(ba)(ii) of the Act applies, which enables the Commission to make orders that will in its opinion, enable conciliation or arbitration to resolve the matter in question.

8 In *Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch v National Foods Pty Ltd* (2004) 84 WAIG 3395 the Commission as presently constituted considered the appropriate principles to apply in the granting of interim orders under s 44 of the Act. Whilst the case dealt with a claim of unfair dismissal, I said at 3397:

> *"19 The Commission's powers in relation to interim orders in matters of this kind are set out in s 44(6)(bb) which provides as follows:*
>
> *"(bb) with respect to industrial matters —*

(i) give any direction or make any order or declaration which the Commission is otherwise authorised to give or make under this Act; and

(ii) without limiting paragraph (ba) or subparagraph (i), in the case of a claim of harsh, oppressive or unfair dismissal of an employee, make any interim order the Commission thinks appropriate in the circumstances pending resolution of the claim;"

20 The powers contained in s 44(6)(bb) of the Act, are in addition to the powers of the Commission under s 44(6)(ba), which enable the Commission, at or in relation to a conference under s 44, to give such directions and make such orders for the purposes there set out, including the prevention of the deterioration of industrial relations in respect of the matter in question until conciliation or arbitration has resolved that matter.

21 It is trite to observe that in the exercise of its jurisdiction under the Act, the Commission is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms: s 26(1)(a) Act. Of course, this provision is not a substantive head of power rather it determines the manner of the exercise of jurisdiction and power possessed by the Commission under the Act.

22 Significantly, Parliament has not, by enacting s 44(6)(bb)(ii) of the Act, sought to prescribe in what circumstances the Commission ought to make an interim order. The statutory provision enables the Commission to make any interim order, in the case of a claim of harsh, oppressive or unfair dismissal of an employee, "that the Commission thinks appropriate in the circumstances", pending the resolution of the claim. This in my opinion confers on the Commission a broad discretion as to whether an interim order ought to be made. Further, the language used in s 44(6)(bb)(ii) of the Act, empowering the Commission to make any interim order that it "thinks appropriate" is similar language to that used in s 66(2), empowering the President, on an application made pursuant to s 66 of the Act, to make any such order or give such direction "as he considers to be appropriate". I note also, that this is the type language used, for example, in s 23 of the Federal Court of Australia Act 1976 (Cth), empowering the Federal Court to grant interlocutory relief.

23 To my mind, having regard to the nature of interim relief generally, not just in this jurisdiction but elsewhere, principles applicable to the making of interim or interlocutory injunctions are of assistance and I therefore respectfully adopt the observations of Sharkey P in Brown in this regard. To those observations I would add the following. The principles applicable to the grant of an interlocutory injunction are now relatively well settled in Australia: Australian Course Grains Pool Pty Ltd v Barley Marketing Board of Queensland (1982) 46 ALR 398; Tablelands Peanuts Pty Ltd v Peanut Marketing Board (1984) 52 ALR 651; Epitoma Pty Ltd v Australasian Meat Industry Employees Union (No 2) (1984) 54 ALR 730; American Cyanamid Co v Ethicon Ltd [1975] AC 396; Castlemaine Tooheys Ltd v South Australia (1986) 161 CLR 148 at 154.

24 It is also the case that the two elements in considering the grant of interlocutory injunctions, they being a serious issue to be tried and the balance of convenience, are not to be considered in isolation: Bullock v The Federated Furnishing Trades Society of Australasia (1989) 5 FCR 464. What appears to be a strong claim on the merits may persuade a court to grant an injunction where the balance of convenience is reasonably even. However, a less strong case on the merits, may still lead to an interlocutory order being made, if there is a strong balance of convenience in favour of the grant of an order. Furthermore, there is authority for the proposition that a court may be more reluctant to grant a mandatory interlocutory injunction than a prohibitory injunction. Thus in Shepherd Homes Ltd v Sandham [1971] 1 Ch 340 it was said by Megarry J at 351 that there needs to be:

"... A high degree of assurance that at trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction".

25 However, the decision whether to grant an interlocutory mandatory order, despite this "high degree of assurance", will often turn on whether the withholding of such an order, would lead to a greater risk of injustice than the grant of an interim order: Business World Computers Pty Ltd v Australian Telecommunications Commission (1988) 82 ALR 499."

9 I adopt and apply what I said in that case for present purposes. I am satisfied that there is a substantial matter to be tried in terms of whether or not Ms Thorley's employment satisfies the relevant criteria for conversion from fixed term to permanent employment status. However, on the material before me presently, I am not able to finally determine that issue as it seems to me there may well need to be some evidence adduced by both parties in order for that question to be properly ventilated. Furthermore, I am satisfied in this matter that Ms Thorley may suffer a considerable injustice in the present circumstances, if an interim order is not made, and ultimately it is held by the Commission that she is entitled to conversion to permanent status. This is so by reason of the imminent expiry of her current fixed term contract of employment. Any prejudice to the respondent from the granting of an interim order, would, in my opinion, be far outweighed by the prejudice to Ms Thorley.

10 In the circumstances of the present matter, it would be consistent with equity, good conscience and the substantial merits of the case and with the principles referred to above, to grant an interim order preserving Ms Thorley's employment until such time and this matter is heard and determined by the Commission.

11 Accordingly, an interim order now issues.

2005 WAIRC 02727

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPELLANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF JUSTICE
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER S J KENNER
DATE	FRIDAY, 30 SEPTEMBER 2005
FILE NO	PSAC 39 OF 2005
CITATION NO.	2005 WAIRC 02727

Result	Interim order issued
Representation	
Applicant	Ms S Thomas
Respondent	Mr Z Gillam

Interim Order

HAVING heard Ms S Thomas on behalf of the applicant and Mr Z Gillam on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the employment of Ms Judith Thorley as a level 3/4 juvenile justice officer at the respondent's Killara Youth Support Service continue pending the hearing and determination of the applicant's claim in the herein matter.

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

2005 WAIRC 03105

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	THE COMMISIONER OF POLICE, WESTERN AUSTRALIA POLICE
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
HEARD	THURSDAY, 20 OCTOBER 2005
DELIVERED	TUESDAY, 22 NOVEMBER 2005
FILE NO.	PSACR 40 OF 2005
CITATION NO.	2005 WAIRC 03105

Catchwords	Industrial law - Conversion to permanent officer status - Whether applicant's member eligible for conversion to permanent employment - Distinction between "public service employee" and "public sector employee" - What constitutes a "one off" period - Principles applied - Applicant's member inelgible to be offered conversion to permanent status - Application dismissed - Order issued - *Industrial Relations Act 1979* (WA) s 44(9); *Public Sector Management Act 1994* (WA) s 3, s 34, s 64(1)(b), s 64(4), s 64(5), Part 3 & 4.
Result	Order issued
Representation	
Applicant	Ms D Larson
Respondent	Ms R Lavell

Reasons for Decision

1 This is a matter referred pursuant to s 44(9) of the Industrial Relations Act 1979 ("the Act") in relation to a dispute between the applicant and the respondent over the employment status of a member of the applicant. The terms of the memorandum of matters for hearing and determination under s 44 set out the dispute and are as follows:

"1. The applicant is in dispute with the respondent regarding the employment of its member Mr Paul Hannah at the WA Police Service.

2. Mr Hannah commenced employment at the WA Police Service on 20 July 2004 on a fixed term contract for one month as a Level 1 Officer. Mr Hannah has remained in this position since this time on a series of fixed term contracts. His current contract expires on 2 September 2005.

3. Mr Hannah originally filled the position on a contract basis to provide relief while the substantive occupant was acting elsewhere. This position has subsequently become vacant.

4. Mr Hannah requested conversion to permanent officer status on 26 July 2005 in accordance with the Premier's Circular Number 2002/17.

5. The respondent rejected Mr Hannah's request for conversion.

6. The applicant says that Mr Hannah meets the criteria for conversion to permanent officer status as set out in Clause 5 of the Circular and that permanency should be granted. The applicant accordingly seeks declarations and orders of the Commission.

7. The respondent wholly denies the applicant's claim and opposes the orders sought."

2 The short issue for determination is whether a "public service officer" appointed pursuant to s 64(1)(b) of the Public Sector Management Act 1994 ("the PSM Act") is eligible for "conversion" to permanent officer status under what is known as the Premiers Circular 2002/17 ("the Circular").

Facts

3 The factual issues are not in dispute and are as follows. The applicant's member Mr Hannah is engaged as a youth administration officer Level 1 at the PCYC of the respondent. Mr Hannah sat the public service test, was interviewed and was selected for appointment by the respondent. He has been engaged in his current position as a fixed term employee in general clerical and administrative duties since 20 July 2004. Mr Hannah has been engaged on monthly fixed term contracts of employment the most recent of which will expire on 30 November 2005. The reason stated for Mr Hannah's engagement on a fixed term contract basis, is to provide relief while the substantive occupant in the position is acting in another capacity. That has been the case in respect of each of Mr Hannah's monthly fixed term contracts, copies of which were tendered as a bundle as exhibit A2.

4 Mr Hannah testified that during this time there had been no complaints as to the quality of his work performance. Having served under successive fixed term employment contracts with the respondent continuously for 12 months, Mr Hannah wrote to the respondent's human resources department requesting "conversion" to permanent employment in accordance with the Circular. This request was denied by the respondent on the basis that in its view, Mr Hannah did not meet the requirements of the Circular and was therefore not eligible for conversion to permanent employment.

Consideration

5 It is not in contention in this matter that Mr Hannah was appointed by the respondent pursuant to s 64(1)(b) of the PSM Act on successive contracts of one month duration commencing on 20 July 2004 with the last to expire on 30 November 2005.

6 Relevantly, s 64(1) of the PSM Act provides:

"(1) Subject to this section and to any binding award, order or industrial agreement under the Industrial Relations Act 1979 or employer-employee agreement under Part VID of the Industrial Relations Act 1979, the employing authority of a department or organisation may in accordance with approved procedures appoint for and on behalf of the Crown a person as a public service officer (otherwise than as an executive officer) on a full-time or part-time basis —

(a) for an indefinite period as a permanent officer; or

(b) for such term not exceeding 5 years as is specified in the instrument of his or her appointment."

7 It is also common ground that Mr Hannah's employment is subject to the terms of the Public Service Award 1992 ("the Award"). Clause 8 - Contract of Service of the Award relevantly provides as follows:

"(5) Fixed Term Contract Employment

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

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

(i) covering one-off periods of relief;

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

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

(iii) work that is seasonal in nature;

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

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

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

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

8 For present purposes, the only basis of employment relevant to Mr Hannah's engagement could be cl 8(5)(b)(i) dealing with the employment of a person as a fixed term contract officer to cover "one-off periods of relief."

9 The Circular provides guidelines for the public sector on the implementation of the State Government's policy on fixed term contract staff. The stated policy is that ongoing positions in the public sector should not be filled by fixed term contract employees. The Circular provides guidelines to employing authorities for the change in status of fixed term contract employees to permanency.

10 Whilst the broad discretion and powers conferred upon the Commission under the Act in relation to dealing with an industrial matter cannot in any way be fettered by instruments such as the Circular, given the parties have conducted their cases around its terms the proper interpretation of it will be considered by the Commission. A number of provisions of the Circular are relevant for present purposes, they being pars (2)(a), (2)(b), (3), (5) and (7). Those provisions are set out as follows:

> *"(2) The arrangement focuses on:*
>
> *(a) current public service employees (employed under Part 3 of the Public Sector Management Act 1994) on fixed term contracts. It is proposed to clarify which positions occupied by the employees are ongoing: and*
>
> *(b) current public sector employees (not employed under Part 3 of the Public Sector Management Act 1994) on fixed term contracts. It is proposed to confirm the indefinite tenure of public sector employees on fixed term contracts when the criteria set out below are satisfied.*
>
> *The policy does not include consultants or persons engaged through service companies or otherwise on contracts for service.*
>
> *(3) "Confirmation" to permanent officer status is not available to fixed term contract public service employees correctly engaged under Section 64 (1)(b) of the Public Sector Management Act 1994. (see point 7 below)*
>
> *(5) Subject to 4 (a) and (b) above, "confirmation" of indefinite tenure will be authorised for, and offered to, all current and future public sector employees employed on fixed term contracts who:*
>
> *(a) on or after the date of this Circular have been continuously employed on a fixed term contract of service, continuously rolled over, at the same level performing substantially the same duties and by the same employing authority, for 12 months or more; and*
>
> *(b) have during this period continuously occupied a position that was filled through open competition: and*
>
> *(c) are not currently involved in documented action relating to sub-standard performance or disciplinary matters.*
>
> *(7) Agencies employing fixed term contract employees under Section 64 (1)(b) of the Public Sector Management Act 1994 are to review the positions occupied by those employees and where the positions are not related to a "project or task" then the agencies shall take steps to fill the position in accordance with the requirements of the Act."*

11 It is important to note that the Circular draws a distinction between a "public service employee" and a "public sector employee". In terms of the meaning to be given to each, assistance can be obtained from the PSM Act. By s 3 of the PSM Act "employee" means a person employed in the Public Sector by or under an employing authority. "Public Sector" is defined to mean all agencies; ministerial offices; and non-SES organisations. Also under s 3 the "Public Service" means the Public Service as constituted under s 34. Furthermore, "public service officer" means an executive officer, permanent officer or term officer employed in the Public Service under Part 3. Section 34 of the PSM Act then sets out what constitutes the Public Service as being constituted by departments; SES organisations and persons employed under Part 3, however engaged.

12 Therefore, from the terms of the PSM Act, there appear to be two categories of employees in the public sector. Firstly, there are those employed under and subject to Part 3 of the PSM Act who are regarded as "public service officers" as defined in s 3. Secondly, there are all other employees who are not so employed but who are employed however in the "Public Sector" as defined in s 3, such as ministerial officers occupying a ministerial office pursuant to Part 4 of the PSM Act.

13 For the purposes of the Circular, the distinction between a "public service employee" and a "public sector employee" is one of some significance. Paragraph (2)(a) is concerned with the identification of positions for those who occupy them on a fixed term basis under s 64(1)(b) of the PSM Act as "public service employees". Paragraph (2)(b) is focused on "public sector employees" not engaged under s 64(1)(b) of the PSM Act and it is those employees who appear to be eligible for "confirmation" to indefinite tenure subject to the confirmation criteria in par (5) having being met. Those criteria expressly refer to "public sector employees" consistent with the reference to the same persons in par (2)(b) of the Circular and the relevant terms of the PSM Act.

14 By par (3) of the Circular it is provided that for "public service employees" "correctly" engaged under s 64(1)(b) of the PSM Act, confirmation to permanent officer status is not available. By par (7) of the Circular, the position of "public service employees" engaged pursuant to s 64(1)(b) is further clarified. If the particular position being occupied by the fixed term employee concerned is an ongoing one, then the Circular requires the employing authority to take appropriate steps to fill the position on a permanent basis, presumably pursuant to s 64(4) and (5) of the PSM Act.

15 In this case, as Mr Hannah is engaged under s 64(1)(b) of the PSM Act, prima facie as a "public service employee", he would not be eligible to be considered for "conversion" to permanent status. It would then be for the respondent to consider whether the position he occupies is ongoing and if the applicant is to fill the position in accordance with the requirements of the PSM Act. Given that Mr Hannah is engaged as a Level 1 officer, then by s 64(5) of the PSM Act the respondent may appoint him to the position on a permanent basis, without a requirement to comply with s 64(4) of the PSM Act. That is, there is no statutory requirement for the position to be filled by open competition.

16 However, the issue arises as to whether or not, for the purposes of par (3) of the Circular, Mr Hannah is "correctly" engaged pursuant to s 64(1)(b) of the PSM Act. This is significant because if Mr Hannah has not been correctly so engaged, the issue that then falls for consideration is what status he would have before considering any question of confirmation to permanency. The draftsperson of the Circular appears to have deliberately inserted the word "correctly" into par (3) such that it is only those persons who are not eligible for consideration for confirmation to permanent officer status. It may be arguable therefore, that if an employee is not "correctly" engaged pursuant to s 64(1)(b) of the PSM Act, then they are not engaged under Pt 3 of the PSM Act at all. That is, in the case of an employee purportedly employed pursuant to s 64(1)(b) of the PSM Act, but who is not correctly so employed, as for example, in contravention of the Award, any such appointment would be invalid. If that was so, then arguably the person remains an employee but in my opinion, would have to be deemed to be a "public sector employee", that is an employee not employed under Part 3 of the PSM Act, which would then trigger the terms of par (2)(b) of the Circular, enabling confirmation to permanent officer status, subject to satisfaction of the confirmation criteria set out in par (5) of the Circular.

17 In this case, the applicant submitted that by cl 8(5)(b) of the Award, set out above, an employing authority may only engage a person as a fixed term contract officer, for the purposes of providing relief pursuant to (i), if it is for a "one-off" period. What then is meant by the terms of cl 8(5)(b)(i) when referring to "covering one-off periods of relief"? In this case, there is no question that Mr Hannah is providing a period of relief for an officer, the substantive occupant of a position, who is performing other duties. The question is whether the engagement by the respondent of Mr Hannah can be reasonably characterised as a "one-off" period(s).

18 The relevant principles in relation to the interpretation of awards and other industrial instruments are well settled. That is, as with the interpretation of any deed, instrument and statute, the same principles will be applied, being to first look at the meaning of the language used, in its ordinary and natural sense: *Perth Electrical Tramways Employees Industrial Union v Commissioner of Railways* (1927) 7 WAIG 155: *Norwest Beef Industries Ltd v WA Branch, Australasian Meat Industry Employees Union* (1984) 64 WAIG 2133 per Olney J. Where the meaning of the language used in an award is clear in its ordinary and natural sense, it is not necessary or permissible to look outside of the instrument, as may be the case where there is some ambiguity: *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 per Higgins J at 162; *Australian Workers Union v Abbey* (1939) 40 CAR 494; *Pickard v John Heine & Son Ltd* (1924) 35 CLR 1 per Isaacs ACJ at 10.

19 The composite word "one-off" is defined in the Concise Oxford Dictionary to mean "made as one (article etc) only, not repeated." The Macquarie Dictionary defines "one-off" to mean "1. Individual, unique: an architect-designed, one-off house 2. (Of a book) published in one print run."

20 It is not insignificant that the draftsperson of the paragraph concerned used the word "periods" and not "period". In my opinion, interpreting this provision as it is drafted, the reference to "one-off" attaches to the circumstance of the person for whom the fixed term employee provides the cover. That is, if an employee is absent on say maternity leave, or as in this case, absent by reason of acting in another position, it is that circumstance, i.e. that persons' absence, that is the "one-off" circumstance for which cover is required. The use of the plural "periods" means in my view, when read in the paragraph as a whole, that a period of cover does not cease to be "one-off" simply because the duration of any fixed term contract for the officer providing cover, is over more than one period. If this interpretation was not the proper construction, then it seems to me that the provision would be unworkable. This would mean a fixed term employee who is engaged for a continuous period of six months on one single indivisible contract to cover another persons' absence for that same period would fall within cl 8(5)(b)(i) of the Award but the same person, engaged to cover in exactly the same circumstances, but who happens to have two separate contracts of three months each, would not fall within the clause. That is not the interpretation of the provision to be preferred in my view.

21 Therefore, in my opinion, Mr Hannah has been correctly engaged by the respondent pursuant to s 64(1)(b) of the PSM Act and is therefore ineligible under the Circular to be offered conversion to permanent status. However, as I have noted above, given that Mr Hannah has been and is engaged as a Level 1 employee under the Award, there is no impediment to the respondent appointing Mr Hannah to an appropriate Level 1 office in accordance with s 64(5) of the PSM Act and any applicable approved procedures.

22 The application is therefore dismissed.

2005 WAIRC 03104

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED **APPLICANT** **-v-** THE COMMISIONER OF POLICE, WESTERN AUSTRALIA POLICE **RESPONDENT**
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 22 NOVEMBER 2005
FILE NO/S	PSACR 40 OF 2005
CITATION NO.	2005 WAIRC 03104

Result	Order issued
Representation	
Applicant	Ms D Larson
Respondent	Ms R Lavell

Order

HAVING heard Ms D Larson on behalf of the applicant and Ms R Lavell on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

INDUSTRIAL MAGISTRATE—Complaints before—

2005 WAIRC 03178

	WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES' COURT
PARTIES	DANIEL JOSEPH DOHERTY
	APPLICANT
	-v-
	LOWAN FINE FOODS PTY LTD
	RESPONDENT
CORAM	INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD	WEDNESDAY, 8 JUNE 2005, WEDNESDAY, 6 JULY 2005, WEDNESDAY, 2 NOVEMBER 2005, WEDNESDAY, 16 NOVEMBER 2005
CLAIM NO.	M 29 OF 2005
CITATION NO.	2005 WAIRC 03178

CatchWords	Long Service Leave; Remuneration; Ordinary pay; Salary package
Legislation:	
	Industrial Relations Act 1979 Section 81CA (1) (b)
	Long Service Leave Act 1955 Sections 4,8 & 11
Cases referred to in decision:	
	Capewell –v- Cadbury Schweppes Australia Ltd 78WAIG 299;
	Blake –v- Robowash Pty Ltd 78 WAIG 2925;
	Holland –v- GAM Steel Pty Ltd Unreported AIRC (Melbourne) delivered 5 January 2000;
	Vickridge –v- 89 Enterprises (1981) 80 WAIG 4485; and
	Fliedner –v- Philips Electronics Australia Ltd [2003] NSWIR Comm 23.
Result	Claim dismissed
REPRESENTATION	
APPLICANT	Mr R Clohessy appeared as agent for the Claimant.
RESPONDENT	Mr G Pearson represented Lowan Fine Foods Pty Ltd, the Respondent.

REASONS FOR DECISION

Background

1 On 30 June 2004 the position of Business Development Manager held by the Claimant in his employment with Lowan Foods Australia Ltd was made redundant. Consequently the Claimant's employment was terminated. At termination the Claimant had been in continuous employment with the Respondent and its predecessors for almost 17 years. The Respondent in this matter is named by the Claimant as being Lowan Fine Foods Pty Ltd. By its response the Respondent has defended this claim on the basis that the correct Respondent entity is Lowan Australia Ltd and not the entity described by the Claimant. There has been no application to amend the name of the Respondent. Notwithstanding that Lowan Foods Ltd and its successor Green's Foods Ltd has continued to defend the claim. The misnomer of the Respondent has not been in the forefront of the defence in this matter. Rather the claim is opposed on its substantive merits.

2 The correct identity of the Respondent will only become pertinent if the Claimant otherwise proves his claim.

3 The evidentiary material before me reveals that the Respondent's predecessor Consolidated Foods Australia Ltd (CFA) by written agreement appointed the Claimant in the position of Business Development Manager with effect from 1 July 2000. The statement of terms and conditions of employment include the following relevant provisions.

> *4 Salary and Benefits*
>
> *Your salary is $83,729 per annum and is deposited on 15th of the month into your nominated bank account. This figure includes annual leave loading. In addition to your base salary a further 9% of this amount will be paid in accordance with the superannuation guarantee legislation.*
>
> *Salaries are reviewed annually with effect from 1st April.*
>
> ***5 Motor Vehicle***
>
> *A CFA vehicle will be provided to you as a tool of trade. The vehicle remains the property of CFA and as such any employee, subject to the company's Group Motor Vehicle Policy may use the vehicle for business circumstances. Continued use of the vehicle is dependent upon strict adherence to the company's Group Motor Vehicle Policy. The employee agrees to return the motor vehicle to CFA upon cessation of employment.*
>
> ***6 Annual Leave and Long Service Leave***
>
> *Your annual leave provision is twenty working days per annum. Except by prior arrangement with the Chief Operating Officer, annual leave must be taken within six months of the end of the year in which it is accrued.*
>
> *Your long service leave provision will be as provided by Company policy, which will be no less than the prevailing State legislation.*

4 In his testimony Mr Doherty said that he considered the vehicle supplied by the Respondent, which he was permitted to use for private use, constituted part of his salary package. He said that there had been discussion concerning the provision of the vehicle and that he could have been paid $18,000 to $19,000 more per annum had he not taken the vehicle as part of his package.

5 On termination the Claimant was paid a termination payment comprising redundancy, annual leave and long service leave entitlements. The long service leave component did not take into account the value of the private use of the motor vehicle supplied by the employers for the period of the accrued long service leave.

The Claim

6 The Claimant, who on common ground is award free, seeks pursuant to ***Section 8*** of the ***Long Service Leave Act 1954(the Act)*** to recover the value of the motor vehicle ($14,000) on a pro rata basis for 14.64 weeks amounting to $3968.46. He says that he has been underpaid that amount by virtue of the Respondent's failure to take the sum into account when calculating his termination payment. The Claimant further says that amount should be paid on a quantum meruit basis. The Claimant also seeks interest on the alleged unpaid amount and also seeks costs.

Response

7 The Respondent says that Mr Doherty was supplied a tool of trade motor vehicle in order for him to undertake his sales duties and visit customers on a regular basis and the vehicle did not form part of his remuneration. Even it if could, which is denied, the claim cannot succeed in any event because ***Section 8(1) of the Act*** only entitled an employee to ordinary pay as defined in ***Section 4 of the Act.***

Determination

8 The claim is one made pursuant to *Section 8(1) of the Act* which provides

8. Long service leave

(1) An employee is entitled in accordance with, and subject to, the provisions of the Act, to long service leave on ordinary pay in respect of continuous employment with one and the same employer, or with a person who, being a transmittee, is deemed pursuant to section 6(4) to be one and the same employer.

9 "Ordinary pay" is defined in *section 4(1) of the Act as follows:*

> ***….."ordinary pay"*** *means subject to subsection (2), remuneration for an employee's normal weekly number of hours of work calculated on the ordinary time rate of pay applicable to him, as at the time when any period of long service leave granted to him under this Act commences, or is deemed to commence and where the employee is provided with board and lodging by his employer, includes the cash value of that board and lodging, where such board and lodging is not provided and taken during the period of leave, but does not include shift premiums, overtime, penalty rates, commission, bonuses, allowances, or the like.*

10 The meaning of "ordinary pay" is further defined in ***section 4(2) of the Act*** in the following way:

> *(2) For the purpose of the interpretation of* ***"ordinary pay"*** *in subsection (1) —*
>
> *(a) where the employee is employed on piece or bonus work or any other system of payment by results, he shall be paid during any period when he is on long service leave at the ordinary rate of pay which would be applicable to him if he was employed in the industry appropriate to his calling on a time basis and not on piece or bonus work or other system of payment by results;*
>
> *(b) where no ordinary time rate of pay is fixed under the provisions of paragraph (a) the ordinary time rate of pay shall be deemed to be the average weekly rate earned by him while in employment during the period of 12 months —*
>
> *(i) ending on the day immediately preceding that on which he commences long service leave or would but for payment in lieu of long service leave have commenced long service leave, if he is then in employment; or*
>
> *(ii) ending on the day immediately preceding that on which he was last in employment, if he is not then in employment; or*
>
> *(iii) ending on the day immediately preceding that of his death,*
>
> *as the case requires; and*
>
> *(c) where the normal weekly number of hours have varied over the period of employment of an employee the normal weekly number of hours of work shall, subject to paragraph (a), be deemed to be the average weekly number of hours worked by the employee during that period of employment (calculated by reference to such hours as are ascertainable if the hours actually worked over that period are not known); and*
>
> *(d) the cash value of any board and lodging provided for an employee shall be deemed to be its cash value as fixed by or under the conditions of the employee's employment, or, if it is not so fixed, shall be computed at the prescribed rate; and*
>
> *(e) where by agreement between the employer and the employee the commencement of the leave to which the employee is entitled or any portion thereof is postponed to meet the convenience of the employee, the rate of payment for such leave shall be at the ordinary time rate of pay applicable to him at the date of accrual or, if so agreed, at the ordinary time rate of pay applicable at the date he commences such leave.*

11 It suffices to say that ***section 4(2)*** has no application to this matter. Nor for that matter does ***section 4(3) of the Act.*** Given that the Claimant is award free relevantly ***section 4(3)*** provides:

> *(3) Where a person is, by virtue of —*
>
> *(a) an award or industrial agreement;*
>
> *(b) an employer-employee agreement under Part VID of the Industrial Relations Act 1979 or other agreement between the person and his employer; or*
>
> *(c) an enactment of the State, the Commonwealth or of another State or Territory,*
>
> *entitled to, or eligible to become entitled to, long service leave at least equivalent to the entitlement to long service leave under this Act, that person is not within the definition of "employee" in subsection (1).*

12 The definition of "ordinary pay" ***section 4(2)*** speaks for itself. In that regard the entitlement to ordinary pay in ***section 8(1)*** means an entitlement to remuneration for an employee's normal weekly hours of work calculated on the ordinary rate of pay applicable but does not include shift premiums, overtime, penalty rates, commission, bonuses, allowance or the like. "Ordinary pay" also includes the cash value of board and lodging however that has no application in a matter before me.

13 It is axiomatic having regard to the definition of "ordinary pay" that the cash value of a vehicle provided by an employer in a salary package situation is not to be regarded as part of the ordinary pay for the purpose of ***section 8(1*)**. Such is to be distinguished from circumstances when part of one salary is sacrificed, as was the case in ***Hayman –v- Donald F Munro & Associates Pty Ltd*** - WAIG 3666.

14 The Claimant's agent cited a number of authorities which he says support his contention that the cash value of a fully maintained motor vehicle supplied to the employee by an employer is to be taken into account in calculating the remuneration of an employee.

15 Those authorities namely

- ***Capewell –v- Cadbury Schweppes Australia Ltd 78WAIG 299;***
- ***Blake –v- Robowash Pty Ltd 78 WAIG 2925;***
- ***Holland –v- GAM Steel Pty Ltd Unreported AIRC (Melbourne) delivered 5 January 2000;***
- ***Vickridge –v- 89 Enterprises (1981) 80 WAIG 4485; and Fliedner –v- Philips Electronics Australia Ltd [2003] NSWIR Comm 23.***

were decided in the context of claims for contractual benefits unfair dismissal and the like. None of them specifically were considered or determined having regard to ***section 8(1) of the Act.***

16 ***Section 8(1*)** when read with ***section 4(1)*** is prescriptive as to what is meant by ordinary pay. It does not import discretion. The fact is that the relevant provisions of the Act do not include the cash value of motor vehicles as part of ordinary pay. For that reason it matters not what other tribunals have found concerning the cash value of motor vehicle for the purpose of determining remuneration in other contexts. For the purposes of the Act the cash value of the motor vehicle supplied to the Claimant by the Respondent cannot be considered for the purpose of calculating the Claimant's long service leave entitlement. On that ground alone the claim cannot succeed.

17 Further the claim cannot succeed for another reason also, being that the employment agreement, *exhibit 2,* which is before the Court tendered by consent, states in unequivocal terms at paragraph 5 thereof, that the vehicle provided to the Claimant by the Respondent was provided as a tool of trade and subject to the Respondent's Motor Vehicle Policy. In those circumstances it cannot be said that the vehicle was provided for the Claimant's private use as part of his salary package. The agreement speaks for itself and undermines the Claimant's contention given in evidence. In those circumstances the provision of a vehicle cannot be given a cash value for the purpose of calculating long service leave entitlements.

18 The claim is wholly unmeritorious and must be dismissed. In accordance with what was said at the trial and for the convenience of the parties, a copy of this decision will be posted to the parties. The matter will otherwise be listed on for the formal order of dismissal to be made, at which time the parties will be given an opportunity to be heard concerning the proposed order of dismissal and any other consequential matter.

G. CICCHINI,
Industrial Magistrate.

2005 WAIRC 03187

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES' COURT

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	CLAIMANT
	-v-
	MR DARYL RICHARD D'SYLVA AND MS TERESA ANTOINETTED'SYLVA T/AS PERIWINKLES LEARNING AND CHILDCARE CENTRE
	RESPONDENT
CORAM	INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD	THURSDAY, 29 SEPTEMBER 2005, THURSDAY, 13 OCTOBER 2005
DELIVERED	THURSDAY, 13 OCTOBER 2005
CLAIM NO.	M 75 OF 2005
CITATION NO.	2005 WAIRC 03187

CatchWords	Right of entry - notice to employer - authorised representative
Legislation:	*Industrial Relations Act 1979 – sections 49G, 49H, 49J, 49M, 49N, 49O and 83E.* *Children's Services (Private) Award No A 10 of 1990 – clause 17*
Result	Failure to give proper notice. Claim dismissed.
REPRESENTATION	
CLAIMANT	Mr M Swinbourn of the *Liquor, Hospitality and Miscellaneous Union, WA Branch* appeared for the Claimant.
RESPONDENT	Mr D Johnstone of *Workplace Relations and Management Consultants Pty Ltd* appeared as agent for the Respondent.

REASONS FOR DECISION

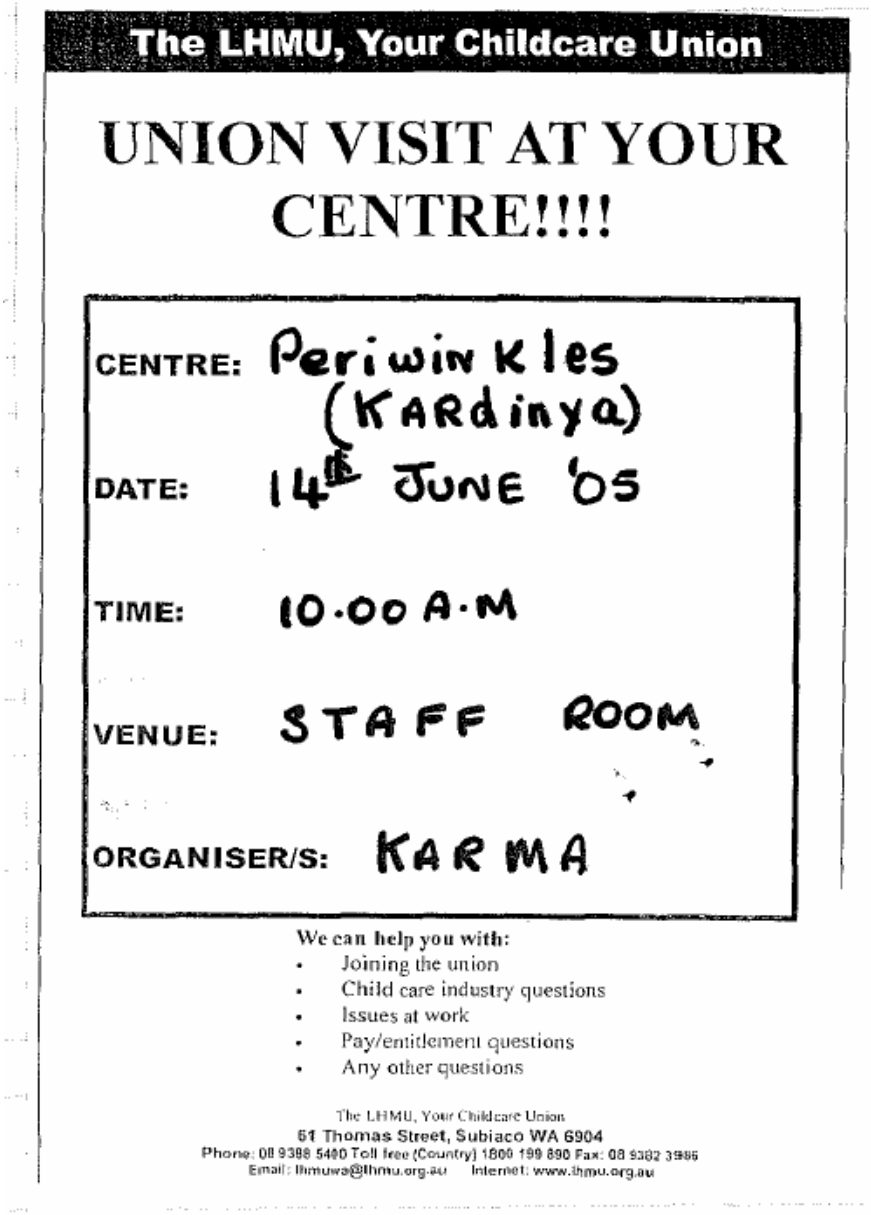
The Facts

1 The Claimant is an organisation of employees registered under Part II of Division 4 of the ***Industrial Relations Act 1979*** (the Act). The Respondent is the occupier of premises at 68 Gilbertson Road, Kardinya and other premises carrying on the business known as Periwinkles Learning and Childcare Centres (Periwinkles). The parties are subject to the ***Children's Services (Private) Award No A10 of 1990*** (the Award).

2 Ms Gayle Heron and Ms Karma Lord are and were at the material time organisers employed by the Claimant. Each were also authorised representatives as defined in section 49G of the Act appointed pursuant to section 49J of the Act.

3 Ms Heron, on or about 8 June 2005, contacted the Kardinya branch of Periwinkles and informed the co-ordinator thereof of the fact that it was intended that authorised representatives would attend the premises to hold discussions with relevant employees who wished to participate in those discussions. "Relevant employee" as defined in section 49G, means an employee who is a member of the organisation or who is eligible to become a member of the organisation. Ms Heron testified that at that time, the date and time of the visit was discussed and arranged. Having made the necessary arrangements a notice confirming the arrangement was faxed to the Kardinya branch of Periwinkles using the fax number that the co-ordinator had confirmed was the correct fax number for the Respondent's business at that location.

4 The notice (exhibit 8) was in the following terms.



The LHMU, Your Childcare Union

UNION VISIT AT YOUR CENTRE!!!!

CENTRE: Periwinkles (KARdinya)

DATE: 14th JUNE '05

TIME: 10.00 A.M

VENUE: STAFF ROOM

ORGANISER/S: KARMA

We can help you with:

- Joining the union
- Child care industry questions
- Issues at work
- Pay/entitlement questions
- Any other questions

The LHMU, Your Childcare Union
61 Thomas Street, Subiaco WA 6904
Phone: 08 9388 5400 Toll free (Country) 1800 199 890 Fax: 08 9382 3985
Email: lhmuwa@lhmu.org.au Internet: www.lhmu.org.au

5 The notice was transmitted to the Respondent's business and a message confirmation document receipt was generated by the Claimant's fax machine signifying successful transmission.

6 The Respondent denies that the notice was received. Mr Daryl D'Sylva testified that the fax number used was not at the material time used for fax purposes. He said that at the material time the number was used as a telephone line. He testified also that the fax machine was not operational in that it was not loaded with paper. Simply put, at that time and for months

beforehand, the Respondent's business at that location did not receive any faxes. Consequently the notice sent to the business was not received by him.

7 At about 10.05 am on 15 June 2005 Ms Heron and Ms Lord entered the foyer of Periwinkles at Kardinya for the purpose of exercising their powers pursuant to section 49H of the Act. They intended to engage in discussions with relevant employees. Upon entering the foyer of the centre they were greeted by Ms Farzaneh Asadi, the centre's co-ordinator. They introduced themselves and explained that they were from the Claimant. Ms Asadi told Ms Heron and Ms Lord that she recognised them from a previous encounter and that the situation was unchanged in that she could not let them enter and speak with workers. She suggested that the representatives could leave some brochures behind. She was told that was not appropriate because they needed to speak with the workers which were their right. She was informed that it was an offence to hinder them in the exercise of their "right of entry" powers under the Act. Ms Asadi became a little distressed and informed Ms Heron and Ms Lord that she was under instruction from Mr D'Sylva, the owner of the centre that she could not let them in. She told them that they should speak to Mr D'Sylva about the matter as it was he who had instructed her not to allow entry. After some further discussion Ms Heron and Ms Lord left when it became apparent to them that they would not be permitted entry. They consequently left at about 10:15 am.

8 Ms Asadi was not called to give evidence and Mr D'Sylva was not present when the aforementioned discussions took place. Accordingly the evidence given by

9 Ms Heron and Ms Lord with respect to what occurred on 14 June 2005 remain unchallenged.

10 The only other evidence of relevance was given by Mr D'Sylva. He testified concerning the operational aspect of the business at Kardinya. I need not address his evidence nor do I need to address the evidence given by Ms Lisa Forester, an organiser and authorised representative employed by the Claimant. Her evidence of her conversation with Mr D'Sylva concerning entry onto premises at another location is not relevant to my considerations.

The Claim and Response

11 The claim is made pursuant to section 83E of the Act. It is alleged that the Respondent contravened section 83E of the Act. It is alleged that the Respondent contravened section 49M(1) of the Act by refusing and/or intentionally and unduly hindering or obstructing authorised representatives of the Claimant exercising power conferred by Part II Division 2G of the Act. The evidence dictates that the Claimant alleges that the Respondent failed to comply with section 49H of the Act.

12 Relevantly section 49H provides.

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.

(2) If an award, order or industrial agreement that extends to the relevant employees makes provision as to entry onto premises by an authorised representative and —

(a) does not require notice to be given by the representative; or

(b) requires a specified period of notice to be given by the representative,

the authorised representative is not required to give notice under this section.

(3) If subsection (2) does not apply, the authorised representative is not entitled to exercise a power conferred by this section unless the authorised representative has given the employer of the employees concerned at least 24 hours' written notice.

13 The conduct giving rise to civil penalties for a failure to comply with section 49H of the Act is set out in section 49M of the Act which states:

49M. Conduct giving rise to civil penalties

(1) The occupier of premises must not refuse, or intentionally and unduly delay, entry to the premises by a person entitled to enter the

premises under section 49H or 49I.

(2) A person must not intentionally and unduly hinder or obstruct an authorised representative in the exercise of the powers conferred by this Division.

(3) *A person must not purport to exercise the powers of an authorised representative under this Division if the person is not the holder of a current authority issued by the Registrar under this Division.*

Section 49O of the Act outlines the avenue for enforcement by providing:

49O. Enforcement of this Division

A contravention of section 49J(9) or 49M(1), (2) or (3) is not an offence but those subsections are civil penalty provisions for the purposes of section 83E.

Section 83E of the Act contains the powers of the Court to deal with a contravention of section 49M of the Act.

83E. Contravention of a civil penalty provision

(1) If a person contravenes a civil penalty provision, an industrial magistrate's court may make an order imposing a penalty on the person, not exceeding —

(a) in the case of an employer, organisation or association, $5 000; and

(b) in any other case, $1 000.

(2) Subject to subsection (3), if a person contravenes a civil penalty provision an industrial magistrate's court may, instead of or in addition to making an order under subsection (1), make an order against the person for the purpose of preventing any further contravention of that provision.

(3) In the case of a contravention of section 49D(2) or (3), the court is not to make an order under subsection (2) instead of making an order under subsection (1) but may make an order under subsection (2) in addition to making an order under subsection (1).

(4) An order under subsection (2) —

(a) may be subject to any terms and conditions the court thinks appropriate; and

(b) may be revoked at any time.

(5) An interim order may be made under subsection (2) pending final determination of an application under this section.

(6) An application for an order under this section may be made by —

(a) a person directly affected by the contravention or, if that person is a represented person, his or her representative;

(b) an organisation or association of which a person who comes within paragraph (a) is a member;

(c) the Registrar or a Deputy Registrar; or

(d) an Industrial Inspector.

(7) An application under subsection (6) must be made in accordance with regulations made by the Governor.

(8) The standard of proof to be applied in determining whether there has been a contravention of a civil penalty provision is the standard observed in civil proceedings.

(9) A person must comply with an order made against him or her under subsection (2).

Penalty: $5 000 and a daily penalty of $500.

(10) Where, on an application under subsection (6), the industrial magistrate's court does not make an order under subsection (1) or (2), the court may, by order, dismiss the application.

(11) An order under subsection (1), (2) or (10) may be made in any case with or without costs, but in no case shall any costs be given against the Registrar, the Deputy Registrar, or an Industrial Inspector.

(12) In proceedings under this section costs shall not be given to any party to the proceedings for the services of any legal practitioner or agent of that party unless, in the opinion of the industrial magistrate's court, the proceedings have been frivolously or vexatiously instituted or defended, as the case requires, by the other party.

14 The Respondent does not take issue with the fact that authorised representatives employed by the Claimant are and were entitled to enter the Respondent's premises at Kardinya for the purpose of holding discussions with relevant employees. The Respondent concedes that the Respondent employs relevant employees pursuant to the Award. Furthermore the Respondent does not take issue with the fact that they occupied the Kardinya premises on the material date. Further, no issue is taken about the Claimant's standing and/or capacity to bring the claim. In essence the Respondent resists the claim on two grounds being firstly that proper notice was not given, and secondly that the timing of the proposed entry offended clause 17(2) of the Award.

Determination

15 Subsection (2) of section 49H provides that if an award, makes provision as to entry onto the premises by an authorised representative and

(a) does not require notice to be given by the representative; or

(b) requires a specified period of notice to be given by the representative,

then the authorised representative is not required to give notice under the section.

Clause 17 of the Award provides.

17. - TIME AND WAGES RECORD AND RIGHT OF ENTRY

(1) A record of the time worked and wages paid to each employee employed under this award shall be maintained by the employer and shall be available for inspection by an accredited representative of the Union upon the giving of reasonable notice to the employer.

(2) Accredited representatives of the Union shall be permitted to interview employees on the business premises of the employer during non-working times and meal breaks. Provided that the duly accredited representative shall notify the employer beforehand of their intention to exercise their rights under this clause.

Provided further that nothing in this subclause shall empower a duly accredited official of the union to enter any part of the premises of the employer, pursuant to this subclause, unless the employer is the employer or former employer of a member of the Union.

Before exercising a power of inspection the representative shall give reasonable notice of not less than 24 hours to the employer.

16 It will be obvious that subclause (1) together with the third and fourth paragraphs of clause 17 relate to entry for the purpose of "inspecting" time and wages records. There is specific reference to inspection in subclause (1) and the fourth paragraph. Inspection is totally different to what was sought to be done on the material date. Accordingly those provisions have no application in this matter. Similarly the third paragraph, of necessity, must relate to the inspection provision. That is the case because of its reference to "former employer of a member of the Union". Obviously that would not apply to the Respondent's situation on the material date. Paragraph three is, therefore, demonstrably an enabling provision to allow a duly accredited official of the Union to enter premises for the purpose of inspecting time and wages records of current and former employees.

17 It follows therefore that the only relevant provision in the Award is clause 17(2). In that regard accredited representatives referred to therein should be read to mean authorised representatives. That subclause does not dispense with the requirement to give notice nor does it require a specified period of notice to be given. Consequently clause 17(2) of the Award does not comply with the prescriptive requirements of section 49H(2) of the Act and enlivens the operation of section 49H(3) of the Act. Section 49H(3) of the Act prescribes that the (my emphasis) authorised representative is not entitled to exercise a power conferred by the section unless the (my emphasis) authorised representative has given the employer of the employee concerned at least 24 hours' written notice.

18 In my view the provision requires a particular identified authorised representative to give 24 hours written notice of his or her intention to enter the employers' premises for the purpose of holding discussions with employees. It is axiomatic that the authorised person must identify him or herself by name, because the provision is more specific. The notice must be given to the employer. In that context "give" means addressed to the employer giving specific details as to the entry.

19 In my view exhibit 8 does not constitute such a notice. It does not specifically identify who sent it and it is not addressed to the employer. In reality it is no more than a flyer directed at employees informing them of the intended visit. It falls far short of the notice that is required to be given pursuant to section 49H(3) of the Act. I find that section 49H(3) has not been complied with and therefore the authorised representatives were not authorised to enter the premises on 14 June 2005.

20 Even if I am wrong in that conclusion I find that there is insufficient evidence to establish that Mr D'Sylva was given written notice of the proposed entry. Although it can be established that a fax was sent on 8 June 2005 from the Claimant to the Respondent, I cannot be satisfied that Mr D'Sylva received it. Indeed the uncontroverted evidence is that he did not receive the same because the fax machine was not being utilized. I was not presented with any technical evidence regarding the operations of fax machines that would have destroyed the credit of Mr D'Sylva's evidence. In those circumstances I have no particular reason to reject his evidence in that regard.

21 Given my findings I do not propose to consider the second limb of the Respondent's submissions.

22 I cannot be satisfied on the balance of probabilities that there was compliance with section 49H(3) of the Act which was in this instance a necessary precondition for entry. Accordingly the alleged failure to comply with section 49M is not made out. The Respondent was not required to allow entry on the material date because the prerequisite for entry had not been met.

23 The claim is dismissed

G. CICCHINI,
Industrial Magistrate.

2005 WAIRC 03183

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES' COURT

PARTIES	JENNI-LEE MANN
	CLAIMANT
	-v-
	AUSTRALIAN FAST FOODS PTY LTD T/AS CHICKEN TREAT
	RESPONDENT
CORAM	INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD	WEDNESDAY, 6 JULY 2005, WEDNESDAY, 17 AUGUST 2005, THURSDAY, 13 OCTOBER 2005, WEDNESDAY, 19 OCTOBER 2005, THURSDAY, 20 OCTOBER 2005, THURSDAY, 3 NOVEMBER 2005
CLAIM NO.	M 280 OF 2004
CITATION NO.	2005 WAIRC 03183

CatchWords	Certified Agreement - Retail Employee Grade IV - Assistant Manager, giving directions - overtime.
Result	Claim dismissed
Representation	
CLAIMANT	Mr RW Clohessy instructed by *Workclaims Australia* appeared as agent for the Claimant.
RESPONDENT	Mr A Power (of Counsel) and with him Ms D Flint (of Counsel) instructed by *Deacons* appeared for the Respondent.

REASON FOR DECISION

Background

1 The Claimant was born on 14 June 1982. On or about 16 September 1997, the Respondent employed her in the position of *Retail Employee*. On 30 October 2000 she was appointed as an Assistant Manager and continues in that position. She currently works at the Respondent's Mirrabooka store, being one of its fifty-six Chicken Treat stores in Western Australia. There are also thirteen other franchised Chicken Treat stores in Western Australia.

2 A store Manager, Assistant Manager/s (the management team) and "crew", typically staffs each Chicken Treat store. The terms and conditions of employment of the store Managers and Assistant Managers are contained within written agreements (Employment Agreement). Store Managers and Assistant Managers are paid a salary plus incentive bonuses. The crew's conditions of employment are currently governed by the ***Chicken Treat Employees SDA Agreement 2004*** certified pursuant to section 170LJ of the ***Workplace Relations Act 1996***. It appears that the various versions of the Agreement, the first of which was certified in 1998, have substantially remained unchanged since inception. It is the former 2001 certified agreement numbered AG 007342 (the Agreement), which is relevant for my purposes in this matter. The Agreement, in clauses 6(2) to 6(5), defines four different classes of *Retail Employees* (the crew) that are covered by the agreement. I set out those provisions.

3 *"Retail Employee Grade I" shall mean an employee engaged in a retail food establishment who is in the first six months of employment and who is gaining the skills required of an Employee Grade II or Grade III.*

4 *"Retail Employee Grade II" shall mean an employee with not less than six months service with Chicken Treat who is engaged to assist with the preparation, assembly, cooking or packing of product for sale; the maintenance of the work area at a standard of cleanliness as determined by Chicken Treat; the cleaning of cooking utensils, cutlery and glassware; and/or in the delivery of product to the customer outside the establishment.*

5 *"Retail Employee Grade III" shall mean an employee with not less than six months service with Chicken Treat who performs customer service functions including the taking of orders by any means, the entering of information onto a computer, the receipt of monies or other duties involving customer contact except the delivery of product to the customer outside the establishment.*

6 *"Retail Employee Grade IV" shall mean an employee involved in the preparation of food using trades equivalent skills and/or required to give direction to or be in charge of Employees Grades I – III.*

7 *The Respondent employs as its crew in its retail outlets Retail Employees in classifications in "Grades I, II or III". It does not employ any "Retail Employees Grade IV". Grades I, II and III Retail Employees provide their labour in performing the various tasks including assisting with preparation, assembly, cooking and/or packing of the product for sale. They are also involved in maintenance of the work area, the cleaning of utensils, the delivery of product, the taking of orders, the entering of information onto a computer and the receipt of monies. Generally they provide a service to customers. It is axiomatic that the management team is responsible for their supervision. The management teams responsibilities however are not limited to supervision. Indeed they are responsible for a myriad of other things aimed at the profitable operation of the particular store.*

The Claim

8 *The Claimant asserts that she is a Retail Employee Grade IV because she is involved in the preparation of food using trade equivalent skills and because she is required to give directions, or be in charge of other employees. It is the second assertion that she pleads as substantiating her claim.*

9 *In essence the Claimant says that she has worked 45 hours per week since October 2000 but has not been paid overtime for the 7 hours per week overtime worked in excess of the 38 ordinary hours as provided for by clause 8 (Hours) of the Agreement. The Claimant contends that she should have, pursuant to clause 9 (Overtime) of the Agreement, been paid 7 hours of overtime each week with the first 2 hours thereof at time and a half and the balance at double time. She has calculated the total underpayment to 8 November last year to be $27,517.52. The Claimant has, in her replacement schedule dated 23 September 2005, claimed in excess of that amount which includes amounts allegedly underpaid subsequent to the filing of the claim. It suffices to say that this Court cannot entertain that part of the claim that postdates the initiating process in this matter.*

Response

10 The Respondent denies that the Agreement binds the Claimant or in any way applies to her employment. It says that a correct interpretation of the Agreement will result in a finding that the classification *Retail Employee Grade IV* cannot apply to Assistant Managers because the Agreement does not cover its managerial personnel.

Determination

11 The pivotal issue to be determined in this matter is whether at the material times the Agreement applied to the Claimant. Such entails a consideration of the terms and conditions of her employment contained within her Employment Agreement together with a consideration of her specific duties and responsibilities outlined thereunder.

12 It is common ground that the terms and conditions of the Claimant's employment are those as set out in Exhibit 1 being the Employment Agreement dated 5 February 2003. The initial agreement relating to the Claimant's appointment to the position of Assistant Manager was lost in a fire, which destroyed much of the Respondent's records. Exhibit 1 was created to replace the one that had been lost in the fire. A perusal of Exhibit 1 demonstrates that the Claimant was appointed to the position of Assistant Manager. As the Assistant Manager she is required to report to the Restaurant Manager and to assist with the development and maintenance of performance standards and profitability required by Chicken Treat outlets. In that regard she was at the material times required to work a 45 hour week including weekends, evenings and public holidays in accordance with set rosters. More recently her hours have reduced to 40 per week. The Claimant is remunerated by way of base salary, plus incentive bonuses. The Employment Agreement purports to govern other aspects of the employment relationship including leave, termination and duties.

13 The duties and role of an Assistant Manager is reflected in the Claimant's own testimony; the evidence given by Simon Kaye who is the Respondent's State Manager, and in the documentary evidence before the Court, particularly the Employment Agreement (exhibit 1) and the various manuals, handouts and instruction sheets contained within the three volumes of Exhibit 4.

14 A review of the evidence dictates that the Claimant was in her capacity as an Assistant Manager required inter alia to do the following:

1 Manage, monitor and maintain production, budgets, sales and profits, stock and supplies.
2 Manage, monitor and maintain marketing.
3 Minimise waste of resources, supplies and product.
4 Manage, monitor and maximise the quality of product.
5 Manage, monitor and maximise customer service.
6 Manage, monitor and maximise the use of human resources to improve customer service and product.
7 Maintain cleanliness and appearance of product, premises and personnel.
8 Manage, monitor and attend to all store banking, accounting and financial control, record keeping and reporting.
9 Manage relationships with suppliers.
10 Manage and maintain the security and safety of premises, personnel and others that enter the store.
11 Manage and maintain the assets of the Respondent.
12 Manage all occupational health safety and welfare issues pertaining to the store.
13 Work with the Area and State Managers to ensure the success of the business as a whole.

15 To achieve those ends the Claimant was required to and did do the following, which are not an exhaustive list of her duties:

- Daily monitoring of sales, budgets and costs.
- Monitoring of satisfactory sales performance and budgets, throughout the day and at the end of the day.
- Daily involvement in proactive sales.
- Daily preparation of sales forecasts to reduce waste.
- Daily control of expenses against a budget.
- Daily and weekly involvement in stock takes and mini stock takes.
- Ensure on a daily basis that product did not run out.
- Constantly monitor product, quality and cleanliness.
- Instruct crews as required on a daily basis.
- Deal with customer complaints as required.
- Cook, preparing and presenting food to the highest standards on a daily basis.
- Manage labour costs by minimising overtime on a daily and ongoing basis.
- Constantly manage labour resources to achieve the appropriate result, having regard to budgetary considerations.
- Minimise staff turnover by producing a happy and pleasant working environment.
- Manage individual employees with respect to their performance and deal with any misconduct issues.
- Ensure on a daily basis that the store is presented appropriately.
- Ensure that staff is appropriately presented.
- Maintain cleanliness and hygiene standards by drafting and enforcing a cleaning schedule.
- Monitor of cleanliness issues, on a daily basis, and instructing staff with respect to problems identified.
- Answer the telephone.
- Ensure that menu board and visual display presentations are appropriate.
- Regularly monitor sales and cash on hand.
- Regularly operate the till and skim the till as required.
- Prepare cash envelopes and drop cash cleared from skimming into the safe.
- Authorise voids and sale cancellations as required.
- Daily balances of the tills.
- Maintain sales records on an hourly and daily basis.
- Collect change from the bank twice a week.
- Count the till float on a daily basis.
- Quote on catering.
- Consolidate the tills on a daily basis.
- Constantly audit sales and crew achievements.
- Receive deliveries on a daily basis.
- Order stock as required to ensure an adequate supply of product.
- Being responsible for the security of keys, alarm codes and safe codes.
- Ensure on a daily basis that the security cameras operate.
- Ensure the integrity of the premises and constantly monitor entry and exits from the store.
- Ensure on a daily basis the maintenance of a safe, secure environment for staff, customers, visitors and contractors.
- Ensure that no alcohol, drugs or other illegal substances make their way onto the premises.
- Ensure no unauthorised person enters the work area.
- Maintain the store's occupational safety and health hazard book.
- Administer first aid as required.
- Respond to any occupational safety and health issue that may arise.
- Ensure that food handling and health requirements are complied with.
- Regularly attend store management meetings with the Area Manager.
- Liaise with the Area Manager to implement marketing programs.

16 A review of the Claimant's duties reveals that she carries a high degree of responsibility, which extends well beyond that of supervision. Her role as Assistant Manager requires her to assume the prime managerial position when working in the store in the absence of the Manager. She is, in those circumstances, in ultimate control of the store. Indeed her title well reflects her position. The fact that the Claimant performs the duties described above is not in dispute and is consistent with the Employment Agreement she entered into with respect to her appointment as Assistant Manager. The Claimant accepted her appointment on the terms and conditions set out in the Employment Agreement. There is no suggestion that the Employment Agreement is a sham. Accordingly the Employment Agreement and in particular the Claimant's position description within that agreement must be given its full weight.

17 In ***Federal Commissioner of Taxation v Krakos Investments Pty Ltd 133 ALR 545*** the Full Court of the Federal Court of Australia held per Hill J (Von Doussa and O'Loughlin JJ concurring) that:

"The parties cannot determine the proper characterisation of a relationship by the label which they choose to attach to it. However, where a transaction is not a sham, and it is not suggested that the label used is not a genuine statement of the parties' intention, that label will be given its proper weight."

Australian Mutual provident Society v Allen (1978) 18 ALR 385; 52 ALJR 407; Narich Pty Ltd v Commissioner of Pay-Roll tax [1983] 2 NSWLR 597, applied.

18 The Claimant was and continues to be employed as an Assistant Manager. The nature and extent of the work required to be performed by an Assistant Manager is, in a number of important respects, significantly different to and much broader in scope than a person employed to perform work under one of the classifications in the Agreement. The evidence overwhelmingly dictates that the Claimant is not employed by the Respondent in the *Retail Employee Grade IV* classification and that the Agreement does not apply to govern her employment. Indeed the *Grade IV* classification does not describe, nor does it encompass, the much wider array of duties performed by an Assistant Manager.

19 The language of clause 6(5), when considered in the light of the language of the Agreement as a whole, reflects the fact that the Agreement does not contemplate an Assistant Manager to come within the *Grade IV* classification of the Agreement. Clauses 41(1) (a) and (b) distinguish the respective roles of an employee under the Agreement and a store Manager (which includes an Assistant Manager) in dealing with grievances or disputes. Practically that provision cannot operate if an Assistant Manager fell within the *Grade IV* classification. A similar inconsistency exists in clauses 43(1) (a) and (e) which deal with "*right of entry*". In the absence of the store Manager the Assistant Manager assumes the primary management role and is for all intents and purposes the Manager. The holding of such a position is materially inconsistent with the classification under the Agreement and, in particular, the *Grade IV* classification.

20 I find there is no ambiguity in clause 6(5) of the Agreement. Its meaning is to be obtained by considering the terms of the Agreement as a whole, applying the reasoning of the Full Bench of the Western Australian Industrial Relations Commission in ***Robe River Iron Associates v Amalgamated Metal Workers' and Shipwrights Union of Western Australia and others (1987) 67 WAIG 1097 at 1098*** and ***Norwest Beef Industries Limited and Derby Meat Processing Co Ltd v West Australian Branch, Australasian Meat Industry Employees Union, Industrial Union of Workers, Perth (1984) 64 WAIG 2124 at 2127***. Accordingly there is no need to resort to extrinsic material as an aid to interpretation. It follows that there is no need to consider the evidence given by Joseph Bullock, the Secretary of The Shop, Distributive and Allied Employees' Association of Western Australia, concerning his role in negotiating the Agreement.

21 On no reasonable view of the evidence could the Claimant be said to have been employed during the material times in the *Retail Employee Grade IV* classification. The claim must be dismissed on that basis alone. Further, and in any event the Claimant has failed to produce evidence to prove on the balance of probabilities that she is entitled to the amounts sought as reflected in her replacement schedule dated 4 March 2005.

G. CICCHINI,
Industrial Magistrate.

2005 WAIRC 03145

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES' COURT

PARTIES	BARRY DAVID SPARLING
	CLAIMANT
	-v-
	ALLSPICE HOLDINGS PTY LTD
	RESPONDENT
CORAM	INDUSTRIAL MAGISTRATE G. CICCHINI
DATE	WEDNESDAY, 16 NOVEMBER 2005
FILE NO.	M 77 OF 2005
CITATION NO.	2005 WAIRC 03145

CatchWords:	*Costs - "frivolous and vexatious" - costs thrown away*
Cases referred to in decision:	*CPSU v Murdoch University 85 WAIG 1998* *Chub Security Pty Ltd – v- Danson 81 WAIG 738*
Legislation	*Industrial Relations Act 1979 sections 83, 83(4), 83C(1), 83C(2),* *Long Service Leave Act 1958* *Commercial Travellers Award* Industrial Magistrates Court (General Jurisdiction) Regulations 2005 Regs 5(2), 11, 15 & 68
Result:	Application dismissed
Representation	
APPLICANT:	Mr R W Clohessy appeared for the Claimant
RESPONDENT:	Ms D Flint (Of Counsel) Instructed by *Deacons* appeared for Respondent.

Reasons for Decision

Background

1 On 6 July 2005 the Claimant lodged with this Court his originating claim pursuant to the provisions of the ***Industrial Relations Act 1979*** (the IR Act). It is alleged therein that the Respondent has failed to comply with the ***Long Service Leave Act 1958***

(the LSL Act) and with the ***Commercial Travellers Award*** (the Award)**.** The Claimant seeks payment of $15,537.64 plus pre-judgment interest thereon. A penalty is also sought for the failure to comply with the Award. By its response lodged on 27 July 2005 the Respondent asserts that it has never employed the Claimant.

2 In accordance with the prescriptive provisions of the ***Industrial Magistrates Court (General Jurisdiction) Regulations 2005*** (the Regulations), the Clerk of the Court, on 28 July 2005, listed the matter for pre-trial conference to be held on 16 August 2005 at 9.00 am. On 3 August 2003 the Claimant filed another claim (M 86 of 2005) in this Court alleging the same breaches and seeking the same relief as in this matter (M 77 of 2005) but naming Stirling Food Wholesalers Pty Ltd as Respondent. On 11 August 2005 Ms Danielle Flint, counsel acting for the Respondent, received by way of service the fresh claim (M 86 of 2005). In her affidavit sworn 10 October 2005 Ms Flint explained what transpired following receipt of the fresh claim. I repeat the relevant portions of her affidavit.

> *8. On 11 August 2005 I instructed Mr Michael Baldwin, an employee of Deacons, to call the agent for the Claimant, Mr Ray Clohessy, to inquire whether in light of his lodging Claim M86 he intended to withdraw Claim*
>
> *M77.*
>
> *9. I am informed by Mr Baldwin, and truly believe, that Mr Clohessy advised Mr Baldwin that he would seek instructions from the Claimant.*
>
> *10. On 11 August 2005 I instructed Mr Baldwin to call the Industrial Magistrates Court (IMC) to find out, givn that there were now two applications on foot regarding the same subject matter, being Claim M77 and Claim M86, whether the pre-trial conference listed on Claim M77 on 16 August 2005 was to be vacated.*
>
> *11. On 11 August 2005, Mr Baldwin informed me and I verily believed that the pre-trial conference before the IMC on Claim M77, listed for 16 August 2005, had not been vacated by the IMC.*
>
> *12. I met Mr Barry McGougan of the Respondent regarding Claim M77 on 15 August 2005 at 3pm to discuss the pre-trial conference listed before the IMC for 16 August. This meeting went ahead and lasted approximately 1 hour.*
>
> *13. On Monday 15 August 2005 at approximately 4.20pm I was informed by*
>
> *Mr Baldwin and truly believe that he had received a phone call from Mr Clohessy informing him that Claim M77 had been withdrawn.*
>
> *14. I instructed Mr Baldwin to call the IMC to confirm that the pre-trial conference listed for 16 August 2005 had been vacated by the IMC.*
>
> *15. I was told by Mr Baldwin on 15 August 2005 and truly believe that he was unable to contact the IMC as the IMC registry was closed for the day.*
>
> *16. At approximately 8.30am on 16 August I received a facsimile from Mr Clohessy informing me that Claim M77 had been discontinued. The facsimile did not include a Notice of Discontinuance.*
>
> *17. Annexed to this affidavit and marked "DLF3" is a true copy of the facsimile from Mr Clohessy.*
>
> *18. At approximately 8.35am on 16 August 2005, I telephoned the IMC to confirm that a Notice of Discontinuance for Claim M77 had been lodged and the pre-trial conference before the IMC had been vacated.*
>
> *19. The IMC informed me that the matter was still scheduled for a pre-trial conference at 9.00am.*
>
> *20. I then attended the IMC at 9.00am.*

3 At 8.30 am on 16 August 2005 Mr Clohessy, on behalf of the Claimant, sent a letter by facsimile transmission to the Clerk of this Court in the following terms:

> *"Please accept this application to discontinue with this matter and confirm."*

4 By doing what he did the Claimant's agent failed to comply with regulation 15 of the Regulations. Relevantly regulation 15 provides:

> ***15. Party may discontinue claim***
>
> *If a party wants to discontinue the whole or part of a claim made by the party it must lodge and serve a notice of discontinuance in the approved form.*

5 The purported notice of discontinuance was not in the form approved by the Chief Magistrate pursuant to regulation 4. Consequently it did not become operative and the matter remained listed for pre-trial conference at 9.00 am on 16 August 2005. Neither the Claimant nor his agent appeared at the pre-trial conference. Ms Flint, for the Respondent, did however appear. Needless to say the pre-trial conference was aborted.

6 On 25 August 2005 the Clerk of the Court sent a letter to the Claimant's agent in the following terms:

> ***Barry David Sparling – and – Allspice Holdings Pty Ltd***
>
> *On the 16 August 2005 you forwarded a letter advising that you wished to discontinue the above application. You were advised to complete a Notice of Discontinuance – Whole of Claim form which was faxed to you but never returned.*
>
> *Please therefore sign and date the completed Notice of Discontinuance –Whole of Claim form and return it to this office in the pre-paid envelope provided as soon as possible.*

7 It suffices to say the notice of discontinuance in the approved form has never been returned and the claim has never been discontinued in accordance with the requirements of the Regulations

8 On 10 October 2005 the Respondent made an application seeking the following order:

> *"That the Claimant pay the Respondent's costs thrown away, in the sum of $968 plus GST, forthwith."*

9 The application which was supported by Ms Flint's affidavit was listed for hearing on 19 October 2005 at 10.00 am. On 18 October 2005 at 3.35 pm the Claimant lodged a document entitled "*Response and Counterclaim*". The text of the document is as follows:

"The Claim dated 10.10.2005.

In relation to a claim for costs, the claimant states that the file is closed. No costs were claimed prior to the matter being discontinued and no application or grounds exist to re-open. Any costs incurred by the Respondent stems from the Respondent's folly alone.

Should the claim proceed, the claimant claims expenses unnecessarily incurred in the Respondent falsely purporting that the Respondent was the Claimant's employer. Expenses include $40 filing fees and $30 A.S.I.C. search fees. Agents costs at $80 per hour for 3 hours in the sum of $240.

ORDER SOUGHT:

1. *The claim of 10.10.2005 be struck out and the Respondent pay the claimed $310 plus costs of the matter.*

Authority: C.P.S.U. v/s Murdoch University Claim M19/2005."

10 The Claimant failed by the date of the hearing of the application to lodge any affidavits in opposition to the Respondent's application and/or in support of his own application albeit that his application was not in the proper form and had not been made in accordance with the Regulations. On hearing the application on 19 October 2005 the Court made certain programming orders to facilitate the provision by the Claimant of necessary affidavits. The matter was otherwise adjourned to 2 November 2005 at 9.30 am for further hearing. Subsequently on 27 October 2005 the Claimant filed a document with attachments in the following terms:

"***RESPONSE AND COUNTERCLAIM***

The Claim dated 10.10.2005.

In relation to a claim for costs, the Claimant states that the file is closed. No costs were claimed prior to the matter being discontinued and no application or grounds exist to re-open. Any costs incurred by the Respondent stems from the Respondent's folly alone.

Should the claim proceed, the claimant claims expenses unnecessarily incurred in the Respondent falsely purporting that the Respondent was the Claimant's employer. Expenses include $40 filing fees and $30 A.S.I.C. search fees. Agents costs at $80 per hour for 3 hours in the sum of $240.

ORDER SOUGHT:

1. The claim of 10.10.2005 be struck out and the Respondent pay the claimed $310 plus costs of the matter.

Authority: (1) C.P.S.U. v/s Murdoch University
Claim M19/2005
(2) Potter v/s Clarks Bread and Patisseri
WAIG. 2888/84 (M104/2004).

2. (a) Warrant 21.5.2005
a. Claim
b. Business Card
c. Allspice Holdings Pty. Ltd – Pay Advice 20.5.2005
d. Deacons 17.6.2005 re Long Service Leave
e. P.A.Y.G. Summary 6.7.2005
f. A.S.I.C. Search 1.8.2005 Allspice Holdings Pty. Ltd.
g. A.S.I.C. Stirling Food Wholesalers Services Pty. Ltd
h. Discontinue Application dated 16.8.2005 filed.

Sworn before me this 27th Day of October, 2005

(Sgd) David Manners *(Sgd) RW Clohessy*

Justice of the Peace
8 Scarborough Beach Road
Scarborough
Western Australia 6019

Receipt No. 2455"

11 It is noted that the document lodged on 27 October was a replication of that lodged on 18 October 2005 with a further paragraph added. The second document was purportedly sworn before a Justice of the Peace on 27 October 2005. Insofar as the document is said to be an affidavit, it cannot be so because it does not identify its maker and does not contain the other necessary requirements of an affidavit. Furthermore, it is not in the approved form as required by regulation 68 of the Regulations. No other affidavits were lodged in contemplation of the further hearing of the matter on 2 November 2005.

12 When the application came on for hearing on 2 November 2005 the Respondent sought to amend the application to include a claim for disbursements incurred. At that time the Claimant, through his agent, announced that he would not be pursuing the counterclaim with respect to costs. Thereafter on that day the Claimant was permitted, over objection, to give evidence viva voce as to the matters in issue with respect to the application. I decided that such was the best course of action to prevent further delay and costs to the parties whilst at the same time attempting to ensure that the parties were, so far as was possible, on an equal footing (see Regulation 5(2)). In doing so I made it clear that if anything was said falling out of the Respondent's counsel's instructions I would permit an adjournment to allow her to gain further instructions. As it turned out an adjournment was not sought as the matters raised were within instructions. The Claimant was in that way able to put evidentiary material before the Court to resist the Respondent's application. Following the receipt of evidence and submissions I reserved my decision with respect to the application.

13 The aforementioned review of the process demonstrates a persistent failure on the part of the Claimant through his agent to comply with the Regulations and/or the orders of the Court, resulting in embarrassment and frustration particularly to the Respondent. The Claimant's conduct inevitably caused delay and increased cost to the Respondent.

Determination of the Application

14 The Respondent's application seeking *"costs thrown away"* lacks statutory foundation. It may be for that reason that the application for costs has evolved into one based on frivolousness or vexatiousness pursuant to section 83C of the IR Act**,** which provides:

> ***83C. Costs of enforcement orders***
>
> *(1) Subject to subsection (2), an order under section 83, 83A or 83B may be made in any case with or without costs, but in no case shall any costs be given against the Registrar, a Deputy Registrar, or an Industrial Inspector.*
>
> *1. In proceedings under section 83 or 83B costs shall not be given to any party to the proceedings for the services of any legal practitioner or agent of that party unless, in the opinion of the industrial magistrate's court, the proceedings have been frivolously or vexatiously instituted or defended, as the case requires, by the other party.*

15 The Respondent contends that the Claimant has frivolously or vexatiously instituted the proceedings. In that regard the Respondent relies on the following three grounds:

1. The claim is brought against the wrong employer; and
2. That aspects of the claim are patently outside the jurisdiction of this Court, and
3. That the claim is in part with respect to money already paid.

16 The Claimant asserts that he named the Respondent as his employer because of documents given to him by his employer, which was suggestive of the fact that the Respondent was in fact his employer. They included business cards, group certificates and copies of pay lodgements confirmation. Apart from those documents he relied on the fact that the Respondent's solicitors when writing to his agent on 17 July 2005 made reference to the Respondent. More particularly in the letter to his agent the Respondent's solicitors said the following:

> "*This payment finalises Allspice's statutory obligation to Mr Sparling in respect of long service leave.*"

17 I accept that the Claimant genuinely believed that the Respondent was his employer. I can only infer that he now accepts that such is not the case. I infer that because he has now filed claim M 86 of 2005 with respect to the same claims but against a different legal entity. It appears that his intent was to discontinue this proceeding and start again. I digress to note that he has not as yet successfully discontinued this claim despite the fact that it was clearly his intention to do so.

18 The fact that the Respondent has been wrongly named as Respondent does not, of itself, axiomatically give rise to a finding that the proceedings have been frivolously or vexatiously instituted. In that regard I adopt my reasoning in CPSU v Murdoch University 85 WAIG 1998, which has, in my view, equal application in this matter. Insofar as this application is based on that foundation it cannot succeed.

19 In considering the other grounds it is obvious that aspects of the Claimant's claim are patently untenable in that this Court lacks the jurisdiction to hear and determine claims for superannuation and long service leave made pursuant to the LSL Act. Indeed this Court lacks jurisdiction to make any order pursuant to the LSL Act in circumstances where a state award covers an employee (see section 4(3) the LSL Act). Given that the Claimant contends in the originating claim that the Respondent has failed to comply with the *"Commercial Travellers Award"* the claim for long service leave pursuant to the LSL Act is seemingly untenable. If that is so the major part of the claim, which relates to long service leave, is it seems doomed to failure within this jurisdiction. There is force in the argument that the making of a claim, which in the main is doomed to failure, may well constitute the institution of a frivolous or vexatious claim.

20 As to the third ground, being that the Claimant has already been paid that which he seeks in the claim is a matter of dispute between the parties. The issue cannot be resolved without a trial of that issue and that cannot be achieved in dealing with this application. Given that I am not in a position to make a finding on that issue, the same cannot be considered.

21 The question remains as to whether this Court can, at this stage of the proceedings and in the manner sought, make an order for costs in any event. Given that the issue of whether or not I could entertain this application at this stage of proceedings had not been raised or argued during the course of the hearing of the application, I caused the Clerk of the Court to write to the parties concerning the issue. On 4 November 2005 the Clerk wrote to the parties in the following terms:

> *"I have been instructed by His Honour to write to you seeking submissions from you in writing relating to the following issues not addressed during the hearing of the application but which have come to His Honour's mind in consideration of the matter.*
>
> *Firstly, given that the claim has not been formally discontinued in accordance with regulation 15 of the Industrial Magistrates Courts (General Jurisdiction) Regulations 2005 and remains live, can the costs application be considered?*
>
> *Secondly, if the costs application is appropriately considered, can the Court make an order for costs without first having made an order under section 83(4) of the Industrial Relations Act 1979 (the Act)? In other words is the making of an order for costs contingent upon an order having been made pursuant to section 83(4) of the Act?*
>
> *Could you please make available your written submissions within the next seven days."*

22 Written submissions were consequently received from both parties.

23 The Respondent submitted that on 16 August 2005 the Claimant lodged a notice of discontinuance. By "filing" his notice of discontinuance the Claimant signalled his intention to discontinue the claim in accordance with regulation 15. The Respondent argues that notwithstanding the "filing" of a notice of discontinuance a matter is not formally discontinued until an order has issued from the Court. It was submitted that an order to discontinue a matter is an order under section 83(4) of the IR Act, which enlivens the Court's ability to make an order for costs under section 83C of the IR Act. Finally the Respondent says that if the Court should find against it in its submissions then it should allow the Claimant to amend its application so as to seek dismissal of the substantive claim.

24 The Claimant submitted that the Claim is still live and there is no legal capacity to award costs until the action is fully heard. Hence the Respondent's application is premature. The Claimant argues that given that no finding that proceedings have been frivolously or vexatiously instituted has been made, no authority exists to order costs. The Claimant argues that there is a "restriction" as to costs found in sections 83C and 84 of the IR Act. The Claimant also referred the Court to Chub Security Pty Ltd v Danson 81 WAIG 738 at paragraphs 22 and 23 concerning premature applications.

25 In dealing with the written submissions I reject the Respondent's contention that the claim has been discontinued. The fact is that despite the obvious intention of the Claimant to discontinue the claim it has not been discontinued in accordance with regulation 15 which provides the only mode of discontinuance. Regulation 15 is mandatory in its terms. It provides that a party "*must lodge and serve a notice of discontinuance in the approved form*" (my emphasis added). Quite fortuitously for the Claimant the claim remains live as a consequence of omission rather than design. The filing of the notice of discontinuance brings the claim to an end without an order of the Court. There is no provision in the IR Act or the Regulations that requires the Court to make an order to give force to the discontinuance. If the discontinuance is made in accordance with regulation 15 it has immediate effect without an order of this Court. Indeed it seems that there is no specific power granted to the Court to make an order of discontinuance. The respondent submits that an order to discontinue is an order under section 83(4). I disagree. Section 83(4) of the IR Act provides:

> *(4) On the hearing of an application under subsection (1) the industrial magistrate's court may, by order-*
>
> *a. if the contravention or failure to comply is proved-*
>
> *1. issue a caution; or*
>
> *2. impose such penalty as the industrial magistrate's court thinks just but not exceeding $2 000 in the case of an employer, organisation or association and $500 in any other case;*
>
> *or*
>
> *b. dismiss the application.*

26 Section 83(4) only permits three types of orders. They are the issue of a caution, the imposition of a penalty or the dismissal of an application. It is axiomatic that reference to an application within section 83 is a reference to a claim. The provision does not encapsulate discontinuance. The Court's power to make an order for costs is contained in section 83C(1) of the IR Act. The Court's power to award costs pursuant to regulation 11 does not apply to claims made under section 83. Section 83C(1) only enables a costs order in circumstances where the Court has made an order pursuant to sections 83, 83A or 83B. For the purposes of this matter, only section 83 is relevant. It suffices to say that no order pursuant to section 83 has been made in this matter. It follows that a costs order cannot be made. I accept the Claimant's submissions in that regard. Section 83C(2) only operates to confine the circumstances in which costs can be ordered pursuant to section 83C(1) when an order is made pursuant to section 83(4).

27 Insofar that it might be argued that aspects of the claim do not fall within section 83 of the IR Act and that regulation 11 applies I take the view that regulation 11 should be considered in light of section 83C(1) which effectively restricts the making of an order for costs to situations where a matter has been finally determined. That provision reflects the intent of Parliament. Regulation 11 should be construed in the same way not only to reflect the intent of the legislature but also to avoid inconsistency. The making of a costs order is necessarily contingent upon the final hearing and determination of a claim. Indeed the very difficulty expressed above concerning the inability to resolve issues without a trial is reflective of the fact that it will almost always be very difficult if not impossible to arrive at an opinion as to whether proceedings have been instituted or defended frivolously or vexatiously without the benefit of tested evidence and hearing argument on the substantive issues. Section 83C as read with section 83(4) refects that.

28 Accordingly for the reasons stated the application for costs cannot succeed. Finally, I am not minded to allow the Respondent's further application to amend its application so as to seek dismissal of the claim because to do so would result in procedural unfairness to the Claimant who has not had the opportunity to consider and argue the same.

29 The application will accordingly be dismissed.

G. CICCHINI,
Industrial Magistrate.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2005 WAIRC 03111

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOSE ROGELIO AGUILERA ACOSTA
	APPLICANT
	-v-
	DARING HOLDINGS PTY LTD TRADING AS ALLBEND ENGINEERING
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
HEARD	WEDNESDAY, 7 FEBRUARY 2001, FRIDAY, 23 MARCH 2001, FRIDAY, 20 APRIL 2001, TUESDAY, 30 APRIL 2002, FRIDAY, 11 NOVEMBER 2005
DELIVERED	WEDNESDAY, 23 NOVEMBER 2005
FILE NO.	APPL 1892 OF 2000
CITATION NO.	2005 WAIRC 03111

CatchWords	Termination of employment – Claim of harsh, oppressive and unfair dismissal – Delay – Request by respondent for application to be struck out – Application struck out – Industrial Relations Act 1979 (WA) s 27(1)(a) & s 29(1)(b)(i)
Result	Application struck out
Representation	
Applicant	Ms E Alvarez, as agent
Respondent	Mr E Rae, as agent

Reasons for Decision

1 The application before the Commission by Mr Acosta is that he was unfairly dismissed in November 2000. It is now before the Commission in November 2005 because the application has still not been heard and determined. Given that some five years has now elapsed, the delay in this matter has been extraordinary. Accordingly, the Commission has listed this matter for mention only in order to determine whether it should be dismissed for want of prosecution.

2 Ms Alvarez, who represented Mr Acosta, states that he is not responsible for the delay and that it should therefore not be held against him. Ms Alvarez tendered a bundle of documents together with written submissions in support of Mr Acosta's position that his application should not now be struck out. A copy of the bundle was given to Mr Rea who represented the respondent.

3 The respondent, Allbend Engineering, argues differently. It acknowledges some of the reasons for the delay but states that the last of the legal proceedings which arose during the course of this application was completed mid-last year and Allbend Engineering has had no contact from Mr Acosta since that time. It asks for the application to be struck out for want of prosecution.

4 This application has considerable background. It was filed in the Commission on 24 November 2000. After conferences were held on 7 February 2001 and 23 March 2001, a hearing was set down for 20 April 2001. On that day a conference was held. A file note of that conference in the bundle of documents states that Mr Acosta agreed to accept a payment being made to him in full and final settlement of the application and that a Notice of Discontinuance was signed by Mr Acosta to be "activated" when a Deed of Settlement had been executed.

5 At that time Mr Acosta was represented by a registered industrial agent, Mr Stokes. On 9 May 2001 Mr Acosta appointed another industrial agent, a firm represented by Mr Crossley. Mr Acosta advised the Commission of this and wrote to the Commission asking for the file to be kept open. On 17 July 2001 Mr Crossley wrote to the Commission requesting a further conference on the ground that Mr Acosta did not believe he had entered into a valid agreement to settle his application.

6 On 29 May 2001 Mr Acosta lodged a complaint to the Registrar against Mr Stokes and another agent Mr Broderick making a number of allegations against Mr Stokes and Mr Broderick in respect of their representation of him. On 1 February 2002, and also on 16 May 2002, the Registrar wrote to Mr Acosta giving reasons, and then further reasons, why he found that the complaint made by Mr Acosta did not justify any further inquiry.

7 On 18 June 2002 Mr Acosta made a claim to the Industrial Magistrate's Court that Mr Stokes and Mr Acosta should be de-registered. He was at that stage represented by Mr Kemp (of Counsel). On 24 July 2003 the Industrial Magistrate's Court handed down its decision striking out Mr Acosta's claim.

8 In relation to the claim of unfair dismissal, a further conference was held in the matter on 30 April 2002. This was unsuccessful in resolving the matter. A hearing date was then scheduled. On 4 November 2002 the parties requested to use a room at the Commission in order to meet. There is no record on the file of the outcome of this meeting, however it did not result in any agreed position. There was no request for anything further to happen to the application.

9 In the bundle of documents is a copy of an e-mail between Mr Crossley (who had changed his name to Mr Solomon) and Mr Rea. That e-mail records that Mr Acosta, or Mr Crossley, had been advised by the Associate to Chief Commissioner Coleman that the claim of unfair dismissal would not be dealt with until "both external cases are concluded" (e-mail sent 11 August 2003).

10 On 12 March 2004 Mr Acosta lodged an appeal to the Full Bench against the decision of the Industrial Magistrate. This appeal was lodged seven months and three weeks after the decision of the Industrial Magistrate and was therefore significantly out of time. On 20 April 2004 the Full Bench refused leave to extend time to file the appeal and the appeal was dismissed ((2004) 84 WAIG 1321, 1327).

11 In the written submissions is the following:

> "The Perth Local Court Plaint No. PE/2001-015273 did finalize on the 02/12/2003.
>
> The Applicant Matter APP 8/04 at the District Court of Western Australia was finalize on the 10 June 2004.
>
> The Applicant at the Industrial Relation Commission complaint M 04/04 to the Former Industrial Agent Mr Bryan Stoke and Mr Gerry Broderick was finalized on the 09 June 2004."

There is no other information before the Commission about the Local Court and District Court matters.

CONCLUSION ON THE REASONS FOR DELAY

12 Notwithstanding the extraordinary delay in this matter, I consider that if it can be said that there has not been any delay in this matter which is the fault of Mr Acosta, then it would be unfair to him to now strike out his claim of unfair dismissal. If, however, there has been a delay in this matter which is the fault of Mr Acosta, then that will provide grounds for considering whether further proceedings are necessary or desirable in the public interest or whether his claim should be struck out.

13 As set out above, there have been a number of other legal actions taken by Mr Acosta which arose from his dissatisfaction about his representation by Mr Stokes, in particular, and his view that Mr Stokes had been "illegally registered" and which related to whether or not he had entered into a binding agreement to resolve his claim of unfair dismissal. These were time-consuming and distracting. As advised by the then Chief Commissioner's Associate, the Chief Commissioner was of the view that Mr Acosta's claim of unfair dismissal should not be heard and determined until both of the issues at that time had resulted in a final position. In my view, that appears to have been a sensible position to adopt. There is no submission

before me that Allbend Engineering objected to this position. Accordingly, the delay in hearing the unfair dismissal claim which occurred while the legal actions were being concluded should not be held against Mr Acosta.

14 The information tendered by Ms Alvarez shows that these other legal actions have been concluded. The advice of the Associate referred to "both external cases" being concluded. If these cases are the complaint to the Registrar and to the Industrial Magistrate's Court, then they were both concluded by the time that the Full Bench dismissed Mr Acosta's appeal on 20 April 2004. It is not known what the District Court matter referred to above was about however it concluded on 10 June 2004. On that date, the other external cases being taken by Mr Acosta as known to the Chief Commissioner were concluded.

15 The written submissions refer at paragraphs 18 and 19 to two "Ongoing matters". These two matters are described as "a pending matter in the Ombudsman Department" regarding "Industrial Relations Commission Internal Investigation" and matters pending at the "Law Complaint Committee".

16 No details of these two "ongoing matters" were given in submissions. However, Ms Alvarez also asked the Commission to receive a second bundle of documents. She expressly requested that the documents be received only by the Commission and that copies not be given to Allbend Engineering. The Commission accepted this bundle on the express understanding that it would not make any findings from those documents adverse to the interests of Allbend Engineering given that it had not been given the opportunity to see them and comment on them.

17 It is sufficient, for these purposes, if I note merely that the covering letter in the bundle carries the date of 12 July 2005 and relates to the complaint made in May 2001 by Mr Acosta to the Registrar which is referred to above. I note that the subject matter of this complaint, and the legal proceedings involving it, was concluded by the decision of the Full Bench in April 2004 which dismissed Mr Acosta's appeal against the decision of the Industrial Magistrate. In fact it is more accurate to say that those legal proceedings were concluded by the Industrial Magistrate Court's decision of 24 July 2003 because Mr Acosta's appeal was lodged by him seven months late and was not accepted by the Full Bench. The second bundle of documents shows that Mr Acosta is still making his own enquiries about the issue even though the legal proceedings about it have long ago concluded.

18 As I understand Ms Alvarez's submission, she states that the covering letter shows that both of the "external cases" which were referred to by the previous Chief Commissioner were continuing at least as at the date of the covering letter of the second bundle of documents, 12 July 2005. However, for that submission to be accepted by the Commission, the documents would need to show that the legal cases referred to by the previous Chief Commissioner were continuing. To put it another way, the covering letter would need to be part of the legal cases to which the then Chief Commissioner referred. It is not. Nor could it be – the legal cases were finalised in June 2004.

19 The second bundle of documents does not show any reason why Mr Acosta, following the dismissal of his appeal against the decision of the Industrial Magistrate, and even the District Court matter referred to above, could not have then requested his claim of unfair dismissal be set down for hearing. He did not do so.

20 I conclude therefore that Mr Acosta has been responsible for the delay in this matter between June 2004 and the present. He took no steps to discuss the matter again with Allbend Engineering. He did not himself take any steps after Mr Crossley ceased to be his agent to enquire of the Chief Commissioner's Associate what he was required to do next to pursue his claim or to appoint anyone else to represent him. In fact, the only effort he appears to have made in this regard occurred after he received the Notice of Hearing for this hearing when Mr Acosta contacted two industrial lawyers regarding representation.

21 Mr Acosta did not take any steps to proceed with his unfair dismissal claim for almost eighteen months. I am left with the conclusion that if the Commission had not itself set this matter down for mention, Mr Acosta would still not have taken any steps to have his unfair dismissal claim listed for hearing.

CONCLUSION

22 It should be well understood that claims of unfair dismissal should be dealt with promptly. This is largely because reinstatement is the primary remedy under the *Industrial Relations Act*, 1979. The Commission must deal in practical solutions and reinstatement is a more difficult remedy to order when much time has elapsed since the dismissed employee was last in the workplace. Even when, as it is here, reinstatement is not claimed that does not mean that a claim of unfair dismissal can just languish at the applicant's choosing. Reinstatement is the primary remedy prescribed under the Act and the Commission is sill obliged to consider it even if it is not sought.

23 Claims of unfair dismissal must therefore be dealt with sooner, not later. The Commission has consistently held so on many previous occasions (see *Culverhouse v John Septimus Roe Anglican Community School* (1995) 75 WAIG 1960 where two and a half years passed because the employee elected to first pursue an alternative remedy through the internal Anglican Church processes and was ultimately unsuccessful; *Lewicki and Others v H.B. Brady Co Pty Ltd* (1990) 70 WAIG 4143 where the applicants through their agent contributed to a year and half's delay, leading to an overall delay of three and a half years; *Taylor v S.G.S. Australia Pty Ltd* (1993) 73 WAIG 3483 where Mr Taylor did not lodge his claim until eighteen months after the dismissal; *MacNamara v Robert Geoffrey Baker t/a Bob's Lawn and Garden Service* (1994) 74 WAIG 2387 where the applicant did not request a hearing and eighteen months passed and the application was discontinued by the Commission. A similar conclusion was reached by the Industrial Relations Commission of SA referring to a delay of approximately eleven months between the employee seeking advice and lodging his claim, nine months of which was clearly the responsibility of the employee (*SA Health Commission v Gibbons* (1995) 61 IR 1 at 7). In *Jose v Milne Feeds Pty Ltd* (1996) 76 WAIG 2459 a further delay of ten months was seen as critical and in *Swinden v Vessey Chemicals (WA) Pty Ltd* (1989) 71 WAIG 766 a delay of fifteen months in prosecuting a claim was held to be too long.

24 For the employer, too, who is obliged to defend a claim that (usually) is seen by the employer as unfounded, it is important that such claims be dealt with promptly. It can be quite time consuming, and even expensive both in time and money, to defend a claim; all the more reason for it to be dealt with promptly.

25 It is also true for the dismissed employee who has lost their job and may find it difficult to commence other employment, particularly if it is difficult to do so because of the unfair dismissal claim itself. It is for this reason that claims of unfair dismissal are obliged to be lodged within twenty-eight days of the date of dismissal; this provides the means for the claim to be made and thus dealt with more swiftly.

26 There is also the very practical issue of the Commission's ability to properly and fairly (fair to Allbend Engineering as well as fair to Mr Acosta) enquire into and deal with a claim when a significant period of time has passed since the events occurred to which the claim relates. Where there is a dispute about the facts and the Commission is required to hear detailed evidence from parties and witnesses and make findings as to credibility, that task is notoriously difficult with the passage of time: people's memories fade and become less reliable.

27 In this claim, there are a number of witness statements on record for use during the proceedings. These witness statements are dated 2001. However, the provision of evidence by a witness statement is only part of the issues to be dealt with in a claim of unfair dismissal. It is not as satisfactory as a person's actual recollection at the time. If this claim is to be heard and determined five years after the events to which it relates occurred, witnesses called, including Mr Acosta himself, will need to rely upon a memory that is five years old, or be assisted in the recollection of events by documents written four years ago. They will need to be sufficiently confident of their recollection to be cross-examined on those documents where their evidence conflicts with other evidence before the Commission. That is less certain after four or five years and is necessarily an unsatisfactory state of affairs.

28 Ms Alvarez suggested, in submissions, that at least some of those witnesses had given some relevant evidence in proceedings in 2003. It is not clear to what she referred, but even that does not provide a satisfactory answer to the effect of delay upon people's evidence. In this matter, as with most matters before the Commission claiming unfair dismissal, there are conflicts in the evidence which can only be resolved by the Commission deciding to accept one person's recollection of events over another's where the evidence conflicts. That task is notoriously difficult after a significant passage of time, as has occurred here.

29 Further, Mr Rea informs the Commission that at least two of the witnesses who would be called by Allbend Engineering are no longer its employees and thus are not readily contactable or available. Indeed, the respondent does not know whether or not those persons are still contactable and available to give evidence.

30 It is also the responsibility of an applicant to pursue their claim. This is all the more reason why, when Mr Acosta was free after June 2004 to request that his claim now be dealt with on its merits, his delay in not doing so is significant. Given that even by that date, almost three and half years had passed, time was really of the essence.

31 Ms Alvarez submitted that steps have also been taken to inform the Attorney General and even the Corruption and Crime Commission. I presume this is again a reference to Mr Acosta's issue with the registration of Mr Stokes. These steps too, it seems, would not have prevented Mr Acosta after June 2004 from asking for his claim of unfair dismissal be dealt with.

32 Ms Alvarez referred to some illness, and that Mr Acosta is unemployed. However, there is nothing in those two simple statements to show why they excuse the delay which has occurred since June 2004.

33 Ms Alvarez also stated that the "fair go" in this matter should result in Mr Acosta's claim now being listed for hearing. However, the concept of a "fair go" is a fair go not just for Mr Acosta, but also a fair go for all persons concerned including Allbend Engineering. Mr Acosta's claim is as much an issue for Allbend Engineering as it is for Mr Acosta. It is by no means clear that it is in a position five years after the event to present the same case that it would have presented had the case proceeded in 2001, or even 2004, particularly if two witnesses are not available, as may be the case. In any event, Mr Acosta had eighteen months from June 2004 to ask for his "fair go" yet did not do so. It is not valid for him now to complain of not having received a "fair go" in this circumstance.

34 I turn to consider the legal principles involved. Where a court is considering exercising its power to dismiss an action for want of prosecution, this power should be exercised only where the applicant's default had been intentional and continuous or where there had been inordinate and inexcusable delay on the part of the applicant giving rise to a substantial risk that a fair trial would not be possible or to seriously prejudice the respondent (*Birkett v James* [1978] AC 297 as referred to in *The Australian Workers' Union, West Australian Branch, Industrial Union of Workers v Barminco Pty Ltd-Plutonic Project* (2000) 80 WAIG 3162).

35 In this case the length of the delay from June 2004 is serious, it being in excess of eighteen months from the time by which, in the manner that the parties themselves accepted, Mr Acosta was free to continue with his claim of unfair dismissal.

36 While it is obvious that Mr Acosta will suffer the prejudice of not being allowed to present his case, this is to be balanced by the evidence that he has not pursued it since June 2004 while, after that time apparently, he has pursued another issue, the registration of Mr Stokes, about which there were no ongoing legal proceedings.

37 It is also to be balanced against the prejudice that the respondent will suffer in having to defend a claim after eighteen months longer than necessary and where its ability to do so may be prejudiced if all of its witnesses are no longer available. Allbend Engineering may have accepted, or at least not objected to, the delay while Mr Acosta addressed his issue with his representation by Mr Stokes and the agreement allegedly reached. It should not be prejudiced by the further delay.

38 Further, the delay since June 2004 is not excusable for any reasonable reason. As observed in *Foseberry v Mt Newman Mining Co Pty Limited* (1988) 68 WAIG 1882 at 1884, the Commission is entitled to exercise its discretion against an applicant and either refuse reinstatement or, in more extreme cases, to refuse to proceed with the matter at all. The Commission must consider the interests of the parties immediately concerned, but also the interests of the wider community, to ensure that public resources are used appropriately and efficiently: s.26(1)(c) of the Act (and see *Pietracatella v W.A. Italian Club (Inc)* (2001) 81 WAIG 2532).

39 The comments of the Full Bench in *Kangatheran v Boans Limited* (1987) 67 WAIG 1112 at 1113 that -

> "This Commission has in the exercise of its jurisdiction under section 29 considerable responsibility to the public and to the litigating public in particular, those who come before it with claims, those who are respondents to those claims. There are many, many applications of a similar sort which are dealt with day by day and there is every reason why individual Commissioners dealing with them are at pains to ensure some reasonable expedition in the prosecution of those claims."

are relevant to my consideration.

40 In this matter I find that the delay since June 2004 by Mr Acosta is inordinate and inexcusable and gives rise to a substantial risk that a fair trial would not be possible or to seriously prejudice Allbend Engineering such that the likelihood of the proceedings being able to be properly heard and determined is remote. In such circumstances, it is hardly in the public interest for the State to expend yet more resources in this matter. I have therefore reached the conclusion that the application should be struck out for want of prosecution. An order now issues to that effect.

2005 WAIRC 03112

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOSE ROGELIO AGUILERA ACOSTA
	APPLICANT
	-v-
	DARING HOLDINGS PTY LTD TRADING AS ALLBEND ENGINEERING
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	WEDNESDAY, 23 NOVEMBER 2005
FILE NO/S	APPL 1892 OF 2000
CITATION NO.	2005 WAIRC 03112

Result	Application struck out
Representation	
Applicant	Ms E Alvarez, as agent
Respondent	Mr E Rea, as agent

Order

HAVING HEARD Ms E. Alvarez (as agent) on behalf of the applicant and Mr E. Rea (as agent) on behalf of the respondent;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under s.27(1)(a)(ii) and (iv) of the *Industrial Relations Act 1979*, hereby order -

THAT the application be struck out for want of prosecution.

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

2005 WAIRC 02946

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DARRYL GRAHAM ARCHER
	APPLICANT
	-v-
	WAYANDAH PACING LODGE (ABN 40 391 842 246)
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
HEARD	THURSDAY, 8 SEPTEMBER 2005
DELIVERED	THURSDAY, 3 NOVEMBER 2005
FILE NO.	APPL 1303 OF 2004
CITATION NO.	2005 WAIRC 02946

Catchwords	Industrial Law - Contractual benefits claim - Agreement to compromise - Application to make orders in terms of a compromise - Application granted - *Industrial Relations Act 1979* s 27, s 29(1(b)(ii) and s 32
Result	Application to make orders in terms of a compromise granted
Representation	
Applicant	Mr G Broderick (as agent)
Respondent	Mr T Ferguson

Reasons for Decision

1. On 8 October 2004 Darryl Graham Archer ("the applicant") made an application pursuant to s29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act") claiming that he was owed benefits under his contract of employment with Wayandah Pacing Lodge (ABN 40 391 842 246) ("the respondent").

2. At the hearing held on 8 September 2005 the respondent advised the Commission that it had been incorrectly named and after hearing from the parties it became clear that the applicant's employer was Capel Excavations Pty Ltd even though the respondent issued the applicant with a group certificate in the name of Wayandah Pacing Lodge which I accept was a mistake on the part of the respondent. When taking into account the Commission's powers under s27(1)(m) of the Act and taking into account the circumstances of this case I formed the view at the hearing that it was appropriate to amend the respondent's name. I therefore propose to issue an order that Wayandah Pacing Lodge (ABN 40 391 842 246) be deleted as the named respondent to this application and be substituted by Capel Excavations Pty Ltd.

Background

3. A s32 conciliation conference was held in relation to this application before Deputy Registrar Wickham on 25 November 2004 and it is not in dispute that at this conference an agreement was reached between the parties to settle this matter and the terms of this agreement were confirmed in a Deed of Settlement ("the Deed") at the end of this conference. As there was a dispute between the parties about whether of not the applicant had complied with the Deed and whether or not the agreed amount in settlement of this application should have been paid by the respondent, Deputy Registrar Wickham referred the file back to the Commission as constituted in June 2005 and enclosed a report about what had transpired between the parties since this application was lodged. Attached to this report was a copy of the Deed reached between the parties on 25 November 2004.

4. Deputy Registrar Wickham's report stated the following:

> "The parties have resolved the issues between them at conference. The applicant did not attend but was represented by Mr Broderick upon full instructions. The respondent signed the Deed of Settlement at the conference."

5. The Deed which was agreed between the parties is as follows (formal parts omitted):

> "1. This Deed of Settlement arises out of an application in the Western Australian Industrial Relations Commission, Application No. 1303/2004. The parties have agreed to settle their dispute on the terms set out below:
>
> 2. Without any admission of liability the parties agree:
>
> (a) The employer will pay the employee the gross sum of $2,500.00 less appropriate tax paid by EFT by 3 December 2004
>
> (b) (deleted)
>
> (c) The employee agrees that this settlement is in full and final settlement of any and all matters relating to and arising from the employment relationship between the parties, including termination of the employee's employment;
>
> (d) The employee shall file a Notice of Discontinuance in the Commission as soon as practicable.
>
> 3. Unless otherwise required by law or by agreement between the parties, the parties will not reveal the terms of, or any negotiations in relation to, this settlement to any other person.
>
> 4. That the applicant shall make every effort to return to the respondent any and all property of the respondent employer to the respondent prior to the settlement date."

(Exhibit A3)

6. Mr Terrence Ferguson signed the Deed at the conference held on 25 November 2004 on behalf of the respondent and several days after this conference the applicant also signed the Deed.

7. As the applicant requested that the Commission issue an order in the terms of the settlement reached on 25 November 2004 the matter was set down to hear from the parties as to whether or not the Commission should issue such an order.

Applicant's evidence

8. The applicant was employed by the respondent as a plant operator driving a bulldozer on a site in Kwinana ("the site") between October 2003 and March 2004.

9. The applicant gave evidence that he gave instructions to his representative prior to the conference held on 25 November 2004 that he would accept $2,500 gross as settlement of his application. The applicant stated that he made every effort and did return all of the respondent's goods that he had in his possession prior to the settlement date of 3 December 2004 and that as a result he believed that he had fulfilled the requirements on him under point 4 of the Deed.

10. The applicant confirmed that the letter written by his representative, dated 29 November 2004, outlined his position in relation to the seven items that Mr Ferguson claimed were outstanding. This letter reads as follows, formal parts omitted:

> "**Daryl Graham ARCHER V's (sic) Wayandah Pacing Lodge**
>
> Further to the WAIRC conference, we wish to advise you that the offer of settlement has been accepted by Mr. Archer. Please find enclosed the relevant documents signed and witnessed by the parties to the application.
>
> With reference to item 4 of the 'Deed of Settlement' Mr. Archer has made reasonable effort and endeavour to comply as required. We respond to each of the items as given to myself as follows;
>
> **WITHOUT PREJUDICE.**
>
> **1.** Two invoice books. Mr. Archer has already advised you that he posted them to you at the address named on the invoice, that of a box number back in April 2004. You advised Mr. Archer that you no longer have that address so may I suggest that you contact the relevant post office.
>
> **2.** Mr. Archer is not aware, (sic) nor has in his possession any fuel dockets. He believes that you have all that he knew of.
>
> **3.** Mr. Archer says that he last saw the grease gun in the tool box attached to the 'bull dozer' that he was operating. He has not retained any of your tools in particular a grease gun.
>
> **4.** Mr. Archer last saw the 'Master key' hidden in the place where you advised him to leave it. Mr. Archer admits that he did get a key cut for the machine and upon searching is (sic) vehicle for any outstanding items listed here, he discovered a key enclosed and wishes to return it.
>
> **5.** Mr. Archer says that he never took possession of a pair of safety glasses when he was terminated. He says further that the pair provided were deteriorated beyond use.
>
> **6.** Mr. Archer says that any engine oil supplied to him was all used. He remembers that he asked you on several occasions to give him more, as he had none.
>
> **7.** Mr Archer denies ever using or needing to use your 'socket and bar' which you allege is in his possession.

This we believe concludes the requirements of the 'Deed' and we look forward to your payment of the gross amount of $2,500.00 into Mr. Archer's account by the 3rd December 2004. We wish to remind you that you are required to provide me with confirmation of the transfer of the funds into Mr. Archer's account. Once we receive the confirmation we are required to file a 'Notice of Discontinuance' in the WAIRC which will close the matter."

(Exhibit A4)

11. The applicant gave the following evidence about the items Mr Ferguson claimed were missing:

    1 The applicant stated that the two invoice books Mr Ferguson gave him were posted by him to Mr Ferguson at the address listed on the invoice books after he was terminated because he was unaware of Mr Ferguson's home address.

    2 The applicant stated that he left all of the fuel dockets he had been given up to 20 March 2004 in the bulldozer's cabin in a plastic bag, which was his normal practice.

    3 The applicant stated that he last saw the grease gun Mr Ferguson claimed was missing in a tool box in the bulldozer.

    4 The applicant stated that the bulldozer's master key was always hidden in the same place on the bulldozer and that the master key was in this place when he ceased employment with the respondent. The applicant stated that he had a key cut for the bulldozer for use in an emergency and he gave this key to his representative to pass on to the respondent after he was terminated.

    5 The applicant stated that he left the safety glasses given to him by the respondent in the bulldozer and they were in the bulldozer on his last day of employment with the respondent.

    6 The applicant stated that Mr Ferguson regularly supplied him with engine oil and that none was left at the time he ceased employment with the respondent.

    7 The applicant stated that he did not have the 'socket and bar' that the respondent claims was supplied to him and he stated that when the respondent's bulldozer had mechanical problems on 19 March 2004 he used one of his own spanners to fix the bulldozer.

12. The applicant stated that he returned all of the respondent's items that he had in his possession before 3 December 2004 and that he could not return any of the other items that the respondent claimed he had as he did not have them.

13. The applicant stated that other workers had access to the site where the bulldozer was being used.

14. Under cross-examination the applicant again denied that he knew Mr Ferguson's home address, he reiterated that he left the fuel dockets in the bulldozer when he ceased working for the respondent and he stated that he left the bulldozer's master key in the usual spot on the bulldozer. The applicant stated that when he returned to site on 23 March 2004 to collect his own screwdrivers and a spanner he discovered that they were missing and that the bulldozer had been moved and was not locked. The applicant stated that his last day of work was 20 March 2004 and that he was sacked by Mr Ferguson on 22 March 2004. The applicant stated that he had his own tools and kept them in tool boxes in his car and he stated that there was no reason for him to keep any of the respondent's tools because he had an extensive tool kit.

15. Mr Broderick stated that the applicant gave him a key to the bulldozer on the day the applicant signed the Deed and Mr Broderick gave evidence that on or about 29 November 2004 he typed the letter outlining the applicant's position concerning the seven items (see Exhibit A4). Mr Broderick stated that he then sent this letter to the respondent and he taped the bulldozer's key to the letter. Mr Broderick stated that his return address was written on the envelope and that this letter was not returned to him. Mr Broderick stated that he sent the letter to the address on the respondent's Notice of Answer and Counter Proposal which was also the same address to which this application was sent.

16. Mr Broderick maintained that he had comprehensive instructions from the applicant when he attended the conference held on 25 November 2004 and that the applicant had indicated to him that a figure of $2,500 would be acceptable to settle his claim. Whilst the applicant was unaware that Mr Ferguson would raise the return of the items contained in point 4 at the conference Mr Broderick was comfortable with the inclusion of this requirement in the Deed.

17. Under cross-examination Mr Broderick recalled calling Mr Ferguson on or about 3 December 2004 to confirm that his letter dated 29 November 2004 had been received and he stated that when Mr Ferguson said he had not received his letter he offered to fax it to him but the respondent's fax was not working. Mr Broderick stated that he did not contact Mr Ferguson before this date as he had no cause to contact him as his letter outlining the applicant's position had been sent several days prior to the date on which the respondent was to pay the $2,500 gross to the applicant and he assumed that the respondent would receive it prior to the settlement date.

Respondent's evidence

18. Mr Ferguson stated that when he agreed to the terms of the Deed at the conference held on 25 November 2004 he expected the applicant to return the seven items he outlined to Mr Broderick at the conference and Mr Ferguson stated that he was waiting for these items to be returned to him before paying $2,500 gross to the applicant.

19. Mr Ferguson claimed that he did not receive the letter from the applicant's representative dated 29 November 2004 until a copy was faxed to him by the Commission in late December 2004 or early January 2005. Mr Ferguson gave evidence that he did not receive the invoice books sent to him by the applicant as the address listed on the invoices was no longer used by the respondent and Mr Ferguson claimed that the applicant should have sent the invoice books to his home address which was known to the applicant as his address was written on the applicant's employment declaration form.

20. Mr Ferguson stated that the fuel dockets given to the applicant for the period 1 March 2004 to 20 March 2004 were not in the respondent's bulldozer after the applicant ceased employment with the respondent and as a result he had to contact the fuel supplier for copies of these dockets.

21. Mr Ferguson stated that when he was asked to move the bulldozer off the site after the applicant ceased employment with the respondent he had to purchase two new keys to move the bulldozer because there was no key in the bulldozer when he went to move it. Mr Ferguson stated that he organised for a new key to be cut on 23 March 2004 and picked it up on 24 March 2004 (see Exhibit R3). Mr Ferguson stated that when he visited the site on 24 March 2004 to move the bulldozer he could not find the grease gun which he claimed should have been in the bulldozer.

22. Mr Ferguson stated that the applicant's safety glasses were missing from the bulldozer and that two drums of engine oil which he supplied to the site on 23 March 2004 were also missing. Mr Ferguson stated that he was unaware that the applicant was not working on the site on this date. Mr Ferguson stated that on 19 March 2004 he gave a 'socket and bar' to the applicant to use on the bulldozer and that it was missing.

23. Under cross-examination Mr Ferguson stated that he was unsure of the date he obtained the new keys for the bulldozer but he confirmed that he moved the bulldozer on 24 March 2004 and Mr Ferguson stated that he was aware that the applicant was on site on 23 or 24 March 2004 as the applicant told him in a telephone conversation about a week after he ceased employment that he had visited the site on one of these dates. Mr Ferguson confirmed that the applicant's last day of work on site was 20 March 2004. Mr Ferguson agreed that other workers had access to the site where the bulldozer was being used but he stated that there had been no previous problems with goods going missing from the site.

Submissions

24. The applicant maintains that as he fulfilled what was required of him under the Deed there was no reason why the respondent should not be ordered to pay the agreed settlement sum of $2,500 gross. The applicant relies on the authority contained in David Charles Thompson v Bituminous Products Pty Ltd and Another (2002) 82 WAIG 1309 in support of its claim.

25. The respondent argues that as the applicant did not return a number of items belonging to the respondent he did not comply with the terms of the Deed and therefore the respondent was under no obligation to pay $2,500 gross to the applicant.

Findings and Conclusions

Credibility

26. In my view the applicant gave his evidence clearly and consistently and I find that his recollection of relevant events was plausible and therefore his evidence should be accepted. I do not have the same confidence in the evidence given by Mr Ferguson as I formed the view that he was hesitant at times whilst giving evidence and I find that some of Mr Ferguson's evidence was inconsistent. For example Mr Ferguson claimed that he was unaware that the applicant was not working at the site on 23 March 2004 yet that is the date on which he ordered a new key for the bulldozer according to the invoice docket from Komatsu and Mr Ferguson stated that he did not order the keys but that he went to Komatsu to purchase them yet this is contrary to what is detailed on the invoice generated by Komatsu (see Exhibit R3). Given my concerns about the evidence given by Mr Ferguson where there is any inconsistency in the evidence given by the applicant and Mr Ferguson I prefer the evidence given by the applicant.

27. In Diana Elizabeth Downs-Stoney v Derbarl Yerrigan Health Service (2004) 84 WAIG 2612 Commissioner Smith comprehensively sets out the relevant law regarding the Commission's powers to issue an order in the terms of an agreement reached at a s32 conference in the case of an application pursuant to s29(1)(b)(ii) of the Act. In this decision Commissioner Smith stated the following at page 2618:

> "In *Thompson v Bituminous Products Pty Ltd* (op cit) the issue before the Commission in that case is whether parties reached an agreement to compromise a claim under s 29B(1) of the Act. In that case there was a dispute as to whether an offer was made to compromise all claims including for a claim of under payment of award entitlements claimed on behalf of the Applicant by the Construction, Forestry, Mining and Energy Union in the Industrial Magistrates' Court. I observed in paragraph [12].
>
> > "Although I have concluded that the Commission does have the power to hear and make a declaration as to whether the parties have, by agreement, compromised an application and to make orders to enforce a compromise agreement, it is my view that the Commission should not exercise its power to hear and determine whether this application has in fact been compromised by an agreement between the parties. The reason I have reached this view is that it is clear that the remedy the Applicant seeks is in the nature of a summary judgement or relief. In an application for enforcement of a compromised agreement in the Supreme Court in *Chesterton International (WA) Pty Ltd v Interchange Holdings Pty Ltd* unreported; SCt of WA; del. 21 February 1995 Heenan J at page 7 observed:
> >
> > > 'Bearing in mind that the power to order summary or final judgment is one that should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried (see *Fancourt and Another v Mercantile Credits Ltd* (1983) 48 ALR 1 at 10) I am satisfied that this is a case in which the power should be exercised. On the material before me it is clear not only that the Court has the power in these proceedings to enforce an agreement compromising the action but also that the agreement in question is binding upon the first defendant.'
> >
> > Further in *Chesterton International (WA) Pty Ltd v Interchange Holdings Pty Ltd (op cit)* Heenan J, at page 5, observed that if there was a substantial dispute as to the terms of the agreement in question the summary procedure would be inappropriate. Murray J in *Dalmation Nominees Pty Ltd v Marinovich (op cit)* made similar observations at page 14 of his reasons for decision. In my view the order sought by the Applicant is an order enforcing the agreement. In *Roberts v Gippsland Agricultural Earthmoving Contracting Co Pty Ltd* [1956] VLR 555 at 561 Smith J observed:
> >
> > > 'And it is to be observed, at the outset, that what we are concerned with here is not the class of case in which, following upon the making of an agreement for the compromising of an action, an order has been pronounced with the real or apparent consent of both parties, and one of them then says that the order should not be drawn up or should be set aside. What we are concerned with is the class of case in which, following upon the making of such an agreement, and at a stage when no order has been pronounced, one of the parties comes to Court, with the other opposing, and asks the Court to make an order to which, by the agreement, the other party undertook to give his consent, or an order directing the other party to pay money or do some other act which, by the agreement, he undertook to do. In other words it is the class of case in which a party to an action comes to the Court seeking what is, in effect, an order enforcing the agreement specifically.'
> >
> > Smith J dealt with a number of rules of practice in relation to enforcement of compromise action and summary procedure at page 562-563. At 563 he observed that it would not be appropriate to make orders in terms of an agreement if there was a:
> >
> > > '(d) …substantial question to be determined as to what were the terms of the agreement, or as to whether it was valid or specifically enforceable, as for example where a substantial case was put forward of material mistake or of other circumstances such as would afford a defence to a suit for specific performance, a party would ordinarily be left to proceed by separate bill so that the matters raised

> might be fully investigated: see *Askew v Millington (supra); Richardson v Eyton (supra); Edwards on Compromises,* p. 186; *Fry on Specific Performance* (6th ed.), p.720.' "

In *Thompson v Bituminous Products Pty Ltd* (op cit) it was conceded by the parties that the Commission does have power in an appropriate case to make orders in terms of a compromise agreement. In this matter the Respondent makes no such concession and says that the compromise agreement constitutes a separate contract which cannot be dealt with by the Commission under s 29(1)(b) of the Act.

The Commission is not a superior court of record, it has no inherent jurisdiction, and its jurisdiction is limited to that explicitly provided by the Act *(Robe River Iron Associates v Federated Engine Drivers and Firemen's Union of Workers' of Western Australia* (1987) 67 WAIG 315; *Australian Glass Manufacturing Co Pty Ltd v Transport Workers' Union of Australia, Industrial Union of Workers', Western Australian Branch* (1992) 72 WAIG 1499). The Commission's powers are circumscribed by statute. In respect of an application under s 29, powers to make orders are confined to the express provisions of the Act (see *Qantas Airways Ltd v Gubbins* (1992) 28 NSWLR 26). The Commission does have implied powers that arise by necessary implication out of the effect of exercise of a jurisdiction which is expressly conferred (*Grassby v The Queen* (1989) 168 CLR 1 at 16-17 per Dawson J). Pursuant to s 12(1) of the Act the Commission is a Court of record. It exercises judicial power when hearing and determining claims by an employee under s 29(1)(b). As its jurisdiction is limited it is an inferior court of record. Dawson J, in *Grassby v The Queen* (1989) 168 CLR 1 at 16, delivered the leading judgment of the court in which he discussed the limits of the implied jurisdiction of an inferior court. Dawson J, first referred to Menzies J observations in *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1 at 7, that implied jurisdiction requires no authorising provision, and Dawson J then went on to say at 16 to 17:

> "Inherent jurisdiction is an elusive concept and the proposition that it arises from the nature of a court has been described as metaphysical. See *Yale Law Journal*, vol. 57 (1947) 83, at p. 85, cited by Jacob, 'The Inherent Jurisdiction of the Court', *Current Legal Problems*, vol. 23 (1970) 23, at p. 27. But it is undoubtedly the general responsibility of a superior court of unlimited jurisdiction for the administration of justice which gives rise to its inherent power. In the discharge of that responsibility it exercises the full plenitude of judicial power. It is in that way that the Supreme Court of New South Wales exercises an inherent jurisdiction. Although conferred by statute, its powers are identified by reference to the unlimited powers of the courts at Westminster. On the other hand, a magistrate's court is an inferior court with a limited jurisdiction which does not involve any general responsibility for the administration of justice beyond the confines of its constitution. It is unable to draw upon the well of undefined powers which is available to the Supreme Court. However, notwithstanding that its powers may be defined, every court undoubtedly possesses jurisdiction arising by implication upon the principle that a grant of power carries with it everything necessary for its exercise (ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest). Those implied powers may in many instances serve a function similar to that served by the inherent powers exercised by a superior court but they are derived from a different source and are limited in their extent. The distinction between inherent jurisdiction and jurisdiction by implication is not always made explicit, but it is, as Menzies J. points out, fundamental.
>
> …
>
> It would be unprofitable to attempt to generalize in speaking of the powers which an inferior court must possess by way of necessary implication. Recognition of the existence of such powers will be called for whenever they are required for the effective exercise of a jurisdiction which is expressly conferred but will be confined to so much as can be 'derived by implication from statutory provisions conferring particular jurisdiction'."

In this matter the Commission has before it an application under s 29(1)(b)(i) and (ii). Despite the fact the Applicant was reinstated to her position as Director, Client Services on 23 September 2003, the application was not discontinued. The Commission cannot in this case make orders expressly under s 23A in relation to the application under s 29(1)(b)(i) because as the Respondent points out the Commission may only make an order under the section if the Commission determines that the dismissal of an employee was harsh, oppressive or unfair. Section 23A has no application to a contractual benefit claim under s 29(1)(b)(ii). This matter has been the subject of conciliation and arbitration under ss 23(1) and 32 of the Act. The Commission has no express power under ss 23(1), 23A or 32 to make an order in terms of a compromise agreement. Although there is no express power vested in the Commission to make an order in terms of a compromise agreement I am of the view that the Commission has inherent power to do so in relation to this matter. The reasons why I have reached this conclusion are as follows.

This application was referred for conciliation and for arbitration under ss 23(1) and 32 of the Act. Section 23(1) provides:

> "(1) Subject to this Act, the Commission has cognizance of and authority to enquire into and deal with any industrial matter."

Section 32(1), (2) and (7) provides:

> "(1) Where an industrial matter has been referred to the Commission the Commission shall, unless it is satisfied that the resolution of the matter would not be assisted by so doing, endeavour to resolve the matter by conciliation.
>
> (2) In endeavouring to resolve an industrial matter by conciliation the Commission shall do all such things as appear to it to be right and proper to assist the parties to reach an agreement on terms for the resolution of the matter.
>
> (7) Where a matter is decided by arbitration the Commission shall endeavour to ensure that the matter is resolved on terms that could reasonably have been agreed between the parties in the first instance or by conciliation."

Section 32A of the Act provides that conciliation and arbitration functions may be exercised at anytime and are not limited by any other provision of the Act.

Pursuant to s 7(1a) of the Act the Commission still has before it an industrial matter. Section 7(1a) provides:

> "(1a) A matter relating to —
>
> (a) the dismissal of an employee by an employer; or
>
> (b) the refusal or failure of an employer to allow an employee a benefit under his contract of service,
>
> is and remains an industrial matter for the purposes of this Act even though their relationship as employee and employer has ended."

As Beech C, observed in *MacLeod v Paulownia Trees (op sit),* s 6(b) and (c) of the Act are consistent with making order in terms of a compromise agreement. Section 6(b) and (c) provide it is a principal object of the Act:

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

For a power to be implied, it must be necessary for the effective exercise of the jurisdiction. What is "necessary" requires identifying a power to make orders which are reasonably required or legally ancillary to the accomplishment of the specific remedies provided for in the Act (see *Pelechowski v The Registrar, Court of Appeal* (1999) 198 CLR 435 at 452; [51] per Gaudron, Gummow and Callinan JJ).

I am of the view that the Commission has power to make orders in terms of a compromise agreement providing that the orders it makes could otherwise be made expressly under ss 23(1), 23A and 32 of the Act. The power to do so is implied in the Act when regard is had to objects in s 6(b) and (c) as the grant of power in ss 23(1), 32 and 32A carries with everything that is necessary for the effective exercise of the power.

In the context of claims made under s 29(1)(b) it is reasonably necessary or legally ancillary to the proper object of accomplishing settlement of industrial disputes that parties be held to their bargains and the means for holding them to their bargains be carried out with the maximum of legal form and technically. The implied power does not extend to making orders that are not within the scope of the original application or to make orders in terms of a compromise that could not have been made following an arbitration of the merits of the application in the absence of any compromise agreement. For example the Commission could not make an order requiring the Respondent to pay the Applicant's legal costs as to do so is contrary to s 27(1)(c) of the Act."

28. Taking into account this authority and given the circumstances of this case I find that the Commission has the power and should issue the order sought by the applicant. I conclude that it is appropriate to do so in the circumstances of this case as I find that the parties have compromised this s29(1)(b)(ii) application as an agreement was reached to settle this application on 24 November 2004 and in my view the applicant has fulfilled that part of the Deed which was a pre-condition to the payment of $2,500 gross by the respondent.

29. I find that the applicant made every effort to return to the respondent any and all of the respondent's property held by him prior to 3 December 2004 as required under the Deed and I have reached this conclusion based on the following findings. It is not in dispute that the Deed was agreed to between the parties at a s32 conference held on 25 November 2004 even though the applicant was not in attendance. I find that the applicant's representative Mr Broderick was acting on full instructions from the applicant when the Deed was finalised on 25 November 2004 and the Deed was later signed by the applicant several days after this conference. It was not in contest and I find that the Deed, as written, was agreed to by Mr Ferguson and he signed the Deed on 25 November 2004 as an acknowledgment of this agreement.

30. I find that there was no uncertainty or ambiguity about the Deed agreed to between the parties on 25 November 2004 as the Deed is clear in its terms. In essence the Deed agreed to by Mr Ferguson on behalf of the respondent and the applicant required the applicant to make every effort to return all of the respondent's property he held by 3 December 2004 and in return for the applicant doing this the respondent would pay the applicant $2,500 gross by this date and Mr Ferguson detailed the seven items he believed were held by the applicant at the conference held on 25 November 2004.

31. As I accept the applicant's evidence in preference to the evidence given by Mr Ferguson I find that the applicant made every effort and did return all of the respondent's property that he held prior to 3 December 2004 which was the date on which the respondent was to pay $2,500 gross to the applicant and that the applicant communicated his position on the seven items identified by Mr Ferguson via his representative on or about 29 November 2004 (see Exhibit A4). I find that the applicant sent the respondent's invoice books to the post office box address in Capel listed on the invoice books soon after he ceased employment with the respondent on 20 March 2004 which in the circumstances would be a logical place to send the books and there was no evidence that the applicant had any cause to visit Mr Ferguson's premises to confirm that Mr Ferguson's address was other than the address on the invoice books. I find that the fuel dockets the applicant accumulated in March 2004 and the safety glasses given to the applicant by the respondent were left in the respondent's bulldozer when the applicant ceased employment with the respondent and that it was the applicant's usual practice to retain these items in the bulldozer and I find that the applicant left the bulldozer's master key in its usual spot on the bulldozer on the last day of the applicant's employment with the respondent, which I find was 20 March 2004. I find that the respondent's 'socket and bar' was not used by the applicant nor taken by him when he ceased employment with the respondent and I also accept the applicant's evidence and I find that there was no engine oil left for the bulldozer at the time the applicant ceased employment with the respondent and there was no evidence that the applicant took the engine oil left by the respondent on the site on 23 March 2004. I also find that as the bulldozer had been shifted and was unlocked when the applicant visited the site on 23 March 2004 this could explain why a number of relevant items were missing from the bulldozer including the applicant's screwdrivers and a spanner and in my view this also supports the applicant's claim that the master key was left in the bulldozer. On the basis of the above findings I conclude that the applicant has satisfied the requirements on him under point 4 of the Deed.

32. As I find that the applicant fulfilled the obligation on him under point 4 of the Deed prior to the settlement date of 3 December 2004 in accordance with the compromise reached between the parties at the s32 conciliation conference on 25 November 2004 in relation to this application I am therefore of the view that it is appropriate to issue a declaration that the parties have compromised this s29(1)(b)(ii) application and an order shall issue that the respondent pay the applicant the amount agreed by the respondent as part of this compromise.

33. A minute of Proposed Order will now issue.

2005 WAIRC 03018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DARRYL GRAHAM ARCHER
	APPLICANT
	-v-
	CAPEL EXCAVATIONS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 10 NOVEMBER 2005
FILE NO/S	APPL 1303 OF 2004
CITATION NO.	2005 WAIRC 03018

Result	Application to make orders in terms of a compromise granted.

Order

HAVING HEARD Mr G Broderick as agent on behalf of the applicant and Mr T Ferguson on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby:

1) ORDERS THAT the name of the respondent be deleted and that Capel Excavations Pty Ltd be substituted in lieu thereof.

2) DECLARES THAT the parties reached an agreement in compromise of this application on 25 November 2004.

3) DECLARES THAT the applicant has fulfilled the obligations required of him under this compromise.

3) ORDERS the respondent to pay Darryl Graham Archer the sum of $2,500 gross within seven (7) days of the date of this order.

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

2005 WAIRC 03118

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JENNIFER CARTER
	APPLICANT
	-v-
	NGUNYTJU TJITJI PIRNI ABORIGINAL CORPORATION
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
HEARD	THURSDAY, 25 AUGUST 2005, FRIDAY, 26 AUGUST 2005, TUESDAY, 13 SEPTEMBER 2005
DELIVERED	THURSDAY, 24 NOVEMBER 2005
FILE NO.	APPL 494 OF 2005
CITATION NO.	2005 WAIRC 03118

Catchwords	Termination of employment – Harsh, oppressive and unfair dismissal – Applicant unfairly dismissed – Reinstatement ordered – Continuity of benefits ordered – *Industrial Relations Act 1979* (WA) s 29(1)(b)(i)
Result	Application alleging unfair dismissal upheld and order for reinstatement issued.
Representation	
Applicant	Mr J Carter on her own behalf
Respondent	Mr M Jensen (of counsel)

Reasons for Decision

1 This is an application by Jennifer Carter ("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 position as a co-ordinator with the Ngunytju Tjitji Pirni Aboriginal Corporation ("the respondent") ("NTP") on or about 27 April 2005. The respondent denies that the applicant was unfairly terminated.

Background

2 There are a number of relevant facts that were not in dispute. The applicant commenced employment as the respondent's co-ordinator on a full-time basis on 9 April 2001 and her employment was governed by a written contract of employment (Exhibit A9) and the terms and conditions of the Aboriginal Medical Service Employees' Award (No A26 of 1987) ("the Award"). The respondent is an Aboriginal association, incorporated under the Aboriginal Councils and Associations Act 1976 and operates in accordance with the registered rules of the Ngunytju Tjitji Pirni Aboriginal Corporation ("the Constitution") (Exhibit A8). The respondent is managed by a Governing Committee ("the committee") established under the Constitution and the applicant reported to this committee on a regular basis.

3 The applicant was on sick leave from 11 April 2005 and due to return to work on 27 April 2005. On or about 14 April 2005 the applicant was sent the following letter (formal parts omitted):

> "**RE: TERMINATION OF EMPLOYMENT**
>
> It has come to the notice of the Ngunytju Tjitji Pirni Governing Committee that you have been in receipt of an unauthorized (sic) pay rise and an equally unauthorized (sic) 12months (sic) back pay.
>
> As this was never discussed or endorsed or even brought to the knowledge of the Committee in accordance with *Section 5.12 of the Ngunytju Tjitji Pirni Constitution,* the Committee has no choice but to call for your immediate termination as Co-ordinator.
>
> Your termination will commence immediately after your sick leave on the 27th of April 2005. Your behaviour is seen as a serious (sic) misconduct and a breach of trust to the organisation."

(Exhibit A3)

4 When the applicant was terminated she was paid six weeks' pay in lieu of notice.

5 As the respondent's co-ordinator the applicant was responsible for 12 staff members and the day to day management of the respondent's Child Health Screening service for up to 700 clients which consisted of mainly Aboriginal mothers and children aged from 0-5 years. The respondent employed two non-indigenous staff members its Administrator, Ms Coral Mencshelyi and its Registered Nurse, Ms Deborah Broughton. The remaining ten employees were indigenous. As at 26 April 2005 NTP was governed by a committee of eight members who were elected at the respondent's annual general meeting which was held in early 2003. At the time the applicant was terminated its committee members were:

Mrs Beverley Sambo – Chairperson

Ms Mercy O'Loughlin – Vice Chairperson

Mrs Thomasisha Skelley – Secretary

Mrs Gloria Obbs – Treasurer

Ms Anita Morrison – Committee Member

Mrs Miriam Champion – Committee Member

Ms Miriam Lewis - Committee Member

Ms Prescilla Lewis - Committee Member

6 The respondent employed the following staff as at 26 April 2005:

Co-Ordinator – Jennifer Carter

Administrator – Coral Mencshelyi

Registered Nurse – Deborah Broughton

Senior Health Worker – Anne Forrest

Health Worker – Shelley Coleman

Health Worker – Yasmin Sambo

Health Worker – Suzanne Bonney

Trainee Health Worker – Michelle Champion

Trainee Health Worker – Christine Donaldson

Playgroup Leader – Carol Thompson

Playgroup Assistant – Alicia Thompson

Cleaner – Yvonne Adams/Shaw

7 A number of the respondent's staff members were not direct employees but were employed under the CDEP programme.

Applicant's evidence

8 The applicant maintained that throughout her employment with the respondent neither she nor other employees had duty statements and that the respondent did not have a code of conduct for its employees. The applicant claimed that Ms Mencshelyi dealt with the respondent's funds and that it was the applicant's role to co-ordinate the respondent's programs.

9 The applicant stated that as she experienced a number of personal tragedies in the first year of her employment with the respondent and because of staff problems she did not have time to formulate policies for NTP's operations. The applicant stated that during the second and third year of her employment with the respondent she undertook a course in Aboriginal Primary Health Care Work which she completed in December 2003 (Exhibit A5).

10 The applicant stated that both she and Ms Mencshelyi had a significant amount of time off work in 2004 due to illness and the applicant stated that in early 2005 she took several weeks of leave for personal reasons.

11 The applicant stated that at the beginning of 2005 she obtained funding to develop policies and to clarify the roles of employees and committee members. The applicant stated that prior to these policies being developed she was terminated.

12 The applicant maintained at the time she was terminated she had little support from the committee or Ms Mencshelyi.

13 The applicant gave evidence about a letter of complaint she received on 6 April 2005 which was generated by Ms Mencshelyi and signed by her and three other employees. The applicant stated that the committee's chairperson, Ms Beverley Sambo had a discussion with Ms Mencshelyi lasting for over one hour on 5 April 2005 and the applicant stated that on the morning of 6 April 2005 she saw Ms Mencshelyi having a discussion with three workers, Ms Anne Forrest, Ms Yasmin Sambo and Ms Suzanne Bonney and that in the afternoon she saw Ms Mencshelyi typing a document on her computer. The applicant stated that later that afternoon Ms Mencshelyi demanded that she read the letter written by her and signed by Ms Mencshelyi and the three staff members with whom Ms Mencshelyi had met earlier that day (Exhibit A12). The applicant stated that after Ms Mencshelyi handed her this letter she attended a committee meeting at approximately 4.40pm to give the committee a

written report which was her usual practice. The applicant stated that after the previous committee meeting minutes were read at this meeting Ms B Sambo started attacking the applicant about the applicant's relatives who were working for the respondent. The applicant gave evidence that Ms B Sambo stated that new staff should not be appointed without the committee agreeing to their appointment and the applicant stated that she then raised issues concerning Ms B Sambo's daughter, Ms Y Sambo. The applicant maintained that the respondent's vice chairperson, Ms Mercy O'Loughlin then said that the committee should meet with Ms Y Sambo. The applicant gave evidence that Ms B Sambo then asked the applicant to leave the meeting. The applicant stated that as she was upset about the letter given to her by Ms Mencshelyi that day she felt she was being personally attacked and she left the respondent's premises however, prior to leaving she left a note asking the committee to contact her so that she could lock up the respondent's premises after they finished their meeting.

14 The applicant stated that because she was upset the following day as she felt that she was not getting any support from senior staff and committee members, she did not attend work and on Friday she took 'time off in lieu'. The following Monday the applicant commenced two weeks' sick leave (Exhibit A1).

15 The applicant stated that she was shocked when she received a registered letter on Monday 18 April 2005 notifying her that she had been terminated (Exhibit A3). The applicant stated that this was not the first time that she had been terminated. The applicant stated that in August 2001 there was internal conflict at NTP which led to the applicant being given a letter notifying her of her termination and the applicant gave evidence that after the committee met this decision was overturned. The applicant believed that Ms Mencshelyi was behind this incident. The applicant claimed that Ms Mencshelyi tried to have her terminated a second time in 2003 after an employee complained about the applicant. The applicant stated that as a result of this complaint a meeting was held with Ms Mencshelyi, a former employee Ms Tanya Lewis, the applicant and some committee members and after a range of issues were canvassed the applicant was told not to send too many emails to staff and the matter was resolved.

16 The applicant gave evidence about the issue which she understood led to her termination. The applicant maintained that she was entitled to the wage increase which she organised for herself with Ms Mencshelyi in early 2005 because once she completed her Aboriginal Primary Health Care Work course in 2003 she was entitled to be paid a higher pay rate under the Award. The applicant stated that even though she completed this course at the end of 2003 she had forgotten about being entitled to the increased rate of pay at the time and the applicant claimed that in any event it was Ms Mencshelyi's role to advise employees of wage increases when they were due. In January 2005 the applicant emailed Ms Mencshelyi about increasing her pay rate and Ms Mencshelyi responded on 3 February 2005 agreeing to give effect to the increase and back pay (see Exhibits A6 and A7). The applicant stated that she assumed this was the appropriate way to have her pay increase dealt with because Ms Mencshelyi normally authorised and paid the wage increases for all of the respondent's employees when they were due and the applicant gave evidence that Ms Mencshelyi told her when the respondent's employees were eligible for a new rate of pay and that the committee did not have to authorise these increases. The applicant also gave evidence that the committee did not authorise any of the wage increases given to her and other employees.

17 The applicant commented on the minutes of a committee meeting held by the respondent on 14 April 2005 which read as follows:

"Minutes for the NTP

14TH Apr. 2005-04-23

2:36pm

Present: Mercy, Gloria, Anita, Beverly (chair)

Absent: Thomasisha, Miriam, Marion.

Arrived late: Thomasisha 3:00p.m.

Business arising

1.0 Landscaping quote for approval, before Fiona Stanley visit.

MOTION accepted Anita

2nd Mercy AIF

Action – Coral to contact landscaper to book him in.

1.1 (a) Yasmin being docked for days taken off for toil without reason being given.

(b) (sic) Does Yasmin need to detail her reason for requesting leave?

Committee requested; Toil leave (accumulated hours) available. Email from Jenny C. to Yasmin requesting that Yasmin provide her with an explanation for her requesting toil leave

Committee deemed that Yasmin will not be docked for toil leave to be effective from 24/04/05.

MOTION accepted Thomasisha.

2nd Gloria. A.I.F. Passed.

Letter to Wayne Combo requesting a list of inexperienced ladies.

NB. In future, employment of these people must be endorsed by the Committee.

1.2 Feul (sic) cards, Staff have them and know how to use them

1.3 Stationery/medical orders, payment of. Approved.

1.4 Nicholsen order for T paper etc. Approved

1.5 Kalgoorlie Home&Lawn (sic) to mow

1.6 Sean Lewis to maintain computers 8am Tuesday. Approved

1.7 Anne Forrest

1.8 Bills all paid up

1.9 Trevor maintenance for fence. Approved

1.10 Cheque to under lock and key

1.11 Staff would like to change their admin day so all staff can be available

Change the current Admin day so that on Admin day one(1) H.W can be in the office and the rest in the field rotating staff si (sic) they can catch up on their work.

1.12 Coral – Perth

1.13 W.A. NILS Coral country representative.

1.14 Requesting pay-rises. Coral, ~~Coral,~~ (sic) Carol. To be addressed when Coral gets back from leave. Committee to investigate

MOTION Pay-rises for Yasmin and Coral were approved by the Committee to commence by the next pay.

MOVED Mercy

2nd Gloria A.I.F passed.

1.15 Before future pay rises an appraisal need to be carried out prior to pay rise and need to be ~~carried out by~~ *endorsed* (sic) by the Senior H.W

MOVED; Anita

2nd; Thomasisha AIF Passed

1.16 Key for the back door for all H.W's

MOTION; Workers can have a key that needs to be put onto their vehicle key-Rings (sic) for access to the back door and key to remain with them.

Unanimous Committee Approval

Due to the discovery of unauthorised payments of back-pay and O/T by the Co-ordinator, Jenny Carter for herself, the Committee has no alternative but to terminate her employment as per Rule *20* of the Constitution and the advice given. This Summary Dismissal will take place immediately after her sick leave expires 26/4/2005.

NB Note that Administrator also committed an offence by her complicit behaviour and her choice to also remain silent."

(Exhibit A10)

18 The applicant believes that her termination, which she understood was decided upon on the day this committee meeting took place, was invalid as the committee did not follow a number of requirements under the Constitution (Exhibit A8). The applicant maintains that these minutes refer to the respondent having no alternative but to terminate the applicant yet there is no mention of a motion being passed to terminate the applicant on 14 April 2005 as required under section 16 of the Constitution. The applicant also maintains that as no motion was put to the meeting to terminate her, the committee did not make a valid decision to terminate her. The applicant claims that as the minutes of this meeting were not adopted by the subsequent meeting held on 27 April 2005 this was also contrary to the Constitution and therefore her termination was invalid and the applicant pointed out that her letter of termination refers to her being terminated under a section of the Constitution which does not exist.

19 The applicant claims that when she was terminated she was denied procedural fairness as she had no opportunity to respond to the committee's decision to terminate her and she was unaware what report if any was made to the committee about her actions prior to her termination.

20 The applicant is seeking reinstatement and believes that this should not be an issue for the respondent as most of the respondent's staff were not involved in her termination. The applicant argues that as an indigenous person is required to fill the position of co-ordinator because the majority of the respondent's clients are indigenous, the applicant maintains it is therefore appropriate that she be reinstated to her former position. The applicant stated that she was very successful in her role, NTP's work was recognised Australia wide, through the applicant NTP has built up significant relationships with other agencies and NTP assists its clients with a range of issues besides health, for example housing and therefore her reinstatement would be of benefit to NTP clients. The applicant stated that she has worked hard for the respondent for four years and she has not been given any warnings about her performance nor has she engaged in any improper behaviour.

21 The applicant maintains that the three employees who signed the letter along with Ms Mencshelyi dated 6 April 2005 had little input into the contents of this letter.

22 The applicant stated that she is currently studying and did not seek out alternative employment after her termination as she was waiting for this application to be finalised.

23 Under cross-examination it was put to the applicant that the issues raised in the letter dated 6 April 2005 were issues that she should have addressed. The applicant maintained that each employee should have come to see her personally, that she did not like the way she was approached by Ms Mencshelyi, she felt that the letter undermined her and she claimed that the letter was generated after she raised concerns with some of the employees who signed the letter.

24 When asked about what took place at the committee meeting held on 6 April 2005 the applicant stated that the committee asked her which employees were working for the respondent and who was a CDEP employee. The applicant maintained that she left this meeting because the chairperson asked her to and she stated that even though she was asked to remain on the premises after leaving the meeting she did not do so because she felt humiliated by Ms Mencshelyi's letter.

25 The applicant stated that she did not get on with Ms Mencshelyi and that it would be difficult to work with her in the future after what she claimed she had done to her however they had worked together in the past after having arguments and fights. The applicant stated that she could return to work with the other staff members because she believed they were innocent.

26 The applicant stated that because NTP did not have written policies it was unclear who should be authorising employee pay increases. The applicant maintains that she had the authority to manage the respondent's funds and she stated that she stopped Ms Mencshelyi authorising employee pay increases in late 2004.

27 The applicant stated that when she visited NTP's office on 18 April 2005 she could not recall referring to Ms Mencshelyi in derogatory language or using threatening language towards her and she could not recall yelling at other employees. The applicant stated that she did not have a good recollection about this day because she was on sick leave at the time.

28 The applicant was asked to comment on documents she generated and sent prior to and subsequent to her termination, including a copy of a letter and attachments to Ms O'Loughlin dated 10 April 2005 (Exhibit R2), an number of emails to NTP staff dated 8, 11 and 18 April 2005 (Exhibit R1), a letter dated 12 July 2005 to committee members (Exhibit R3), a letter to committee members dated 10 August 2005 (Exhibit R4) and a letter to committee members dated 11 July 2005 (Exhibit R5). The applicant stated that she generated this correspondence to highlight a number of concerns to the committee. The applicant maintained that even though she had raised a number of issues about staff and committee members in this correspondence after she was terminated she stated that she could work with them if she was reinstated and that she trusted the respondent's employees.

29 The applicant maintained that on or about 4 April 2005 she raised issues with the three employees who had signed the letter dated 6 April 2005 as well as Ms Mencshelyi. The applicant stated that prior to her termination she spoke to Ms Y Sambo about health and safety issues and she spoke to Ms Forrest, who was Ms Y Sambo's supervisor about this discussion and she also had a discussion with Ms Bonney about making excessive numbers of phone calls. The applicant believed that the three employees who signed the letter dated 6 April 2005 did not read the letter before signing it and the applicant understood that Ms B Sambo had requested that the letter be drawn up because she saw her speaking to Ms Mencshelyi prior to the letter being written.

30 In re-examination the applicant stated that she had sent several pieces of correspondence to committee members after her termination because she was angry and she believed that this was the only way she could obtain justice and the applicant stated that she did not complain to the committee about any staff members prior to her termination.

31 The applicant believed that the committee made its decision to terminate her without any written report being presented to the committee about the increase to her rate of pay and the applicant maintained that she should not have been terminated whilst on sick leave.

32 Ms Bonney is currently an Aboriginal Education Islander Officer at South Kalgoorlie Primary School and she has held this position since 20 May 2005. Ms Bonney worked with the respondent in 2002 and she returned to work for the respondent in November 2004 to fill in for an employee who was on maternity leave. Ms Bonney stated that she had no problems undertaking her role with the respondent and that the job was full-on and taxing. Ms Bonney stated that after a number of staff returned from leave in January and February 2005 she felt less pressured.

33 Ms Bonney stated that when she signed the letter dated 6 April 2005 she had worked for the respondent for approximately five months. Ms Bonney stated that after coming in to work on 6 April 2005 Ms Mencshelyi approached her, Ms Forrest and Ms Y Sambo and said that Ms B Sambo had contacted Ms Mencshelyi asking for a letter to be written about work issues for the committee meeting taking place later that day. Ms Bonney stated that as Ms Forrest, Ms Y Sambo and Ms Bonney were busy Ms Mencshelyi typed this letter. Ms Bonney stated that she signed the letter at about 3.30pm on 6 April 2005.

34 Ms Bonney stated that due to the lack of guidelines at work as to how to raise concerns, she had spoken to Ms Mencshelyi about some work issues and she gave evidence that Ms Mencshelyi told her that the only way to address her concerns was to raise them with the committee. Ms Bonney stated that Ms Mencshelyi encouraged her to read the letter dated 6 April 2005 before she signed it. Ms Bonney stated that she signed the letter regardless of what was in it and she stated that she understood the letter would be given to the committee that afternoon. Ms Bonney stated that Ms Mencshelyi said that the applicant would be shown the letter before the committee meeting and then the issues raised in the letter would be taken to the committee. Ms Bonney stated that she only signed this letter so that a meeting could be arranged between the applicant and the committee. Ms Bonney stated that Ms Mencshelyi did not encourage her or the other health workers to raise their concerns directly with the applicant.

35 Ms Bonney stated that on 7 April 2005 Ms Mencshelyi told her that the committee was unhappy with the applicant because of the letter dated 6 April 2005 as well as other issues and that the applicant would be terminated. Mr Bonney stated that she was shocked when she was told that this would happen.

36 Ms Bonney stated that she believed that there was a power play between Ms Mencshelyi and the applicant and that as a result there was tension in the office.

37 Ms Bonney stated that on Tuesday 12 April 2005 Ms Mencshelyi told her that a meeting with a lawyer was going to be held the following day to discuss the applicant and Ms Bonney stated that on the afternoon of 12 April 2005 staff met with some committee members to discuss this meeting. Ms Bonney was told to attend a meeting on Wednesday 13 April 2005 with the lawyer however she did not do so as she was stressed at the time and took sick leave on the Wednesday, Thursday and Friday of that week and Ms Bonney stated that she contacted Ms Mencshelyi on 13 April 2005 and told her that she was on sick leave. Ms Bonney stated that Ms B Sambo visited her on 13 April 2005 at home and asked her to attend the meeting with the lawyer that day however Ms Bonney did not attend this meeting. Ms Bonney stated that when she arrived at work on the morning of 18 April 2005 she and the other health workers were advised that the applicant was no longer working for the respondent.

38 Ms Bonney stated that she enjoyed working for the respondent but she was unhappy about the letter she signed on 6 April 2005 being used as a basis to terminate the applicant.

39 Ms Bonney stated that she had a discussion with Ms B Sambo in Perth in February 2005 about problems between the applicant and Ms Mencshelyi and Ms Bonney stated that Ms B Sambo did not offer her any advice or assistance about how to resolve these issues and she was told by her that she was a good worker and to 'hang in there'. Ms Bonney stated that the main issues of concern that she had with the applicant related to personal issues the applicant bought up at work and not being spoken to in a respectful manner and Ms Bonney stated that she did not feel comfortable raising these issues directly with the applicant.

40 Ms Obbs has been the committee's treasurer for just over one year. Ms Obbs attended the committee meeting held on 14 April 2005 and could not recall whether or not the discussion about the applicant's termination was moved as a motion or if a motion was put if anyone seconded the motion. Ms Obbs stated that the applicant was terminated because she had given herself back pay and because Ms Mencshelyi had told her that the applicant had made her sign a cheque for this back pay and was told not to tell anyone about this payment. Ms Obbs was unaware if the applicant was entitled to an increased rate of pay.

41 Ms Obbs stated that she was not aware of the details of the respondent's income and expenditure and Ms Obbs could not recall if Ms Mencshelyi presented any documents to the committee at the meeting where the issue of the applicant's back pay was discussed. Ms Obbs stated that she was unaware if the respondent had any policies about how funding should be handled but she stated that the committee's treasurer should sign the respondent's cheques. Ms Obbs stated that she was unaware that

cheques were being signed by Ms Mencshelyi and the applicant and issued without her signature. Ms Obbs stated that the committee did not investigate Ms Mencshelyi's claim that the applicant had made her sign the cheque for back pay and she did not know why it did not do so. When asked why the applicant was not approached about this issue she could not recall if the applicant was at work at the time.

42 Ms Michelle Champion was employed under the CDEP programme and commenced working with the respondent in February 2003. Ms Champion stated that on 6 April 2005 she received a phone call from Ms Mencshelyi whilst she was on a training course telling her that she had a letter for her to sign and that Ms Y Sambo brought the letter over to her to sign (Exhibit A12). Ms Champion stated that after she read this letter she told Ms Y Sambo that she would not sign it. Ms Y Sambo then told her to ring Ms Mencshelyi, which she did however Ms Mencshelyi was unavailable as she was on another call. Ms Champion stated that she had no discussions with Ms Mencshelyi about its content prior to the letter being drafted. Ms Champion stated that after she returned to her studies that day she felt stressed and she did not attend her course the following day.

43 Under cross-examination she reiterated that she had no discussions with Ms Mencshelyi prior to the letter being generated on 6 April 2005.

Respondent's evidence

44 Ms Skelley is the committee's secretary and she has held this position for approximately two years. Ms Skelley stated that committee meetings were held intermittently and she assumed that the respondent's operations were running smoothly. Ms Skelley stated that she did not attend the committee meeting held on 6 April 2005.

45 Ms Skelley stated that she contacted Ms Mencshelyi on 12 April 2005 and that as she was upset she therefore visited the respondent's office. Ms Skelley stated that when she arrived at the respondent's office Ms Mencshelyi was crying and the situation was chaotic and that a number of staff were upset. Ms Skelley understood that there had been a clash between the applicant and Ms Mencshelyi and she understood that the applicant had sworn at Ms Mencshelyi. Ms Skelley gave evidence that an urgent committee meeting was called for that afternoon and a lawyer was contacted to discuss terminating the applicant.

46 Without being able to recall specific dates Ms Skelley stated that she understood that at some point some of the respondent's money was missing and it had come to the respondent's attention that the applicant had given herself a pay rise. The committee asked Ms Mencshelyi what was going on and Ms Mencshelyi advised it about a range of issues. Ms Mencshelyi was then asked to show the respondent's books to the committee. Ms Skelley stated that Ms Mencshelyi told the committee that the applicant had demanded that back pay be paid to her and demanded that Ms Mencshelyi write a cheque for the back pay and that Ms Mencshelyi was told by the applicant not to tell the committee about this payment. Ms Skelley stated that she was unaware who generated the respondent's cheques or that employees were being given back pay. Ms Skelley stated that she attended a meeting with a lawyer about the applicant and that she also contacted the Registrar for Aboriginal Corporations in Canberra and explained that a staff member had taken money from the respondent without the committee's knowledge or permission. Ms Skelley stated that she was advised that this was fraud and that as a result the applicant could be summarily terminated.

47 Ms Skelley stated that another committee meeting was held on 14 April 2005 because the committee was concerned about what was happening within NTP and the committee felt that it had let things go too far. Ms Skelley stated that the applicant's removal was 'tantamount' and Ms Skelley stated that it was in the respondent's best interests to terminate the applicant because she had unlawfully taken money from the respondent and the applicant was threatening and frightening people.

48 Ms Skelley read the minutes of the meeting dated 14 April 2005 and she stated that it was her understanding that a motion to terminate the applicant was not passed at this meeting. Ms Skelley understood that a motion to this effect was passed at the following meeting and she stated that she was not in attendance at this meeting. Ms Skelley stated that she did not write the applicant's letter of termination.

49 Ms Skelley stated that she did not trust the applicant because of her behaviour and because she kept information from the committee. Ms Skelley claimed that the applicant's threatening behaviour was also an issue and she believed the applicant's actions would impact on the respondent's credibility.

50 Under cross-examination Ms Skelley stated that she was unaware if minutes were taken of the committee meetings held on 6 April 2005 and 12 April 2005. Ms Skelley stated that she usually takes the minutes at committee meetings and she does not know who takes the minutes if she is not in attendance. Ms Skelley was aware that a committee meeting was held on 12 April 2005 and she understood that minutes were taken at this meeting but she did not know what had happened to them. Ms Skelley stated that minutes may have been taken of the meeting on 6 April 2005 but she did not attend this meeting.

51 Ms Skelley stated that when she attended the respondent's office on 12 April 2005 she was advised about a number of issues of concern about the applicant. Ms Mencshelyi told committee members that Fiona Stanley was visiting the respondent's premises and the committee did not know about this, Ms Skelley had no idea that the applicant had given herself back pay and there were also other matters occurring in the office without the committee's knowledge and Ms Skelley stated that on the afternoon of 12 April 2005 she reviewed documents confirming a number of these claims. Ms Skelley stated that Ms Mencshelyi did not tell her that the applicant was on sick leave at this point in time. Ms Skelley stated that on the afternoon of 12 April 2005 some committee members spoke to some employees and asked them why they were upset. Ms Skelley stated that some staff were nervous and jittery because they thought the applicant would visit NTP's office.

52 Ms Skelley stated that she attended a meeting with a lawyer on 13 or 14 April 2005 but she was unaware if he spoke to staff members.

53 Ms Skelley reiterated that no motion to terminate the applicant was passed at the committee meeting on 14 April 2005 and that there was only a discussion. Ms Skelley confirmed that she wrote these minutes and Ms Skelley stated that even though a decision to terminate the applicant was being contemplated at that point in time a final decision had not been made.

54 Ms Skelley stated that the applicant's letter of termination was written without her knowledge and she only saw the letter after it was sent to the applicant.

55 Ms Skelley was unaware that the applicant's contract of employment was governed by the terms of the Award, she doubted if the committee had any idea about this Award and she was not aware that the respondent's employees were employed and paid under the terms of the Award. Ms Skelley stated that she left issues of this nature up to the staff members running the respondent's office.

56 Ms Skelley could not recall if Ms Mencshelyi showed her copies of the emails sent to her by the applicant in early 2005 about her back pay and pay increase although she could recall seeing the emails at some point. Ms Skelley stated that no discussions were held with the applicant about her termination as she was away and could not be contacted. Ms Skelley stated that the situation was highly emotional at the time the applicant was terminated and that there were a number of accusations between Ms Mencshelyi and the applicant and it was up to the committee to intervene. Ms Skelley stated that she endeavoured to keep the lines of communication open with the applicant and she stated that no one was seeing reason at this time and that there was a lot of conflict and hostility.

57 Ms Skelley stated that the committee was angry with both Ms Mencshelyi and the applicant for Ms Mencshelyi giving the applicant a cheque for her back pay.

58 Ms Skelley stated that the respondent did not have any policies in place and should have had them in place and Ms Skelley confirmed that the respondent had funding to develop relevant policies. Ms Skelley stated that the committee did not determine each employee's role and claimed that the applicant should have done so. Ms Skelley stated that the committee assumed that things were running smoothly at NTP.

59 Ms Skelley stated that when the committee met with a lawyer he gave the respondent advice that it should proceed with caution in relation to the applicant. Ms Skelley stated that the decision to terminate the applicant was not an easy one to make and that discussions about this issue went on for several days. Ms Skelley stated that the applicant's termination was put to a vote of committee members and the committee decided that the applicant had 'to go'. Ms Skelley understood that Ms Mencshelyi was frightened of the applicant and of 'getting bashed up'. Ms Skelley understood that the staff were upset about the applicant standing over them and bullying them and that this led to the letter dated 6 April 2005 being generated. Ms Skelley stated that it was not possible to approach the applicant about the issues outlined in this letter because it was an emotional time.

60 In re-examination Ms Skelley stated that she understood standover tactics were being used by the applicant, that bullying and fighting had been occurring and that the committee was unaware of this and the committee did not know how to deal with these issues.

61 Ms O'Loughlin has been the committee's vice-chairperson for two to three years. Ms O'Loughlin stated that at the committee meeting held on 6 April 2005 the applicant was asked about employing her relatives and family friends without first coming to the committee and she stated that she had previously raised this issue with the applicant. In response the applicant stood up and said she was going. Ms O'Loughlin asked the applicant to wait outside however the applicant left the office. Ms O'Loughlin stated that after Ms Mencshelyi was asked to come in and lock the office as they did not see the note left by the applicant, Ms Mencshelyi was asked a number of questions by the committee about what was happening at NTP. Ms O'Loughlin stated that Ms Mencshelyi told the committee the applicant had made her sign a cheque to give her back pay and the applicant told her not to tell the committee and Ms Mencshelyi stated that she was too frightened to raise this issue with the committee. Ms O'Loughlin stated that the applicant also told Ms Mencshelyi to pay one of the applicant's relatives Ms Carol Topliss, four years' back pay however this was not done.

62 Ms O'Loughlin stated that the following day she checked the respondent's bank statements for the last 12 months and found that all was in order and she also checked payslips for all employees and saw where the applicant had been given a payment for back pay. A lawyer was contacted to advise the committee about this overpayment. Ms O'Loughlin stated that she spoke to Ms Forrest, Ms S Coleman and Ms Y Sambo about the applicant and they told her that they were being terrorised by the applicant and were frightened and were too scared to approach her and instead approached Ms Mencshelyi. Ms O'Loughlin stated that they told her that they were unaware that they could raise these issues with the committee. Ms O'Loughlin stated that after 6 April 2005 she was called into the office each day by Ms Mencshelyi as 'everyone was terrified there'.

63 Ms O'Loughlin stated that at the committee meeting held on 14 April 2005 the applicant's actions were discussed and the committee decided that it was inappropriate to continue employing the applicant because of her standover tactics and because of the advice the respondent had received over the backpay issue. The respondent then decided to terminate the applicant. When asked if a formal decision was made to terminate the applicant Ms O'Loughlin stated that the committee talked about it. Ms O'Loughlin stated that even though the applicant's termination letter does not refer to staff issues this was a factor in the committee's decision to terminate the applicant and Ms O'Loughlin stated that the applicant was also terminated because of the sneaky way she had given herself back pay and because Ms Mencshelyi was told not to tell the committee about this payment.

64 Ms O'Loughlin stated that she did not think it was possible for the applicant to be reinstated and Ms O'Loughlin stated that four committee members recently met with six staff members and two of those staff members stated that they would resign if the applicant was reinstated. Ms O'Loughlin stated that if the applicant returned she could not deal with the situation because of the tension it would cause and that if the applicant returned it would have to be on conditions.

65 Under cross-examination Ms O'Loughlin reiterated that the applicant was not asked to leave the meeting held on 6 April 2005 when the issue of the applicant employing her family was raised. Ms O'Loughlin agreed that at this meeting the applicant mentioned that Ms Y Sambo was not turning up for work. Ms O'Loughlin stated that after the applicant left the meeting Ms Mencshelyi attended the meeting and told the committee that the applicant had been paid 12 months back pay and that she wanted back pay to be paid to her sister. Ms O'Loughlin recalled that Ms Morrison took the minutes of this meeting. Ms O'Loughlin stated that the letter dated 6 April 2005 (Exhibit A12) was not tabled at the committee meeting held on 6 April 2005 and Ms O'Loughlin stated that she read this letter after 6 April 2005 in Ms Mencshelyi's office. Ms O'Loughlin was aware of the existence of the Award but stated that she had not read it and only became aware that employees' pay rates were determined by the Award after the applicant was terminated. Ms O'Loughlin was not aware that under the Award an employee was entitled to a new pay rate when additional qualifications were gained. Ms O'Loughlin stated that she did not sight the email correspondence between Ms Mencshelyi and the applicant concerning the applicant's back pay and when asked why no discussions were held with the applicant about this issue Ms O'Loughlin stated that because the applicant was on leave it was not possible to talk to her.

66 Ms O'Loughlin stated that a decision was made to terminate the applicant during the week of 6 April 2005 or the following week. Ms O'Loughlin stated that a motion to terminate the applicant was not moved at the committee meeting on 14 April 2005 nor was it seconded, but a decision was made to write to the applicant as she had done the wrong thing and that at that stage the committee was still deciding what it should do. Ms O'Loughlin stated that the decision to terminate the applicant was not authorised at any meeting. Ms O'Loughlin stated that she was part of the committee that authorised the applicant being sent a letter of termination after it was typed up but she did not know who formulated the letter. Ms O'Loughlin stated that the applicant had breached the respondent's trust by going behind the committee's back to authorise a pay increase for herself and that it was sneaky behaviour between the applicant and Ms Mencshelyi.

67 Ms O'Loughlin stated that she was aware that the applicant was on sick leave during the week that she was terminated.

68 Ms O'Loughlin stated that the committee was now more aware about how to run its operations and stated that the committee had been 'a bit slack'.

69 Ms O'Loughlin stated that no approach was made to the applicant about the pay increase and back pay because there was no time and Ms O'Loughlin stated that there was no point in waiting for the applicant to return to work to terminate her as it wanted to get rid of the applicant as soon as possible. Ms O'Loughlin stated that the committee also decided not to wait to terminate the applicant when she returned to work because it was unsure when she would return.

70 Ms B Sambo has been the respondent's chairperson for three years. Ms B Sambo stated that Ms Bonney is her niece and that when they both attended a training course in Perth in early 2005 Ms Bonney told her that the workplace was unpleasant because of the applicant and that employees were not being listened to by the applicant and that a number of employees were stressed. Ms B Sambo said she did not discuss these issues with Ms Mencshelyi however she advised employees to write a letter and give it to the applicant. Ms B Sambo said she knew a letter had been written as she was at the respondent's office on the day the letter dated 6 April 2005 was given to the applicant but she did not see the letter before it was given to the applicant. Ms B Sambo was unsure of the date she first saw the letter.

71 Ms B Sambo stated that at the meeting held on 6 April 2005 Ms O'Loughlin asked the applicant why she was employing her relatives. Ms B Sambo could not remember the applicant's response but recalled the applicant stood up and said she was going home and left the meeting. Ms B Sambo stated that when Ms Mencshelyi attended the respondent's premises to lock up the office that evening the committee raised a number of issues with Ms Mencshelyi including employee pay rises and Ms Mencshelyi told the committee about the applicant being given a pay rise which was back dated for one year.

72 Ms B Sambo stated that at another committee meeting held a couple of days later the committee discussed the applicant's unauthorised pay rise and as it believed that this payment was wrong the committee decided to contact the Registrar of Aboriginal Corporations for advice.

73 Ms B Sambo stated that a discussion took place at the committee meeting held on 14 April 2005 about the applicant giving herself a pay rise as well as back pay without consulting the committee and Ms B Sambo stated that the applicant should have known that she had to let the committee know about this payment. Ms B Sambo understood that the applicant's actions were fraudulent and the applicant should therefore be terminated.

74 Ms B Sambo stated that the applicant's letter of termination was drawn up on 14 April 2005 and she understood that it was sent the same day.

75 Ms B Sambo stated that even though a number of complaints were made about the applicant in the letter dated 6 April 2005 the committee did nothing about these complaints. Ms B Sambo stated that she understood that three employees would leave if the applicant was reinstated and she stated that if the applicant returned to work she would be the applicant's enemy and she could not trust the applicant. Ms B Sambo stated that she had no intention of leaving the committee if the applicant was reinstated.

76 Under cross-examination Ms B Sambo recalled that at the committee meeting held on 6 April 2005 she asked the applicant to leave the meeting. Ms B Sambo stated that a couple of days before this meeting she told Ms Bonney and Ms Y Sambo to put their concerns about the applicant in writing and Ms B Sambo stated that she did not intend that this letter be used as a basis for terminating the applicant.

77 Ms B Sambo stated that during the meeting held on 12 April 2005 the issue of signing cheques was discussed because the committee had decided that it now wanted committee members to sign the respondent's cheques. Ms B Sambo stated that the reference in the minutes of the meeting dated 14 April 2005 to the applicant's actions was not a motion but a unanimous view that the applicant had committed fraud and that she had to be terminated and that it was not necessary to vote or move a motion as everyone agreed to terminate the applicant as there was no other alternative.

78 Ms B Sambo stated that she has not read the Award and she stated that she did not deal with the money side of things or with employees' wages as it is all done by the administrator Ms Mencshelyi. Ms B Sambo maintained that the applicant was not automatically entitled to a pay rise and that she should have raised this issue with the committee. Ms B Sambo could not recall if the committee signed any cheques prior to 14 April 2005 and Ms B Sambo stated that she was unaware about employee pay rates as this was an issue for the administrator and Ms B Sambo stated that she understood that Ms Mencshelyi knew about these issues but she was unaware if Ms Mencshelyi had been authorised to handle the respondent's finances. Ms B Sambo stated that she was unaware who authorised pay increases for the respondent's employees and she stated that these increases should have come to the committee.

79 Ms B Sambo stated that wage increases for Ms Mencshelyi and Ms Y Sambo were authorised at the committee meeting held on 14 April 2005.

80 Ms B Sambo stated that she was unaware who typed or worded the applicant's letter of termination and she stated that it could have been Ms Skelley or Ms Morrison and that she only signed this letter.

81 Ms B Sambo agreed that in 2001 she advised the applicant to remain in her position even though she had been sent a letter terminating her by the then committee president and that the committee organised a meeting with staff at the time to sort out outstanding problems.

82 Ms B Sambo stated that she understood that the committee would become involved with the issues raised by employees in their letter of 6 April 2005 only after these employees had met with the applicant.

83 Ms B Sambo stated that she did not know anything about any financial policies that the respondent may have.

84 Ms Y Sambo has been a health worker with the respondent for approximately four years and she confirmed that her mother is the committee's chairperson. Ms Y Sambo stated that she signed the letter dated 6 April 2005 because she wanted to raise a number of concerns with the applicant. Ms Y Sambo stated that after discussing her concerns with Ms Bonney and Ms Forrest she decided to ask Ms Mencshelyi to write a letter as she did not know how to express herself. Ms Y Sambo stated that she often discussed issues with Ms Mencshelyi. Ms Y Sambo stated that she saw the letter dated 6 April 2005 before signing it, she made some changes to the last paragraph of the letter and that she wanted the letter to be given to the applicant so that the applicant would consider her behaviour. Ms Y Sambo stated that she felt unsafe approaching the applicant directly and Ms Y Sambo stated that if the applicant was reinstated she would resign as things would get worse and as she had no trust in the applicant.

85 Under cross-examination Ms Y Sambo stated that Ms Mencshelyi did not approach her about generating the letter dated 6 April 2005 and she stated that this letter had to be written because 'that is the way things work'. Ms Y Sambo stated that she took a copy of this letter to Ms Champion and asked her if she wanted to sign it and she could not remember if she asked her to ring Ms Mencshelyi. Ms Y Sambo understood that the committee would deal with the concerns outlined in this letter after it was given to the applicant.

86 Ms Forrest is the respondent's senior health worker and she has held this position for over two years and Ms Forrest has worked for the respondent for between five and six years. Four of the respondent's staff report to Ms Forrest. Ms Forrest stated that the letter dated 6 April 2005 was generated because she was unable to approach the applicant directly to discuss her concerns with her because when she did so in the past the applicant would twist her comments. Ms Forrest stated that she asked Ms Mencshelyi to type the letter and that she had approached Ms Mencshelyi for advice on a range of issues. Ms Forrest stated that she read the letter before she signed it and changed parts of the last paragraph and Ms Forrest understood that the letter would be presented to the committee to assist with the resolution of the issues between the employees and the applicant. Ms Forrest stated that both she and Ms Mencshelyi gave this letter to the applicant on 6 April 2005 and that after the applicant opened the letter she did not read all of it. The applicant stated that she did not need to read the letter at that point in time and then went to the committee meeting.

87 Ms Forrest stated that after the applicant was terminated the applicant returned to the respondent's office and told the health workers that she had been terminated and that it was not their fault that she had been terminated and she stated that a loud conversation then took place between the applicant and Ms Mencshelyi but she could not hear what was being said. Ms Forrest stated that if the applicant returned to work with the respondent she would resign.

88 Under cross-examination Ms Forrest stated that Ms Bonney had raised concerns with her about client and staff issues but she could not remember her mentioning conflict between Ms Mencshelyi and the applicant. Ms Forrest stated that she unsuccessfully tried to raise issues with the applicant on a couple of occasions. Ms Forrest stated that after the letter dated 6 April 2005 was written a discussion took place with the committee about the employees' concerns but she could not remember the date of this meeting.

89 Ms Mencshelyi has been employed as the respondent's administrator for six and a half years and her role is to deal with the respondent's finances and provide back up to the co-ordinator. Ms Mencshelyi reported to the applicant prior to her termination and Ms Mencshelyi now reports to the committee. Ms Mencshelyi stated that even though she did not have a written job description she is aware of her role.

90 Ms Mencshelyi stated that the committee currently authorises employees' pay rises and that previously the applicant would take pay rises to the committee for their endorsement. Ms Mencshelyi stated that one of her roles is to write out the cheques and someone else countersigns them. Ms Mencshelyi stated that during November and December 2004 she was on two months sick leave and she stated that whilst on leave she came back on the weekends to complete the wages and the accounts and she wrote out the respondent's cheques.

91 Ms Mencshelyi commented on the letter dated 6 April 2005 (Exhibit A12). Ms Mencshelyi stated that she typed this letter after consulting a number of NTP's staff. Ms Mencshelyi stated that the idea for a letter arose after having a discussion with Ms Bonney in February 2005 and Ms Mencshelyi stated that Ms Bonney spoke to her on a number of occasions about disagreements she had with the applicant. Ms Mencshelyi stated that Ms Bonney was concerned at the way the applicant dealt with staff and that the applicant was not listening to staff and Ms Mencshelyi stated that Ms Y Sambo and Ms Forrest also had issues with the applicant. Ms Mencshelyi stated that the staff thought the applicant treated them like children, the applicant questioned the length of time they spent with clients, the applicant checked their timesheets on a daily basis and they were questioned about which clients they were with and the length of time spent with them and how long they spent on lunch breaks. Ms Mencshelyi advised staff to approach the applicant through Ms Forrest as she was the senior health worker or to speak directly to the applicant. Ms Mencshelyi stated that as these three employees were too frightened to approach the applicant either on their own or as a group they asked Ms Mencshelyi to write a letter to the applicant outlining their concerns. Ms Mencshelyi stated that the contents of this letter were based on what she was told by the three employees as well as from what she had observed. Ms Mencshelyi stated that she prepared the letter over a couple of days and that after the three employees reviewed the letter a change was made to the last paragraph. Ms Mencshelyi stated that each employee read the letter and was happy with it. Ms Mencshelyi then stated that Ms B Sambo approached her to ask that the letter be written given the comments made to her by Ms Bonney and her daughter Ms Y Sambo. Ms Mencshelyi stated that Ms Champion was given the opportunity to sign the letter and Ms Mencshelyi was aware that Ms Y Sambo took the letter to her. Ms Mencshelyi stated that the letter was not generated to give to the committee as she understood the issues raised in the letter were to be resolved directly with the applicant. Ms Mencshelyi stated that at approximately 4.00 pm on 6 April 2005 the letter was given to the applicant. Ms Mencshelyi stated that soon after the applicant started reading the letter the applicant told her that she could not deal with the letter at the time as she had to attend a committee meeting.

92 Ms Mencshelyi stated that at approximately 6.30 pm a committee member telephoned her at home and asked her to attend the office to lock up. When Ms Mencshelyi attended the office the committee spent over an hour asking her questions about what was happening in the office and Ms Mencshelyi stated that Ms B Sambo asked her if the letter dated 6 April 2005 had been given to the applicant and asked for a copy of the letter. Ms Mencshelyi could not recall how the issue of the wages paid to employees arose but she said that after this issue was mentioned she volunteered information about the applicant's recent pay rise and Ms Mencshelyi stated that she did not give the committee any documentation at this time about the pay increase. Ms Mencshelyi stated that the committee was surprised and angry that the applicant had given herself a pay rise as they did not know about it. Ms Mencshelyi understood that after this meeting some committee members would be visiting the office over the next few days to look into a range of issues.

93 Ms Mencshelyi stated that when she received the email from the applicant on 25 January 2005 about increasing her pay she did not question this rise as she assumed the applicant had already raised this issue with the committee. Ms Mencshelyi stated that she paid the applicant the back pay owing to her by cheque and she stated that she did not raise this matter with the committee at the time as it was not her position to do so. Ms Mencshelyi stated that it was the applicant's role to authorise employee pay increases and that the applicant had authorised all previous staff pay increases.

94 Ms Mencshelyi stated that in the days after 6 April 2005 many meetings were held with different committee members. Ms Mencshelyi stated that she was not involved in the decision to terminate the applicant but she was aware that the applicant was going to be terminated because she was involved in a meeting with a lawyer to discuss the applicant's actions and Ms Mencshelyi was aware that a committee member typed the applicant's letter of termination on her computer and the letter was signed in her office.

95 Ms Mencshelyi stated that after the applicant was terminated she visited the respondent's office and abused her for some minutes using foul language and Ms Mencshelyi stated that she understood that the applicant had abused a committee member and yelled at other staff members when she attended the respondent's office. Ms Mencshelyi stated that nobody is currently working in the co-ordinator's position and that Ms Forrest is now 'the face of' the respondent with the help of Ms Broughton and Ms Mencshelyi. Ms Mencshelyi stated that if the applicant was reinstated she did not think she could work with the applicant and it would be likely that she would have to leave. Ms Mencshelyi stated that she understood that the applicant did not trust her.

96 Under cross-examination Ms Mencshelyi confirmed that NTP staff did not have any duty statements or policies and she stated that staff worked together on trust.

97 Ms Mencshelyi recalled receiving a letter from the applicant in 2004 stating that Ms Mencshelyi was no longer authorised to make any payments on behalf of the respondent. Ms Mencshelyi stated that the co-ordinator usually authorised pay rises and

Ms Mencshelyi confirmed that if additional relevant qualifications were gained by an employee, as provided for under the Award, then that employee was entitled to an increased pay rate when approved by the applicant.

98 Ms Mencshelyi maintained that she supported the applicant throughout her employment with the respondent.

99 Ms Mencshelyi was aware that the applicant should have been given a pay rise when she completed her qualifications and Ms Mencshelyi stated that it was not her role to raise this with the applicant and that the applicant should have raised this salary increase with the committee for approval.

100 Ms Mencshelyi stated that prior to the applicant commencing employment with the respondent she met monthly with the committee to seek approval of the respondent's finances. Ms Mencshelyi stated that during this period a committee member co-signed NTP's cheques and the committee always approved employee pay rises. When asked if the committee authorised all payments made prior to the applicant commencing employment, Ms Mencshelyi stated that it was her belief that when a committee member co-signed a cheque this was authorising that payment.

101 It was put to Ms Mencshelyi that the applicant had spent little time at work early in 2005 and therefore the complaints about her had no basis. In response Ms Mencshelyi stated that most of the complaints about the applicant arose throughout the previous year. Ms Mencshelyi stated that the letter dated 6 April 2005 was not a big issue and it was an attempt by the employees to approach the applicant about a range of concerns. Ms Mencshelyi denied that there was a power play between herself and the applicant and Ms Mencshelyi believed that there was conflict in the respondent's office because the applicant would not talk to anyone and that this issue had been happening for most of last year and the letter was generated to give the applicant a chance to address these issues.

102 Ms Mencshelyi confirmed that Ms B Sambo asked her if the letter dated 6 April 2005 had been given to the applicant as she was aware that the letter was being written.

103 Ms Mencshelyi was asked about the complaints raised by the three staff members. Ms Mencshelyi stated that they told her that they were frightened of the applicant. Ms Mencshelyi agreed that it was appropriate for the applicant to discipline staff however she had the view that the applicant should have disciplined staff more gently.

104 Ms Mencshelyi stated that Ms Morrison typed the applicant's letter of termination and Ms Mencshelyi maintained that she had nothing to do with this letter and she confirmed that she gave Ms Morrison access to her computer to type the letter.

105 Ms Mencshelyi stated that at a meeting held on 30 August 2005 Ms Skelley was appointed as the new chairperson of the committee.

106 Ms Mencshelyi gave evidence that a previous NTP co-ordinator Ms Lewis ceased employment with the respondent as a result of pressure from the committee and Ms Mencshelyi stated that when the applicant was terminated in August 2001 she was aware that meetings were held with staff and that after this issue arose three staff members left.

107 Ms Mencshelyi acknowledged that NTP was short-listed for an award and Ms Mencshelyi agreed that the respondent's programme had been recognised at a national level.

108 Ms Mencshelyi stated that if she, Ms Forrest, and Ms Y Sambo ceased employment with the respondent that it would have little impact on the respondent.

109 Ms Mencshelyi stated that she did not attend all committee meetings and that she was sometimes called in to a meeting and then asked to leave. When asked why her presence was not noted on a number of committee meeting minutes Ms Mencshelyi stated that this was not an issue for her.

110 Ms Mencshelyi was asked about the committee meeting held on 14 April 2005. Ms Mencshelyi stated that she attended parts of this meeting and she was unaware why she and Ms Y Sambo had been given a pay increase by the committee at this meeting. Ms Mencshelyi was asked about the initials which were on the second page of the minutes of the meeting held on 14 April 2005. At first she stated that she did not know if these were her initials and she could not remember initialling the minutes and when pressed she stated that the initials on the minutes were probably her initials. Ms Mencshelyi did not know why Clause 20 of the Constitution was referred to in the minutes when the committee was discussing the applicant's termination. Ms Mencshelyi stated that someone would have asked her to put in the reference to Clause 20.

111 Ms Mencshelyi reiterated that pay rises were never given to employees without the committee's approval prior to the applicant commencing employment.

112 Ms Mencshelyi was asked to comment on the minutes of a committee meeting held on 10 August 2005 (Exhibit A13). Ms Mencshelyi stated that she and Ms B Sambo signed a cheque for a $1200 loan to a staff member and she stated that this often happened and the committee was told after the fact. Ms Mencshelyi stated that even though Ms B Sambo claimed that she was unaware of this payment Ms Mencshelyi maintained that Ms B Sambo knew about it beforehand because Ms Mencshelyi had explained the payment to her and she had countersigned the cheque for this loan. It was Ms Mencshelyi's view that payments were authorised when the cheques was countersigned by a committee member. Ms Mencshelyi stated that the respondent's accounts were not put to the committee for authorisation prior to cheques issuing and she stated that it was her view that when a cheque was countersigned by a member of the committee the payment was therefore authorised.

113 Ms Mencshelyi was aware that the applicant had sick leave in April, May and June in 2004 and that the applicant had substantial time off from work in early 2005 for family reasons.

114 Ms Mencshelyi stated that she gave the committee a copy of the emails exchanged between her and the applicant about the pay increase (Exhibits A6 and A7) however she could not recall if this was done prior to 14 April 2005. Ms Mencshelyi confirmed that she read all of the minutes of NTP's committee meetings and did not know why there was no reference to the emails in these minutes.

115 Ms Mencshelyi was asked if she had ever made the committee aware of the Award. Ms Mencshelyi stated that she had spoken to the committee about the Award prior to 14 April 2005, she had asked committee members if they were aware of the Award and she had shown committee members a copy of the Award and told committee members that employee pay rates were linked to the Award. When told that this was contrary to the evidence given by a number of the committee members Ms Mencshelyi maintained that she did make them aware of the Award and that they do not always remember what information has been given to them. Ms Mencshelyi maintained that this was the case even though there was no mention of the Award being discussed in any committee minutes.

116 Ms Mencshelyi stated that after committee members met with the lawyer some committee members met with Ms Forrest, Ms Y Sambo and Ms Mencshelyi about their concerns with the applicant and that these meetings were taped. Ms Mencshelyi understood that the tapes were destroyed one or two days later.

Submissions

117 The applicant maintains that her termination was unlawful as the respondent breached a number of provisions of the Constitution when terminating the applicant. There was no evidence that a motion was passed at the committee meeting held on 14 April 2005 and Ms B Sambo gave evidence that a decision to terminate the applicant was not made on this date. The applicant believed that the meeting held on 14 April 2005 did not have a quorum, the applicant's letter of termination relies on an incorrect section of the Constitution as the reason for the applicant's termination and the applicant's termination letter refers to her committing serious misconduct, yet there is no mention of this in the committee minutes of 14 April 2005.

118 The applicant maintains that her termination was procedurally flawed and that she was denied natural justice given the manner of her termination. The applicant argues that she had no opportunity to respond to the respondent's view that she should be terminated and the applicant maintains that it was unfair for her to receive a letter of termination whilst she was on sick leave.

119 The applicant argues that the respondent had no reason to terminate her. The applicant maintains that it was not the committee's custom and practice to authorise wage increases or any back pay owing to employees and she claimed that the committee was unaware of the terms of the Award. The applicant maintains that the committee had no understanding of how the pay rates for the respondent's employees were determined and there was no dispute that the applicant was entitled to the increase that she claimed and was paid as she had gained the relevant qualifications.

120 The applicant argues that the issues raised in the letter dated 6 April 2005 lack substance as she had been on leave for significant periods of 2004 and early 2005.

121 The applicant maintains that even though she generated a substantial amount of correspondence after her termination she stated that she did so because she was upset at the way she had been treated by the respondent. The applicant claims that she sent a number of emails to staff because she was stressed and had no other way of defending herself. The applicant maintains that she was isolated by the committee at that point, she was being ignored and she felt put down. Additionally, the respondent had made a decision to remove the applicant's ability to counter sign the respondent's cheques and to have the locks changed as at 12 April 2005 which further added to her distress. The applicant argues that the committee was not supportive of her even though she had worked hard for the respondent, that NTP had been very successful and it was recognised nationally.

122 The applicant maintains that she did not make any complaints about Ms Mencshelyi to the committee and that they worked on trust and were supportive of each other. The applicant claims that she did not use foul language when she attended the respondent's office after she was terminated but she conceded that she had a dispute with Ms Mencshelyi about the issue of payment for overtime worked by the applicant.

123 The applicant stated that she is seeking reinstatement without loss of wages and argues that if she was reinstated she was confident that she would work well with current employees and that if Ms Mencshelyi decided to leave if the applicant was reinstated she would be easy to replace.

124 The respondent maintains that the applicant was not summarily terminated because she was given a payment in lieu of notice as provided for under the Award and her written contract of employment and that the applicant was not terminated whilst on sick leave as she was given notice during her sick leave that her termination would be effective when her sick leave finished.

125 The respondent maintains that it had good reason to terminate the applicant as the applicant gave herself a pay rise and back pay for a period of twelve months without this payment being authorised by the committee. The respondent argues that it was the committee's custom and practice to authorise pay rises prior to them being given effect and relies on the minutes of 14 April 2005 and the evidence of Ms Mencshelyi in support of this contention. The respondent argues as it was common practice for the committee to authorise pay rises the applicant should have sought this authority from the committee before giving herself a pay rise and that even though there were no duty statements confirming the applicant's role in relation to this matter there was an onus on the applicant to act with propriety.

126 The respondent maintains that the letter dated 6 April 2005 was not used by the respondent as a basis for terminating the applicant and there was no hidden agenda in drawing up this letter. The respondent argues that it was at the committee's instigation that Ms Mencshelyi was questioned about this letter as well as the issue of the applicant giving herself a wage increase and back pay.

127 The respondent took legal advice and obtained advice from the Registrar of Aboriginal Corporations about the applicant's actions and after receiving this advice decided to terminate the applicant on 14 April 2005. The respondent concedes that the committee minutes and the applicant's letter of termination of 14 April 2005 refer to the applicant being terminated using an incorrect clause in the Constitution however it argues that this does not invalidate the committee's decision. The respondent also claims that even if the respondent was in breach of the Constitution when terminating the applicant and the decision was unlawful it does not mean the termination was unfair in all of the circumstances.

128 The respondent therefore argues that it had a valid reason for terminating the applicant and given the circumstances and the seriousness of the issues the manner of her termination was fair and reasonable.

129 If the Commission finds that the dismissal was unfair, the respondent opposes the applicant's reinstatement as it maintains that the relationship between the applicant and the respondent has broken down. The respondent relies on the argumentative basis upon which the applicant has cross-examined a number of witnesses during the hearing as well as the applicant's behaviour and the nature and tone of the emails sent to the respondent after her termination. The respondent also argues that as nobody currently occupies the respondent's co-ordinator position it is therefore unnecessary for anyone to fill this position. In the alternative the respondent argues that the applicant has not made any effort to mitigate her loss but if compensation is to be awarded to the applicant the respondent maintains that she would be entitled to sixteen weeks' pay.

Findings and Conclusions

Credibility

130 I listened carefully and closely observed all of the witnesses whilst they were giving their evidence. In the main I found the evidence given by the applicant to be plausible and consistent and in my view her evidence was given to the best of her recollection. The applicant's evidence was also supported by substantial documentation and corroborated by the evidence of a number of other witnesses. I therefore accept the evidence given by the applicant. In my view the evidence given by Ms Bonney, Ms Obbs, Ms Champion, Ms Skelley, Ms O'Loughlin, Ms B Sambo, Ms Y Sambo and Ms Forrest was given to the best of their recollection and on this basis I accept their evidence.

131 I have concerns about the evidence given by Ms Mencshelyi. I found Ms Mencshelyi's evidence about a number of key issues to be inconsistent and implausible and I formed the view that Ms Mencshelyi was not being as candid as she could have been about some issues. For example, when Ms Mencshelyi was asked about whether or not she had initialled the minutes of the meeting of 14 April 2005 she stated at first that she did not know if the initials were hers and after further questioning she reluctantly conceded that she did probably initial these minutes. Some of the evidence given by Ms Mencshelyi was contrary to the evidence given by a number of other witnesses and therefore the weight of evidence is against Ms Mencshelyi. A number of committee members gave evidence that they were unaware that the Award applied to the respondent's employees, yet Ms Mencshelyi claimed that she had advised the committee about the Award and its application to the respondent's employees and stated that committee members had probably forgotten being briefed about the Award as they do not always remember information given to them. If Ms Mencshelyi had briefed committee members about the Award as claimed by her it is my view that it would be unusual for so many committee members to forget they had been informed about the Award. Ms Mencshelyi gave evidence that prior to 14 April 2005 the committee authorised employee pay rises yet no committee member gave evidence to this effect nor were any committee meeting minutes tendered in support of Ms Mencshelyi's claim for the period up to 14 April 2005. As I have concerns about the evidence given by Ms Mencshelyi I conclude that where there is any conflict between the evidence given by the applicant and the other witnesses and Ms Mencshelyi, I prefer the applicant's evidence and the evidence given by the other witnesses who gave evidence in these proceedings.

132 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 as 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.

133 Paragraphs 2 to 7 of this decision set out the undisputed background to this application. It is also not in dispute that the applicant received a letter of termination from the respondent dated 14 April 2005 on or about 18 April 2005 whilst she was on sick leave and that this letter notified her that her termination was to be effective on the date her period of sick leave was due to finish, that is 27 April 2005. The reason given by the committee for the applicant's termination was that she had acted contrary to section 5.12 of the Constitution as she did not discuss with the committee, seek the endorsement of the committee or bring to the committee's attention a pay rise and the receipt of 12 months' back pay (see Exhibit A3).

134 During the hearing the respondent conceded that the applicant had an entitlement under the Award, which applied to the applicant's employment, to the pay increase and relevant back pay given to her by Ms Mencshelyi in early 2005 as the applicant had completed the Aboriginal Primary Health Care Work course in December 2003.

135 I find on the evidence that the applicant was unfairly terminated.

136 It should be noted at the outset that the respondent's claim that the applicant breached section 5.12 of the Constitution as the basis for terminating the applicant is without foundation as there is no section 5.12 in the Constitution. Notwithstanding the respondent's reliance on a section of the Constitution which does not exist as the basis for the applicant's termination I understand the issue in dispute in this instance to be whether or not the applicant acted contrary to the Constitution by not seeking the committee's endorsement for the pay rise and back pay and whether or not the applicant should have brought this pay rise and back pay to the committee's attention prior to this payment being made to the applicant.

137 Clause 21(1) and (2) of the Constitution read as follows:

"**Accounts:**

21. (1) Proper accounts and records shall be kept by the Treasurer or such person as the committee appoints, of the transactions and affairs of the Association. The Committee shall do all things necessary to ensure all payments out of the monies of the Association are correctly made and properly authorised and that adequate control is maintained over the assets of, or in a (sic) custody, of the Association and over the incurring of liabilities by the Association.

(2) Accounts shall be passed for payment by the Committee or under the authority of a delegation approved by the Committee for this purpose."

(Exhibit A8)

Under the Constitution the committee is required to manage and control NTP's affairs and to ensure that all monetary payments are properly authorised. Even though this requirement was in place under the Constitution I find on the evidence that the committee did not manage and control NTP's affairs in accordance with this section of the Constitution. There was undisputed evidence and I find that the committee did not have any formal or informal policies and procedures in place to manage its affairs as committee members, the applicant and Ms Mencshelyi gave evidence that the respondent does not have any policies and procedures in place to monitor the payment of monies. Additionally, the committee's treasurer Ms Obbs stated that she was unaware of the details of the respondent's income and expenditure and both Ms Obbs and the committee's secretary Ms Skelley stated that they did not know who was signing cheques issued on behalf of the respondent. In the circumstances I find that the committee did not have any policy requiring the applicant to seek the committee's endorsement for wage increases and back pay for herself and other employees, prior to these payments being effected notwithstanding the complaint by some committee members that the applicant should have sought the committee's endorsement for her pay rise.

138 Furthermore, I find that it was not the committee's custom and practice to require the applicant to seek the committee's endorsement or authorisation or to inform it about employee pay rises and back payments, including rises given to the applicant, before they were given effect as the only person who stated that this was required of the applicant was Ms Mencshelyi. As I prefer the applicant's evidence and the evidence given by committee members to the evidence given by Ms Mencshelyi where there is any inconsistency, I reject Ms Mencshelyi's claim that it was the committee's normal practice to authorise pay rises for all of the respondent's employees, including the applicant, prior to these rises being given effect. No committee member gave evidence confirming Ms Mencshelyi's claim that it was the committee's custom and practice prior to 14 April 2005 to authorise pay rises and any back pay due to its employees prior to these rises being paid to employees and I accept the applicant's evidence that throughout her employment with the respondent all of the respondent's employees who were due a pay rise, including the applicant, were given pay rises and that these payments were not brought before the committee for authorisation nor were these pay rises brought to the committee's attention. No committee member gave evidence confirming that committee members made any formal or informal approaches to the applicant prior to 14 April 2005 requiring her to present all wage increases paid to employees for authorisation by the committee or that these rises be brought to the committee's attention prior to these payments being effected and no committee member gave evidence confirming that it had any role in authorising wage rate increases for NTP's employees prior to 14 April 2005 and that the committee had advised the applicant that she was required to seek the committee's endorsement prior to employees receiving a pay rise and back pay nor was there any documentation to this effect. Additionally, no committee meeting minutes of meetings held prior to 14 April 2005 were tendered confirming Ms Mencshelyi's claim that the committee authorised employee pay rises prior to employees being paid these increases. I find that as at 14 April 2005 committee members were unaware that NTP's employees were paid in accordance with the Award and that employees were given wage increases from time to time in line with the Award's wage increases or when additional qualifications were gained. I also find that the custom and practice for the respondent's employees to access pay rises was for the applicant, in her role as co-ordinator and in conjunction with Ms Mencshelyi, to pay the respondent's employees wage increases as and when they were due, although it appears that from time to time on her own volition Ms Mencshelyi granted pay rises to employees when the Award rates increased. In the circumstances I conclude that the applicant and Ms Mencshelyi were entrusted by the committee to give effect to the respondent's employees' wage increases, without prior authorisation of the committee, and that these wage payments were made to employees without the committee's scrutiny or authorisation.

139 Even though it is my view that the applicant should have updated the committee on an ongoing basis about employee pay rises and any back pay due to employees, including payments due and paid to the applicant, I accept that for some years the wages paid to its employees and any resultant back pay payments was not a concern for the committee and that the committee accessed employee pay records as and when it chose to review these records, which it did in April 2005.

140 As I have found that the committee had no processes or procedures in place, either formal or informal, requiring the applicant to seek the committee's authorisation prior to effecting any pay rise and back pay due to NTP's employees including the applicant and the committee did not require the applicant to advise it when pay increases for the respondent's employees including her own wage increases were to be effected, it follows and I find that the wage increase and back pay paid to the applicant by Ms Mencshelyi in early 2005 at the applicant's instigation was a legitimate payment which was not made contrary to the Constitution, nor was this increase and payment required to be authorised by the committee or advised to the committee prior to this payment being effected. I therefore find that the applicant did not misconduct herself or behave in a manner warranting termination when she asked Ms Mencshelyi to give her the pay increase and back pay to which she was entitled in February 2005 and that as a result the respondent did not have a valid reason for terminating the applicant.

141 I accept there is a reference in the minutes of the committee meeting held on 14 April 2005 to the committee dealing with pay increases for Ms Y Sambo and Ms Mencshelyi however this was after the committee had canvassed the applicant's termination in the period leading up to this meeting and in my view this appears to be a new procedure.

142 I find that as the applicant was terminated in a manner contrary to Clauses 16 and 9 of the Constitution the applicant's termination was unlawful and therefore invalid. The committee has the power to appoint and remove employees (Clause 12), it is required to decide issues by a majority of votes (Clause 16(1)) and proper minutes of the proceedings of all meetings of the committee are to be kept (Clause 9(13)). It was not clear if and when a decision was made by the majority of the committee to terminate the applicant. The committee meeting minutes dated 14 April 2005, which was the date on which the applicant's letter of termination was generated, does not confirm that a motion was passed by a majority of committee members to terminate the applicant and it is unclear from these minutes whether the committee decided that the applicant was to be terminated as at that date. These minutes do not confirm that a motion was moved to terminate the applicant nor was there a seconder for such a motion and no committee member gave evidence that a decision to terminate the applicant was voted on at this committee meeting and approved by a majority of the committee members as required under the Constitution. Additionally, the respondent's secretary Ms Skelley, who generated the minutes of this meeting, gave evidence that no motion to terminate the applicant was passed at this meeting and she understood that a motion to terminate the applicant was passed at a later meeting. I accept that some committee members gave evidence that there was a discussion about terminating the applicant at this committee meeting however this does not confirm that a decision was made by a majority of committee members in attendance at the meeting to terminate the applicant.

143 I find that the applicant was treated unfairly when she was terminated whilst on sick leave. The respondent argued that the applicant was not terminated when she was on approved sick leave as her termination was not effective until after the applicant was due to return from this period of sick leave. In my view it is inappropriate and grossly unfair to advise an employee who is absent from work due to illness that his or her contract of employment will cease at the end of their period of sick leave and in doing so not give the employee any opportunity to discuss the reasons for the termination or to contest the

termination and to discuss possible alternatives to termination which is what happened in this instance. I am also of the view that in any event these discussions should take place after an employee has recovered from their illness and has returned to work and is therefore in a proper position to adequately address concerns raised by an employer.

144 I find that the applicant was denied procedural fairness and natural justice given the manner of her termination and that as a result this contributed to the applicant being unfairly terminated. It was not in dispute and I find that the applicant was terminated without any prior discussion about the reasons for her termination and I find that the committee made no effort to hold discussions with the applicant after 6 April 2005 about the reasons for her termination or to clarify the pay rise and back pay given to the applicant by Ms Mencshelyi. Furthermore, the committee did not give any information to the applicant detailing the basis upon which it had formed the view that she had behaved in a manner warranting termination and the applicant was given no opportunity to respond to the committee's view that she should be terminated. I also find that the applicant was treated unfairly as she was not given the opportunity to work out her period of notice as no reason was given by the respondent for not allowing the applicant to work during this period. I find that at the time the applicant was terminated committee members were unaware that emails had been generated between herself and Ms Mencshelyi in February 2005 about increasing the applicant's rate of pay and about the applicant's back pay and it is my view that if the applicant had the opportunity to show these emails to the committee, which I believe demonstrate that the applicant was not being secretive about accessing a pay rise and being entitled to back pay as a result of this rise, the committee would have been made aware of the applicant's entitlement to the increase and back pay under the Award and it is my view that this information may have had an impact on the committee's decision to terminate the applicant. Three committee members claimed they were advised by Ms Mencshelyi that the applicant told her not to tell the committee about her pay rise which in my view indicated to the committee that the applicant was deliberately trying to withhold information about her pay increase from the committee and Ms Obbs and Ms O'Loughlin claimed that the applicant's actions in this regard contributed to the committee's decision to terminate the applicant and the applicant was given no opportunity to respond to this claim. I find that the applicant was denied procedural fairness in relation to this claim as she was not given any opportunity to respond to this allegation prior to her termination being effected and I am concerned that this issue was not put to the applicant during the hearing and that Ms Mencshelyi gave no evidence during the hearing confirming that she gave information to this effect to the committee.

145 I find that as the committee does not deal consistently with employees who generate what it claims to be unauthorised payments this contributed to the applicant being unfairly terminated. On the one hand the committee determined that the applicant should be terminated for granting herself an unauthorised pay increase and the payment of back pay to which she was entitled. However, the respondent's committee became aware on 30 August 2005 that Ms Mencshelyi made an unauthorised loan to one of the respondent's employees and did not take the same actions against her in that instance as it did against the applicant. Even though Ms Mencshelyi claimed that the committee had authorised this payment as Ms B Sambo countersigned the cheque for this loan and that this meant that the loan was authorised, the minutes of the committee meeting dated 30 August 2005 confirm that Ms B Sambo was unaware of this loan.

146 In all of the circumstances I therefore find that the applicant was unfairly terminated as the committee had no reason to terminate the applicant, the applicant was given notice of her termination whilst on sick leave, the applicant was denied procedural fairness and natural justice given the manner of her termination, the applicant was terminated contrary to the requirements of the Constitution and the applicant was treated less favourably by the respondent when compared with how it treated another employee who had acted in a similar manner. She was not afforded a fair go all round (see Undercliffe Nursing Home v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch (op cit)).

Reinstatement

147 The applicant is seeking an order for reinstatement to her former employment without loss of wages or continuity of employment. In this instance I am satisfied on the evidence that the working relationship between the applicant and respondent has not broken down such that an order for re-instatement or re-employment would be impracticable.

148 The issue of reinstatement was recently considered by the Full Bench in Gonzalo Portilla v BHP Billiton Iron Ore Pty Ltd (2005) 85 WAIG 3441. In this decision the Full Bench clarified the Commission's powers when dealing with employee's reinstatement. His Honour the President and Kenner C stated the following at page 3458:

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

and further at page 3459:

> "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)).
>
> 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)).
>
> 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)).
>
> …
>
> "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)).
>
> 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."

149 Even though there was opposition to the applicant's reinstatement from some of the applicant's former colleagues and some committee members with whom the applicant previously worked, I find in all of the circumstances of this case that the applicant should be reinstated to her former position as co-ordinator effective from the date of her termination.

150 In my opinion, the applicant's relationship with the respondent's committee members and most existing staff members is capable of being restored and I find that the applicant should be given the opportunity to continue to make the ongoing substantial and significant contributions to NTP's programmes which she had made to date. In reaching this view I take into account that this is not the first occasion that the applicant was terminated and when there were difficulties between the applicant and the committee in 2001 they were able to successfully re-establish their relationship and move forward in a positive and cooperative manner and I have no doubt that the same positive outcome can eventuate on this occasion. During the period that the applicant was the respondent's co-ordinator the respondent gained nationwide recognition for its programmes which is a testament to the work of the respondent's committee, the applicant and its employees who clearly worked well together over a lengthy period to advance the interests of its numerous indigenous clients. Both the applicant and Ms Mencshelyi were an integral part of this team and were able to work positively together to achieve the respondent's aims despite minor difficulties which occasionally arose. I am therefore of the view that the applicant will be an asset to the respondent if she is returned to her former position and that the applicant can return to her former position and make a positive contribution to the respondent's operations. Furthermore, the position of co-ordinator currently remains vacant and I do not have sufficient evidence before me to accept the respondent's contention that this position is no longer required by the respondent.

151 Ms Forrest and Ms Y Sambo were the only employees who gave evidence that they would definitely cease employment with the respondent if the applicant was reinstated to her former position and even though some committee members expressed concerns about the applicant's return as co-ordinator no committee members stated they would resign if the applicant is reinstated and some committee members stated that they could work with the applicant in the future if some accommodation was reached between the applicant and committee members. I find that the difficulties between Ms Y Sambo and Ms Forrest and the applicant prior to the applicant's termination which were outlined in their letter to the applicant dated 6 April 2005 were not so serious that the problems they identified they had with the applicant are insurmountable. Indeed, both Ms Forrest and Ms Y Sambo stated that they were happy for the letter dated 6 April 2005 to be given to the applicant so that the committee could negotiate the problems they had with the applicant and I find that a number of the issues raised in this letter could be addressed when relevant policies and dispute resolution procedures are generated by the respondent, which I understand is currently pending.

152 The respondent argued that the applicant's actions after her termination towards the respondent's employees and some committee members demonstrates a lack of trust between the applicant and the respondent and that in particular the relationship between the applicant and Ms Mencshelyi has broken down. In my view the respondent should take some responsibility for some of the correspondence the applicant generated after her termination. The committee effectively removed the applicant from the running of NTP's operations in the period after 12 April 2005 by changing the locks and removing the applicant's right to sign cheques and after notifying the applicant on or about 18 April 2005 that she was to be terminated on 27 April 2005 the committee did not have any discussions or negotiations with the applicant in this intervening period. I accept that in the circumstances this would have been an upsetting and distressing period for the applicant who was already unwell and on sick leave at the time and to some extent explains the basis for her writing to the committee members and staff members to put her side of the story. The applicant gave evidence that she spoke to Ms Mencshelyi on one occasion

when she visited the respondent's office after she was terminated and Ms Mencshelyi gave evidence that the applicant abused her for some minutes using foul language during this conversation. There was also evidence that some employees were stressed in the period prior to and after the applicant's termination. I accept that the applicant's conversation with Ms Mencshelyi may have been tense however I find that this conversation will not be fatal to their ongoing relationship as both the applicant and Ms Mencshelyi have worked positively and successfully together in their important roles for some years. I therefore have little if any doubt that with goodwill being exercised by both the applicant and Ms Mencshelyi that their working relationship can be restored. Additionally, I find that some of the stress and tension that was evident in the respondent's office in the period pre and post the applicant's termination was to some extent as a result of Ms Mencshelyi's efforts to gain support from some staff members in what in my view appeared to be a campaign to discredit the applicant.

153 As it is my view that the applicant should be reinstated to her former position with the respondent I will order that the applicant be reinstated to her former position within the respondent's operations operative from the date of her termination, that is, 27 April 2005.

154 As the applicant is being re-instated she is not required to demonstrate that she has mitigated her loss. If mitigation was required to be taken into account I find that the applicant gave evidence that she did not seek out alternative employment after she was terminated as she was studying and waiting on the outcome of this matter. I therefore find that the applicant has failed to mitigate her loss.

155 In addition to an order for reinstatement pursuant to s23A(5) of the Act I will order that the respondent pay the applicant a sum of money being the remuneration that the applicant would have earned from her date of termination on 27 April 2005 less any wages and other entitlements, including notice, paid to the applicant during the period up to the date of reinstatement. I will also order that the respondent reinstate the applicant's accrued entitlements from the date of her termination and that her service with the respondent be regarded as continuous for all purposes, including long service leave.

156 A minute of proposed order will now issue.

2005 WAIRC 03144

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JENNIFER CARTER
	APPLICANT
	-v-
	NGUNYTJU TJITJI PIRNI ABORIGINAL CORPORATION
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 28 NOVEMBER 2005
FILE NO/S	APPL 494 OF 2005
CITATION NO.	2005 WAIRC 03144

Result	Application alleging unfair dismissal upheld and order for reinstatement issued

Order

HAVING HEARD Ms J Carter on her own behalf and Mr M Jensen of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby:

1) DECLARES THAT the respondent harshly, oppressively and unfairly dismissed Jennifer Carter on 27 April 2005.

2) ORDERS that the respondent shall reinstate Ms Carter in its employment to her former position as if her contract of employment had not been terminated on 27 April 2005, within seven (7) days of the date of this order.

3) ORDERS that the respondent re-instate Ms Carter's accrued entitlements and that her service with the respondent be regarded as continuous for all purposes including long service leave.

4) ORDERS that the respondent shall pay Ms Carter an amount of money in respect of all of the remuneration lost by her by reason of the termination of her contract of employment as if she had worked continuously in the employment of the respondent between 27 April 2005 and the date she is reinstated, less any income earned by her in this period and the payment of any entitlements at termination, within 14 days of the date of this order.

5) THAT liberty to apply is reserved to the parties to this order in relation to (4) above.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

2005 WAIRC 03219

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SIMON CARTER
	APPLICANT
	-v-
	LEEUWIN STAR PTY LTD
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
HEARD	FRIDAY, 18 NOVEMBER 2005
DELIVERED	MONDAY, 5 DECEMBER 2005
FILE NO.	U 117 OF 2005
CITATION NO.	2005 WAIRC 03219

CatchWords	Termination of employment – Harsh, oppressive and unfair dismissal – Acceptance of referral out of time – Application referred outside of 28 day time limit – Relevant principles to be applied – Commission satisfied applying principles that discretion should not be exercised – Acceptance of referral out of time not granted – *Industrial Relations Act 1979* (WA) s.29(1)(b)(i),(2)&(3)
Result	Application for application to be received out of time dismissed
Representation	
Applicant	Mr J Hammond (of Counsel)
Respondent	Mr B Jackson (of Counsel)

Reasons for Decision

1 The applicant, Simon Carter, seeks that his claim of unfair dismissal be received beyond the 28 days provided for in s.29(3) of the *Industrial Relations Act 1979* on the basis that he says that it would be unfair not to do so.

2 Mr Carter was initially employed by the respondent on a casual basis, then for many years on a more regular basis. The respondent's business is that of production of canned and frozen abalone. The respondent and Mr Carter agree that the position he held at the time of his dismissal was that of production co-ordinator.

3 In August 2005, Mr Carter and his de-facto partner, Christina Clare Fernandes, were on annual leave out of Australia. During that time, by letter dated 11 August 2005, David Leith, who appears to be the respondent's chief executive officer, advised him, formal parts omitted, as follows:

"Dear Simon

This is to advise that due to a reduction in available work in this business, we have taken unavoidable decisions to reduce our workforce. In particular, the Fisheries Department has decided to reduce the Greenlip Abalone Quotas for the remainder of 2005. This reduction is expected to be in force for the (sic) 2006 year as well. This result will be a significant and very detrimental fall in production and sales over the coming 12 – 18 months.

As a result, we have no alternative other than to carry out reductions in our workforce. At least three positions will be discontinued, including the position of Production Co-ordinator. This decision comes into effect immediately.

I am aware you are absent on leave at present, and this news may come as a surprise to you. I very much regret having to inform you in writing rather than in person. I am also mindful of the personal consequences this may have for you and your family and very much regret that these cannot be avoided. Please contact me after you return to Australia as there are some matters regarding termination pay that have to be finalised."

(Exhibit A1 at page 13)

4 Mr Carter received this letter when he returned from annual leave on 28 August 2005. He met with Mr Leith on 31 August 2005. At the meeting were Mr Carter, Ms Fernandes, and Mr Leith. The discussion revolved around the reasons for the dismissal and the entitlements due to Mr Carter. The affidavit of Ms Fernandes says that in respect of that meeting:

"As Simon was visibly upset at this meeting, I raised the following points.

1.1.1. The termination letter was sent whilst we were on overseas holiday, despite loyalty and commitment for over 10 years.

1.1.2. There had been no prior warning.

1.1.3. That we were shocked and distressed to receive such unexpected news.

1.1.4. The respondent had not discussed or given Simon the chance to discuss the termination and possible alternative employment arrangements.

1.1.5. The offer of 1 weeks' termination pay was inadequate."

(Exhibit A2 at pages 2 and 3)

5 Mr Carter's affidavit refers to his being "visibly distressed by the termination and unable to express myself". However, according to the affidavit, he refused to accept the termination entitlements calculated by Mr Leith and asked Mr Leith to cross out the amount he had written on the Employment Separation Certificate.

6 The evidence is that Mr Carter wrote to Mr Leith on 5 September 2005 in the following terms:

"Dear David

RE: TERMINATION OF EMPLOYMENT ENTITLEMENTS

Further to our meeting and subsequent telephone conversation on Wednesday 31st August 2005, I wish to advise you of my termination of employment entitlements. After further legal advice, I am informed that, at a minimum, my entitlements total 22.67 weeks pay based upon:

- 4 weeks notice/payment in lieu of the notice period
- 8.67 weeks Long Service Leave
- 8 weeks Redundancy/Severance pay

Based on a 40 hour working week the payment due to me is $21,763.20 gross

As previously discussed, I would like this payment to be made to me by 5pm Wednesday 14th August 2005. If these payments are not paid to me by this date I will have no recourse other than to make a claim for Contractual Benefits to the Industrial Magistrates Court

Please call me on (08) 93782107 if you would like to discuss this matter."

(Exhibit A1 at page 10)

7 Correspondence then passed between Mr Carter and Mr Leith as to Mr Carter's entitlements. That correspondence dealt only with the issue of his claim for 4 weeks' notice, long service leave and redundancy pay. There is no evidence that at any time until the filing of the claim that Mr Carter raised the issue of the dismissal being unfair.

8 This application was lodged electronically with the Commission on 17 October 2005 and according to the Statutory Declaration of Service was served on the respondent on 18 October 2005.

9 Mr Carter does not seek reinstatement. In response to the question within the Notice of Application as to the remedy sought, he says "I am seeking LSL pro rata, 8 weeks redundancy payment and 4 weeks notice in lieu based on 40 hours her week (I was paid at the reduced rate of 36.37 hours per week)."

10 Mr Carter says that the reasons for the delay in filing this application were a lack of knowledge and his difficult personal circumstances. His affidavit says that he made a number of different contacts in an attempt to clarify his entitlements, including "numerous" telephone calls to Wageline, searches of the Department of Consumer and Employment Protection's website and the Western Australian Industrial Relations Commission's website to investigate his rights regarding the termination. He says that at one stage he mistakenly believed that he could only apply to the Industrial Magistrate's Court for denied contractual benefits. Some time during the week ending 11 September 2005, he telephoned the Employment Law Centre. He investigated further in respect of the long service leave entitlement by communications with Wageline on 13 September 2005. He made an appointment with a lawyer at the Employment Law Centre on Tuesday, 27 September 2005 but the meeting was cancelled due to that particular lawyer having a conflict of interests. An alternative appointment was made for Tuesday, 4 October 2005 and at that point, Mr Carter says, he was told that it looked like the termination was unfair. He says that he was not aware that he could make a late application for unfair dismissal until some time during the week ending 9 October 2005 when Ms Fernandes had a conversation with a friend who had experience of an unfair dismissal claim. He says that immediately upon Ms Fernandes conveying this advice, he researched the matter on the Commission's website and became aware that he could make a late application. Accordingly, he made an application on 16 October 2005, lodged on 17 October 2005.

11 Mr Carter says that the unfairness of the dismissal relates to those matters that have already been raised. He says that the denied contractual benefits are substantial and possibly amount to in excess of $16,000.00.

12 Mr Carter has also given evidence through his affidavit of the personal circumstances involving his de-facto partner's health and that of his children, and the effects upon him.

13 The respondent says the delay is lengthy, and the reasons for the delay are not genuine. It also says that this claim of unfair dismissal is not genuine, that Mr Carter was simply delaying the process and that, in any event, he is merely seeking the same as he claims in application B117 of 2005 by which he claims denied contractual benefits of:

"LSL for 8.45 weeks for 40 hours per week @ $24.00 per hour is $8112.00. Redundancy Pay, 8 weeks for 40 hours per week @ $24.00 is $7680.00. Notice in Lieu, 4 weeks for 40 hours per week @ $24.00 is $3840.00-$3491.52 payment made to me = $348.48."

(Answer to Question 20 – Application No. B 117 of 2005)

14 The entitlements claimed total $16,140.00. The application of denied contractual benefits was also filed on 17 October 2005. I note in passing that at the time of the hearing of this matter, the application for alleged denied contractual benefits appears not to have been served upon the respondent, notwithstanding that it was filed on 17 October 2005.

Conclusions

15 The respondent says that the date of termination was the date of the letter of termination, being 11 August 2005, as the letter says that the decision to terminate came into effect immediately.

16 I find that the date of termination is the date upon which Mr Carter received the letter, being 28 August 2005. Whilst the letter of termination dated 11 August 2005 says that termination is effective immediately, this could not be so as Mr Carter had not been advised of the end of the contract of employment at that point. Accordingly, the application is some 21 days out of time.

17 The decision of the Industrial Appeal Court in Malik v Paul Albert, Director General, Department of Education of Western Australia ((2004) 84 WAIG 683) sets out a range of principles to deal with applications for an extension of time. The first of those principles is that the time limits set by legislation need to be complied with. It is necessary for Mr Carter to show that it would be unfair not to allow him to proceed with his application. Other considerations include the length in the delay, the reasons for the delay, the prejudice to the respondent, if any, and the merits of the substantive application.

18 As to the length of the delay, the period of 21 days in the context of applications being lodged within 28 days of the date of dismissal is significant.

19 As to the reason for the delay, Mr Carter's evidence indicates a lack of knowledge of his entitlements and his right to make a claim. This, of course, is not an excuse. In any event, it is quite clear that he has made numerous enquiries with different bodies including Wageline and has undertaken searches of the Commission's website in respect of his denied contractual benefits, but does not seem to have come across the issue of unfair dismissal until he searched for that matter after he was advised around 9 October 2005. It then took him a further week until 17 October 2005 to lodge the claim.

20 I note Mr Carter's personal circumstances and these would normally warrant consideration and compassion being afforded to him. However, it seems those circumstances did not prevent Mr Carter making what he described as numerous telephone calls to Wageline and searches on the Department of Consumer and Employment Protection and this Commission's website to investigate his rights regarding his entitlements upon termination.

21 Apart from Ms Fernandes's comments within her affidavit to the effect that Mr Carter was upset when he met with Mr Leith on 31 August 2005, and that she raised the issue of the termination being unfair, there is no evidence that from that time until the filing of the application that Mr Carter raised with the respondent that the termination was in fact unfair.

22 While Mr Carter says that one of the reasons for the delay is his lack of knowledge and the other is his personal circumstances, it is clear that those personal circumstances did not prevent him from pursuing the denied contractual benefits which he says are owed to him. Further, he has filed an application with the Commission, B117 of 2005, by which he seeks the same remedy as he does for his unfair dismissal claim. The application in respect of those denied contractual benefits is not out of time.

23 Therefore, in terms of Mr Carter's personal circumstances being an explanation for the delay, this does not stand up to scrutiny based his own evidence of the efforts he made to pursue his denied contractual benefits.

24 The issue of Mr Carter's lack of knowledge also does not stand scrutiny as he seems to have had plenty of opportunity to become informed. He certainly knew of the appropriate places to get advice. He clearly did not raise the issue of an unfair dismissal nor did he appear to be interested in it until at least 4 October 2005 when a lawyer met with him and advised him that it looked like an unfair dismissal. Therefore, I do not accept either of Mr Carter's reasons for the delay.

25 As to the merits of the claim, it may be that there is some merit in the application. However, Mr Carter does not seek reinstatement or compensation for loss or injury. He seeks as a remedy those things which are also what he says are his denied contractual benefits. Those matters ought be pursued through that application.

26 Therefore, if the Commission were to decline to accept the application out of time Mr Carter is not left without the prospect of pursuing the remedy he seeks by both this and the denied contractual benefits applications.

27 I would not grant the application to extend time in which to lodge the application, there being no good reason for the delay, the delay is not insignificant and Mr Carter did not genuinely challenge the dismissal with the respondent at all during the period from the time of termination until he filed the application.

28 Application dismissed.

2005 WAIRC 03216

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SIMON CARTER
	APPLICANT
	-v-
	LEEUWIN STAR PTY LTD
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	MONDAY, 5 DECEMBER 2005
FILE NO	U 117 OF 2005
CITATION NO.	2005 WAIRC 03216

Result Application for application to be received out of time dismissed

Order

HAVING heard Mr J Hammond (of Counsel) on behalf of the applicant and Mr B Jackson (of Counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT the application for the application to be received out of time be and is hereby dismissed.

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

2005 WAIRC 03137

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	YIN MAUNG LAY
	APPLICANT
	-v-
	ATLAS GROUP PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
HEARD	THURSDAY, 17 NOVEMBER 2005
DELIVERED	FRIDAY, 25 NOVEMBER 2005
FILE NO.	APPL 1568 OF 2004
CITATION NO.	2005 WAIRC 03137

Catchwords	Industrial law - Termination of employment - Harsh, oppressive and unfair dismissal - Whether Commission has jurisdiction - Applicant's employment governed by federal certified agreement - Effect of agreement on Commission's unfair dismissal jurisdiction - Principles applied - Direct inconsistency between agreement and unfair dismissal jurisdiction - Unfair dismissal jurisdiction ousted by terms of agreement - Application dismissed - *Industrial Relations Act 1979* (WA) s 7, s 23A, s 29(1)(b)(i); *Workplace Relations Act 1996* (Cth) s 170LT, s170LZ, Division 5; *Commonwealth Constitution* s 109; *Judiciary Act 1903* (Cth) s 78B.
Result	Order issued
Representation	
Applicant	Mr K Chilvers as agent of Chilvers & Associates
Respondent	Mr A McPherson of counsel instructed by Messrs Hotchkin Hanly

Reasons for Decision

1 The claim in this matter is one brought by the applicant alleging that he was harshly, oppressively and unfairly dismissed. The application is made pursuant to s 29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act").

2 The respondent wholly opposes the applicant's claim.

Threshold Issue

3 The Commission raised with the parties an issue at the outset of the hearing of the matter, that being the Commission's jurisdiction to entertain the applicant's claim. It was common ground that at the material time, the applicant's employment was subject to the terms of the Atlas (SWTP) Certified Agreement 2000 ("the Agreement") made pursuant to s 170 LT of the Workplace Relations Act 1996 (Cth) ("the WR Act"). The Agreement remained in force as at the time of the dismissal of the applicant.

4 The issue raised is whether there was any inconsistency, either direct or indirect, for the purposes of s 109 of the Commonwealth Constitution, which would deprive this Commission of jurisdiction. Having raised the issue, the Commission directed the respondent to issue a notice pursuant to s 78B of the Judiciary Act 1903 (Cth) to the Commonwealth and State Attorney's General, which was effected by letter dated 19 September 2005 from the respondent's solicitors. On the resumption of the hearing of the matter, the Commission was informed that no Attorney General had indicated any intention to seek leave to intervene in the proceedings. Having been satisfied that sufficient notice had been given to the Attorney's General and a reasonable period of time elapsed for them to consider intervention, the Commission proceeded to hear the parties further.

5 It is trite to observe that neither the acquiescence nor the express consent of the parties can confer jurisdiction upon the Commission which it does not otherwise possess: *Halsbury's Laws of England* Fourth Ed Vol 10 par 317. The only exception to this under the Act, is where an organisation of employees and an employer may agree that a matter, which is not an industrial matter under s 7 of the Act, be regarded as one and the Commission is of the opinion that the objects of the Act would be furthered if a matter was regarded as an industrial matter. That is not the circumstance in these proceedings.

6 The applicant's employment was at its commencement and at its termination, governed by the terms of the Agreement. The Agreement was made under the terms of the WR Act. It is also to be noted however, that an award and an agreement such as the Agreement, made under the WR Act, are not themselves a law of the Commonwealth in the terms of s 109 of the Constitution, but are factum made there under: *TA Robinson and Sons Proprietary Limited v Haylor* (1957) 97 CLR 177 at 182.

7 Inconsistency for the purposes of section 109 of the Constitution may arise in two ways. Firstly, is where the Commonwealth law by its terms discloses an intention to cover the field to the exclusion of a relevant State law. Secondly, inconsistency can arise where both the Commonwealth and State laws collide in the sense that the subject of the law can only obey one law by disobeying the other or where one law takes away a right or privilege which the other law confers: *Ex parte McLean* (1930) 43 CLR 472 J; *R v Licensing Court of Brisbane*; *Ex parte Daniell* (1920) 28 CLR 3; *Blackley v Devondale Cream (Vic) Pty Ltd* (1968) 117 CLR 253 at 258.

8 The applicant's claim is brought under s 29(1)(b)(i) which is in the following terms:

> ***"29. By whom matters may be referred***
>
> *(1) An industrial matter may be referred to the Commission —*
>
> *(b) in the case of a claim by an employee —*
>
> *(i) that he has been harshly, oppressively or unfairly dismissed from his employment; or…"*

9 The applicant seeks an order under s 23A of the Act which relevantly provides as follows:

"23A. Powers of Commission on claims of unfair dismissal

…(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.

(4) If the Commission considers that reinstatement would be impracticable, the Commission may order the employer to re-employ the employee in another position that the Commission considers —

(a) the employer has available; and

(b) is suitable.

(5) The Commission may, in addition to making an order under subsection (3) or (4), make either or both of the following orders —

(a) an order it considers necessary to maintain the continuity of the employee's employment;

(b) an order to the employer to pay to the employee the remuneration lost, or likely to have been lost, by the employee because of the dismissal.

(6) If, and only if, the Commission considers reinstatement or re-employment would be impracticable, the Commission may, subject to subsections (7) and (8), order the employer to pay to the employee an amount of compensation for loss or injury caused by the dismissal…"

10 The effect of a certified agreement made under the WR Act is dealt with in Division 5 of that legislation. For present purposes, s 170 LZ deals with the effect of a certified agreement on Commonwealth or State laws, awards or agreements. Section 170 LZ provides as follows:

"170LZ Effect of a certified agreement on Commonwealth laws or State laws, awards or agreements

(1) Subject to this section, a certified agreement prevails over terms and conditions of employment specified in a State law, State award or State employment agreement, to the extent of any inconsistency.

(2) Provisions in a certified agreement that deal with the following matters operate subject to the provisions of a State law that deals with the matter:

(a) occupational health and safety;

(b) workers' compensation;

(c) apprenticeship;

(d) any other matter prescribed by the regulations.

(3) If a State law provides protection for an employee against harsh, unjust or unreasonable termination of employment (however described in the law), subsection (1) is not intended to affect the provisions of that law that provide that protection, so far as those provisions are able to operate concurrently with the certified agreement.

(4) To the extent of any inconsistency, a certified agreement displaces prescribed conditions of employment specified in a Commonwealth law that is prescribed by the regulations.

(5) In this section:

***Commonwealth law** means an Act or any regulations or other instrument made under an Act.*

***Prescribed conditions** means conditions that are identified by the regulations.*

***State law** means a law of a State or Territory (including any regulations or other instrument made under a law of a State or Territory), but does not include a State award or a State employment agreement."*

11 At first blush, it may be said that s 170 LZ(3) saves the Commission's unfair dismissal jurisdiction under the Act. However, whilst this subsection deals with what might be said to be the "covering the field" aspect of inconsistency, such a statutory provision cannot avoid a direct inconsistency, hence the use of the words in s 170 LZ (3) "so far as those provisions are able to operate concurrently with the certified agreement": *The Queen v The Credit Tribunal; Ex parte General Motors Acceptance Corporation, Australia* (1977) 137 CLR 555 per Mason J at 563; *City of Mandurah v Hull* (2000) 80 WAIG 4319 per Anderson J at 4323.

12 The relevant provision of the Agreement is clause 4 - Contract of Service. This clause relevantly provides as follows:

"4. - CONTRACT OF SERVICE

(1) The employee shall be employed within the S.W.T.P. and work in accordance with this agreement and other requirements of his / her contract of employment.

(2) The employee shall also be required to do any duties as directed by Atlas, that the employee is skilled or qualified to perform.

(3) The first 3 months of employment with Atlas shall be a probationary period. At any time during this period the employee or the employer may terminate the employment by giving one hour's notice. Atlas may offer continuing employment to the employee beyond the probationary period.

(4) Atlas may terminate the contract of service, by giving to the employee the period of notice required by paragraph (b) or (c) of this sub clause or payment in lieu of notice.

a) The amount of payment in lieu of notice in this sub clause is based on 40 ordinary hours per week at the employee's total rate of pay.

b) The required period of notice is first worked out using this table:-

Employees period of continuous service with the employer	*Period of notice*
Not more than 1 year	*At least 1 week*
More than 1 year but not more than 3 years	*At least 2 weeks*
More than 3 years but less than 5 years	*At least 3 weeks*
More than 5 years	*At least 4 weeks*

Atlas shall give the employee an additional one weeks notice if the employee is over 45 years old and has completed at least 2 years continuous service with Atlas.

c) Where the employee is employed on a probationary period or casual basis, one hours notice is required by Atlas to terminate the contract of service and paragraph (b) of this sub clause shall not apply.

(4) Nothing in this sub clause affects Atlas's right to dismiss the employee instantly, without notice or payment in lieu, in the event of serious misconduct.

(5) The employee may terminate his or her service by giving either:

a) one hours notice to Atlas if employed on a probationary period or casual basis; or

b) one weeks notice to Atlas.

(6) If the employee gives less than the required notice, Atlas may deduct payment, equivalent to the period of notice not given by the employee, from the employee's termination pay.

(7) The employer is entitled to deduct payment for any day or part of a day on which an employee cannot be usefully employed for reasons beyond the employer's control including power shortages, industrial action and machinery failure. Before standing down an employee without pay the employee shall be offered the opportunity to take any accrued annual leave."

13 In my opinion, for the following reasons, there is a direct inconsistency between the terms of clause 4 of the Agreement and ss 23A and 29(1)(b)(i) of the Act to oust the Commission's unfair dismissal jurisdiction in this case.

14 In my view, what clause 4 of the Agreement did at the material time was to confer a right on the respondent to determine the employment of the applicant by the giving of the period of notice as specified in cl 4(4)(b) or (c). The fact that cl 4 of the Agreement was specifying the rights of the parties under the Agreement, is supported by the terms of cl 4(4) (sic) (which it appears should be (5)), which deals with the right of the respondent to dismiss an employee instantly in the event of serious misconduct.

15 Direct inconsistencies of this kind have been dealt with by the Commission and the Industrial Appeal Court in similar circumstances in the past. In *Metropolitan (Perth) Passenger Transport Trust v Gersdorf* (1981) 61 WAIG 611 the Industrial Appeal Court came to the conclusion that a contract of service clause contained in a federal award providing the right to terminate on notice, was directly inconsistent with the terms of the then s 29(2)(a) of the Act as it then was. In dealing with this matter, Wallace J referred to and relied upon a judgement of Bray CJ in *The Queen v The Industrial Court of South Australia; Ex parte General Motors Holden Pty Ltd* 10 SASR 582 where, in dealing with a similar issue, he said at 590:

> *"Is, then, a power to direct re-employment by the former employer of a former employee, whose employment has been terminated in accordance with the provisions of the award, consistent with that award? I do not think it is. If re-employment is directed under s.15(1)(e), it can only be re-employment in terms of the award. The award gives the employer the right to terminate on a week's notice. Assume a case where a week's notice has been given. The Industrial Court declares the dismissal to have been harsh, unjust or unreasonable and directs re-employment. The employer gives, under the terms of the award, another week's notice. There could be an interminable series of week's notice, direction to re-employ, another week's notice, and another direction to re-employ. It seems to me that this would be to qualify gravely, and indeed to destroy, the right to determine on a week's notice given to the employer by the award. I do not think it consistent with the award for State legislation to attach to that right a potential condition of defeasance, to adopt the language of Walters J and Wells J."*

16 Similarly, in *Martindale v British Petroleum Refinery (Kwinana) Pty Ltd* (1992) 72 WAIG 1263 the Industrial Appeal Court considered the same issue in relation to the terms of the federal award there in issue, dealing with the right to terminate on notice and the then s 29(b)(i) of the Act. The Court unanimously agreed that the unfair dismissal jurisdiction of the Commission was ousted by the relevant terms of the federal award. Ipp J, in dealing with this issue, came to the following conclusions at 1264:

> *"The issue as to whether there is a direct conflict between cl 5 of the Award and s 29(b)(i) of the Act or whether the Award evinces an intention to "cover the field" raises a question of construction. In my opinion, as a matter of language, the sentence:*
>
> > *"employment shall be terminated by a week's notice on either side given at any time during the week or by the payment or forfeiture of a week's wages as the case may be"*
>
> *gives the right to the employer or the employee, as the case may be, to terminate the employment. In other words, and dealing with the employer alone, that sentence confers upon the employer an entitlement to terminate the employment by a week's notice. This in my view is the appropriate construction based on the ordinary meaning of the words used in that sentence. It is reinforced by the explanatory statement in the following sentence. That explanatory statement sets out that:*
>
> > *"This shall not affect the right of the employer to dismiss any employee without notice for malingering, inefficiency, neglect of duty or misconduct…"*
>
> *The reference in the latter sentence to "the right of the employer" assumes that the preceding sentence confers a "right" upon the employer.*

Furthermore, the first paragraph of the clause, which stipulates that, except as elsewhere provided, "employment shall be by the week" is consistent with a right being conferred upon an employer to terminate the employment on a week's notice.

It was submitted by counsel for the appellant that the omission in cl 5 to deal with the rights of an employee who is "unfairly" dismissed indicates that the clause is not an exclusive code. He also submitted that, properly construed, cl 5 deals only with procedural matters and does not create substantive rights.

In my view the fact that cl 5 does not deal with a termination of employment that might be "unfair", but which is otherwise covered by the provision of the clause, is simply an indication that the parties to the Award intended that an employee should have no rights following on such a termination or dismissal, other than those recorded in the clause.

Similar clauses in other Federal awards have been construed the same way. In Metropolitan (Perth) Transport Trust v. Gersdorf (1981) 61 WAIG 611 the relevant clause in the Federal award concerned provided that:

> *"(a) Except as elsewhere provided in this Award, employment shall be by the week.*
>
> *(b) Employment shall be terminated by a week's notice on either side, given at any time during the week or by the payment or forfeiture of a week's wages as the case may be."*

Brinsden J said, in regard thereto, at 614:

> *"In my view cl 7 gives to both employer and employee a right to terminate on a week's notice. It does not merely deal with length of notice but otherwise leaving the right to terminate to the common law. There is ample authority for this view…"*

Brinsden J explained (at 614-615) that he came to this conclusion for the following reasons:

> *"There is no express provision like (the explanatory statement in the Award stipulating that the provision that the employment shall be terminated by a week's notice on either side did not affect the right of the company to dismiss an employee without notice for malingering, inefficiency, neglect of duty or misconduct) in this award, but there is nevertheless clear recognition in the award of the right of the appellant to terminate the employment for misconduct as for example in cl 18(i) and (n) and cl 24. Clause 10 regulates the way in which the Trust might go about discharging an employee through misconduct. If that procedure were not to be followed by the Trust then it seems that a dispute concerning the matter arising out of the Award would be occasioned invoking the jurisdiction of the Board of Reference under cl 6. These provisions by implication provide in the Award the right to terminate for misconduct. In my view therefore this Award does provide, so far as the employer is concerned at least, a compete code on the way it may go about terminating the services of an employee"*

Wallace J expressed similar views and Smith J agreed with both Wallace J and Brinsden J.

Counsel for the appellant conceded that Gersdorf was authority directly in point, and contrary to his argument, but submitted (as he was obliged to do) that the reasons of the Court in that case were clearly wrong.

There is however a line of cases, including decision of courts of the highest authority, in which like views have been expressed in regard to similar awards and legislation. See for example the Full Court of the Supreme Court of South Australia in The Queen v. The Industrial Court of South Australia; ex parte General Motors – Holden Pty Ltd [1975] 10 SASR 582; the views expressed by Barwick CJ, Stephen and Aikin JJ in Ansett Transport Industries (Operations) Pty Ltd v Wardley (1980) 142 CLR 237; the views expressed by Mason, Brennan and Deane JJ in Metal Trades Industry Association of Australia v. Amalgamated Workers' and Shipwrights' Union (1983) 48 ALR 385 (at 400-401), and the remarks made by the High Court in Belton v General Motors – Holden Limited (No 2) (1954) 58 ALJR 509 at 511-512."

17 Whilst the issue of consistency arose again in *Hull*, which referred to both *Gersdorf* and *Martindale*, this judgement can be distinguished as in that case, the award under consideration contained a provision which expressly saved the right of an employee to seek a remedy in this Commission in relation to unfair dismissal. There is no such provision in the Agreement.

18 In my view, the present case is on all fours with both *Gersdorf* and *Martindale.* Both of those judgments have not been overturned or reconsidered by the Court in *Hull.* Whilst it is regrettable the matter of jurisdiction has arisen at a late stage in the present proceedings, I am compelled to conclude that the relevant terms of the Agreement, set out above, are directly inconsistent with the terms of ss 23A and 29(1)(b)(i) of the Act. Therefore the Commission is without jurisdiction to entertain the applicant's claim.

19 The application is therefore dismissed.

2005 WAIRC 03138

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	YIN MAUNG LAY
	APPLICANT
	-v-
	ATLAS GROUP PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 25 NOVEMBER 2005
FILE NO/S	APPL 1568 OF 2004
CITATION NO.	2005 WAIRC 03138

Result	Order issued
Representation	
Applicant	Mr K Chilvers as agent of Chilvers & Associates
Respondent	Mr A McPherson of counsel instructed by Messrs Hotchkin Hanly

Order

HAVING heard Mr K Chilvers as agent on behalf of the applicant and Mr A McPherson of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

THAT the application be and is hereby dismissed.

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

2005 WAIRC 03195

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	FRANK LEONE
	APPLICANT
	-v-
	EXPRESS LABOUR HIRE
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
HEARD	TUESDAY, 29 NOVEMBER 2005
DELIVERED	THURSDAY, 1 DECEMBER 2005
FILE NO.	APPL 1329 OF 2004
CITATION NO.	2005 WAIRC 03195

Catchwords	Industrial Law - Contractual benefits claim - Agreement to compromise - Application to make orders in terms of a compromise - Application granted - *Industrial Relations Act 1979* s 27, s 29(1(b)(ii) and s 32
Result	Application to make orders in terms of a compromise granted
Representation	
Applicant	Mr F Leone on his own behalf
Respondent	No appearance

Reasons for Decision

1 On 12 October 2004 Frank Leone ("the applicant") made an application pursuant to s29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act") claiming that he was owed benefits under his contract of employment with Express Labour Hire ("the respondent").

Background

2 After a s32 conference was convened on 9 December 2004 in relation to this application Mr Peter Eathorne, acting on behalf of the respondent, signed a Deed of Settlement ("the Deed") on or about 8 February 2005 to settle this application by a payment to the applicant of a nett amount of $350 which the applicant paid to the respondent pursuant to his contract of employment with the respondent. The Deed was also signed by the applicant on or about 8 February 2005. After this settlement was reached between the parties the applicant advised the Commission that the respondent had not paid the $350 nett to him as agreed in the Deed. A further conciliation conference was set down by the Commission on 29 November 2005 however the respondent did not attend and the applicant then sought an order in the terms of the agreement reached between the parties.

3 The respondent did not appear at the hearing in relation to this matter. I am satisfied that sufficient notice was given to the respondent of these proceedings as the notice of hearing was sent to the respondent at two relevant addresses and neither of these notices were returned to the Commission. As I was satisfied that the respondent had been advised of the hearing and given the Commission's powers under s27(1)(d) of the Act I formed the view that it was appropriate in the circumstances to proceed with the hearing in the absence of the respondent.

4 In Diana Elizabeth Downs-Stoney v Derbarl Yerrigan Health Service (2004) 84 WAIG 2612 Commissioner Smith comprehensively sets out the relevant law regarding the Commission's powers to issue an order in the terms of an agreement reached at a s32 conference in the case of an application pursuant to s29(1)(b)(ii) of the Act. In this decision Commissioner Smith stated the following at page 2618:

> "In *Thompson v Bituminous Products Pty Ltd* (op cit) the issue before the Commission in that case is whether parties reached an agreement to compromise a claim under s 29B(1) of the Act. In that case there was a dispute as to whether an offer was made to compromise all claims including for a claim of under payment of award entitlements claimed on behalf of the Applicant by the Construction, Forestry, Mining and Energy Union in the Industrial Magistrates' Court. I observed in paragraph [12].

"Although I have concluded that the Commission does have the power to hear and make a declaration as to whether the parties have, by agreement, compromised an application and to make orders to enforce a compromise agreement, it is my view that the Commission should not exercise its power to hear and determine whether this application has in fact been compromised by an agreement between the parties. The reason I have reached this view is that it is clear that the remedy the Applicant seeks is in the nature of a summary judgement or relief. In an application for enforcement of a compromised agreement in the Supreme Court in *Chesterton International (WA) Pty Ltd v Interchange Holdings Pty Ltd* unreported; SCt of WA; del. 21 February 1995 Heenan J at page 7 observed:

> 'Bearing in mind that the power to order summary or final judgment is one that should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried (see *Fancourt and Another v Mercantile Credits Ltd* (1983) 48 ALR 1 at 10) I am satisfied that this is a case in which the power should be exercised. On the material before me it is clear not only that the Court has the power in these proceedings to enforce an agreement compromising the action but also that the agreement in question is binding upon the first defendant.'

Further in *Chesterton International (WA) Pty Ltd v Interchange Holdings Pty Ltd (op cit)* Heenan J, at page 5, observed that if there was a substantial dispute as to the terms of the agreement in question the summary procedure would be inappropriate. Murray J in *Dalmation Nominees Pty Ltd v Marinovich (op cit)* made similar observations at page 14 of his reasons for decision. In my view the order sought by the Applicant is an order enforcing the agreement. In *Roberts v Gippsland Agricultural Earthmoving Contracting Co Pty Ltd* [1956] VLR 555 at 561 Smith J observed:

> 'And it is to be observed, at the outset, that what we are concerned with here is not the class of case in which, following upon the making of an agreement for the compromising of an action, an order has been pronounced with the real or apparent consent of both parties, and one of them then says that the order should not be drawn up or should be set aside. What we are concerned with is the class of case in which, following upon the making of such an agreement, and at a stage when no order has been pronounced, one of the parties comes to Court, with the other opposing, and asks the Court to make an order to which, by the agreement, the other party undertook to give his consent, or an order directing the other party to pay money or do some other act which, by the agreement, he undertook to do. In other words it is the class of case in which a party to an action comes to the Court seeking what is, in effect, an order enforcing the agreement specifically.'

Smith J dealt with a number of rules of practice in relation to enforcement of compromise action and summary procedure at page 562-563. At 563 he observed that it would not be appropriate to make orders in terms of an agreement if there was a:

> '(d) …substantial question to be determined as to what were the terms of the agreement, or as to whether it was valid or specifically enforceable, as for example where a substantial case was put forward of material mistake or of other circumstances such as would afford a defence to a suit for specific performance, a party would ordinarily be left to proceed by separate bill so that the matters raised might be fully investigated: see *Askew v Millington (supra); Richardson v Eyton (supra); Edwards on Compromises,* p. 186; *Fry on Specific Performance* (6th ed.), p.720.' "

In *Thompson v Bituminous Products Pty Ltd* (op cit) it was conceded by the parties that the Commission does have power in an appropriate case to make orders in terms of a compromise agreement. In this matter the Respondent makes no such concession and says that the compromise agreement constitutes a separate contract which cannot be dealt with by the Commission under s 29(1)(b) of the Act.

The Commission is not a superior court of record, it has no inherent jurisdiction, and its jurisdiction is limited to that explicitly provided by the Act *(Robe River Iron Associates v Federated Engine Drivers and Firemen's Union of Workers' of Western Australia* (1987) 67 WAIG 315; *Australian Glass Manufacturing Co Pty Ltd v Transport Workers' Union of Australia, Industrial Union of Workers', Western Australian Branch* (1992) 72 WAIG 1499). The Commission's powers are circumscribed by statute. In respect of an application under s 29, powers to make orders are confined to the express provisions of the Act (see *Qantas Airways Ltd v Gubbins* (1992) 28 NSWLR 26). The Commission does have implied powers that arise by necessary implication out of the effect of exercise of a jurisdiction which is expressly conferred (*Grassby v The Queen* (1989) 168 CLR 1 at 16-17 per Dawson J). Pursuant to s 12(1) of the Act the Commission is a Court of record. It exercises judicial power when hearing and determining claims by an employee under s 29(1)(b). As its jurisdiction is limited it is an inferior court of record. Dawson J, in *Grassby v The Queen* (1989) 168 CLR 1 at 16, delivered the leading judgment of the court in which he discussed the limits of the implied jurisdiction of an inferior court. Dawson J, first referred to Menzies J observations in *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1 at 7, that implied jurisdiction requires no authorising provision, and Dawson J then went on to say at 16 to 17:

"Inherent jurisdiction is an elusive concept and the proposition that it arises from the nature of a court has been described as metaphysical. See *Yale Law Journal*, vol. 57 (1947) 83, at p. 85, cited by Jacob, 'The Inherent Jurisdiction of the Court', *Current Legal Problems*, vol. 23 (1970) 23, at p. 27. But it is undoubtedly the general responsibility of a superior court of unlimited jurisdiction for the administration of justice which gives rise to its inherent power. In the discharge of that responsibility it exercises the full plenitude of judicial power. It is in that way that the Supreme Court of New South Wales exercises an inherent jurisdiction. Although conferred by statute, its powers are identified by reference to the unlimited powers of the courts at Westminster. On the other hand, a magistrate's court is an inferior court with a limited jurisdiction which does not involve any general responsibility for the administration of justice beyond the confines of its constitution. It is unable to draw upon the well of undefined powers which is available to the Supreme Court. However, notwithstanding that its powers may be defined, every court undoubtedly possesses jurisdiction arising by implication upon the principle that a grant of power carries with it everything necessary for its exercise (ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest). Those implied powers may in many instances serve a function similar to that served by the inherent powers exercised by a superior court but they are derived from a different source and are limited in their extent. The distinction between inherent jurisdiction and jurisdiction by implication is not always made explicit, but it is, as Menzies J. points out, fundamental.

…

It would be unprofitable to attempt to generalize in speaking of the powers which an inferior court must possess by way of necessary implication. Recognition of the existence of such powers will be called for whenever they are

required for the effective exercise of a jurisdiction which is expressly conferred but will be confined to so much as can be 'derived by implication from statutory provisions conferring particular jurisdiction'."

In this matter the Commission has before it an application under s 29(1)(b)(i) and (ii). Despite the fact the Applicant was reinstated to her position as Director, Client Services on 23 September 2003, the application was not discontinued. The Commission cannot in this case make orders expressly under s 23A in relation to the application under s 29(1)(b)(i) because as the Respondent points out the Commission may only make an order under the section if the Commission determines that the dismissal of an employee was harsh, oppressive or unfair. Section 23A has no application to a contractual benefit claim under s 29(1)(b)(ii). This matter has been the subject of conciliation and arbitration under ss 23(1) and 32 of the Act. The Commission has no express power under ss 23(1), 23A or 32 to make an order in terms of a compromise agreement. Although there is no express power vested in the Commission to make an order in terms of a compromise agreement I am of the view that the Commission has inherent power to do so in relation to this matter. The reasons why I have reached this conclusion are as follows.

This application was referred for conciliation and for arbitration under ss 23(1) and 32 of the Act. Section 23(1) provides:

"(1) Subject to this Act, the Commission has cognizance of and authority to enquire into and deal with any industrial matter."

Section 32(1), (2) and (7) provides:

"(1) Where an industrial matter has been referred to the Commission the Commission shall, unless it is satisfied that the resolution of the matter would not be assisted by so doing, endeavour to resolve the matter by conciliation.

(2) In endeavouring to resolve an industrial matter by conciliation the Commission shall do all such things as appear to it to be right and proper to assist the parties to reach an agreement on terms for the resolution of the matter.

(7) Where a matter is decided by arbitration the Commission shall endeavour to ensure that the matter is resolved on terms that could reasonably have been agreed between the parties in the first instance or by conciliation."

Section 32A of the Act provides that conciliation and arbitration functions may be exercised at anytime and are not limited by any other provision of the Act.

Pursuant to s 7(1a) of the Act the Commission still has before it an industrial matter. Section 7(1a) provides:

"(1a) A matter relating to —

(a) the dismissal of an employee by an employer; or

(b) the refusal or failure of an employer to allow an employee a benefit under his contract of service,

is and remains an industrial matter for the purposes of this Act even though their relationship as employee and employer has ended."

As Beech C, observed in *MacLeod v Paulownia Trees (op sit),* s 6(b) and (c) of the Act are consistent with making order in terms of a compromise agreement. Section 6(b) and (c) provide it is a principal object of the Act:

"(b) to encourage, and provide means for, conciliation with a view to amicable agreement, thereby preventing and settling industrial disputes;

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

For a power to be implied, it must be necessary for the effective exercise of the jurisdiction. What is "necessary" requires identifying a power to make orders which are reasonably required or legally ancillary to the accomplishment of the specific remedies provided for in the Act (see *Pelechowski v The Registrar, Court of Appeal* (1999) 198 CLR 435 at 452; [51] per Gaudron, Gummow and Callinan JJ).

I am of the view that the Commission has power to make orders in terms of a compromise agreement providing that the orders it makes could otherwise be made expressly under ss 23(1), 23A and 32 of the Act. The power to do so is implied in the Act when regard is had to objects in s 6(b) and (c) as the grant of power in ss 23(1), 32 and 32A carries with everything that is necessary for the effective exercise of the power.

In the context of claims made under s 29(1)(b) it is reasonably necessary or legally ancillary to the proper object of accomplishing settlement of industrial disputes that parties be held to their bargains and the means for holding them to their bargains be carried out with the maximum of legal form and technically. The implied power does not extend to making orders that are not within the scope of the original application or to make orders in terms of a compromise that could not have been made following an arbitration of the merits of the application in the absence of any compromise agreement. For example the Commission could not make an order requiring the Respondent to pay the Applicant's legal costs as to do so is contrary to s 27(1)(c) of the Act."

5 Taking into account this authority and given the circumstances of this case I find that the Commission has the power and should issue the order sought by the applicant and I conclude that it is appropriate to do so in the circumstances of this case as I find that the parties have compromised this s29(1)(b)(ii) application as an agreement was reached to settle this application on or about 8 February 2005 and confirmed in the Deed and I accept the applicant's evidence that the respondent has not paid him the amount of $350 nett.

6 I find that there was no uncertainty or ambiguity about the agreement reached between the parties as the Deed, which was agreed to and signed by Mr Eathorne on behalf of the respondent, required that the respondent pay the applicant $350 nett as full and final settlement of this application. I am therefore of the view that it is appropriate to issue a declaration that the parties have compromised this s29(1)(b)(ii) application and that an order shall issue that the respondent pay the applicant the amount agreed by the respondent as part of this compromise.

7 A minute of Proposed Order will now issue.

2005 WAIRC 03244

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	FRANK LEONE
	APPLICANT
	-v-
	EXPRESS LABOUR HIRE
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 7 DECEMBER 2005
FILE NO/S	APPL 1329 OF 2004
CITATION NO.	2005 WAIRC 03244

Result	Application to make orders in terms of a compromise granted

Order

HAVING HEARD Mr F Leone on his 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 parties reached an agreement in compromise of this application on or about 8 February 2005.

2) ORDERS the respondent to pay Frank Leone the sum of $350 nett within seven (7) days of the date of this order.

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

2005 WAIRC 03176

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KIM IRENE MAGUIRE
	APPLICANT
	-v-
	TREVOR CLAPTON, MANAGER OF KALBARRI BEACH RESORT
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
HEARD	WEDNESDAY, 9 NOVEMBER 2005
DELIVERED	WEDNESDAY, 9 NOVEMBER 2005
FILE NO.	U 74 OF 2005
CITATION NO.	2005 WAIRC 03176

Catchwords	Industrial law - Termination of employment - Harsh, oppressive and unfair dismissal - Whether constructive dismissal or resignation - Intent of parties considered - Principles applied - No dismissal at the intitiative of the employer - Commission lacks jurisdiction - Application dismissed - *Industrial Relations Act 1979* (WA) s 29(1)(b)(i)
Result	Order issued
Representation	
Applicant	In person
Respondent	Mr E Rea as agent

Reasons for Decision
(Ex Tempore)

1. The application before the Commission is one brought by the applicant against the respondent by which it is alleged that on or about 9 September 2005 the applicant was dismissed from her employment as a front office reception supervisor. The respondent opposes the applicant's claim and moreover argues that the application is beyond the Commission's jurisdiction because in fact and in law there was no dismissal for the purposes of s 29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act").

2. The factual circumstances of the matter are not particularly complicated and are essentially as follows. The applicant commenced employment with the respondent as a full time receptionist in 1994. It seems that prior to that time there was also a previous period of employment, not relevant for present purposes. The respondent is a hotel resort operation located in Kalbarri in Western Australia. The applicant's duties entailed work as the senior receptionist and also to coordinate and prepare for tour groups staying at the resort location.

3. The applicant testified that she worked at the respondent as the receptionist supervisor and later senior supervisor without apparent incident until about July 2005, when a meeting took place between her and the respondent's management, Mr and Mrs Clapton, as to aspects of her work performance. The current managers took over the management of the respondent it seems, in or about mid-2003.

4. In the final analysis the critical evidence is not really in dispute. It is common ground that some performance issues were raised by the respondent with the applicant in a meeting, as I have mentioned, on 15 July 2005. The outcome of this meeting was a document signed by both parties, that being the applicant and the Claptons, the managers of the respondent, which was tendered as exhibit R1.

5. The matter really in contest is what took place as to the events of a meeting between the applicant and Mr Clapton on 9 September 2005. That meeting, it is common ground, took place in Mr Clapton's office at about 3.30pm in the afternoon. The applicant testified that at about this time she was requested to attend a meeting with Mr Clapton in his office. At this meeting the applicant said that Mr Clapton commenced to raise two issues with her, they being her manner of dealing with a customer on the previous day and her manner in dealing with owners of some units in the resort complex. The applicant testified that she asked for names of the relevant unit owners, and Mr Clapton responded that he would not provide them, but that he may be able to give them to her at a later date.

6. Mr Clapton informed the applicant that he would have to give the applicant a first written warning on that afternoon. Before he went any further, the applicant said to him, in words to the effect, that "she knew where this was going, to forget the written warning and to write out a cheque for her final pay". The applicant then left the office and returned a short time later, apparently to drop off some resort keys at the reception area. Thereafter the applicant returned to the respondent's premises on the following Saturday to attend for work in another capacity for another employer, as the Commission understands it.

7. There was no further contact it seems, between the parties after Friday afternoon until Monday 12 September at about 11.00am in the morning. The applicant telephoned the resort and spoke to Mr Clapton to inform him that she was not coming in as she was advised to have some time off on advice. There was some minor dispute about the content of that telephone conversation which the Commission will return to later.

8. According to the applicant's evidence, Mr Clapton informed her that she had resigned the previous Friday and according to the applicant at the end of that conversation she simply said words to the effect "Okay" and the conversation ended. Thereafter on the following Tuesday, it seems on the evidence, the applicant was offered and accepted some casual or part time employment and informed the Commission that she is still looking for permanent employment.

9. The respondent adduced evidence through Mr Clapton, the co-manager of the respondent. As I have already observed, there is no real contest on most of the applicant's testimony. He testified that because there was no real improvement in aspects of the applicant's performance and behaviour, in particular, in view of the events discussed in July 2005, he chose to speak with the applicant on Friday 9 September. Additionally, he decided to do so because of the complaints he had recently received from both a customer and from some unit holders.

10. Mr Clapton's evidence was that he was calm and businesslike and put issues to the applicant. In the face of an interruption from the applicant, he said for her to wait until he had an opportunity of explaining his position. Mr Clapton testified that once he got to the point of informing the applicant that he was going to issue the applicant with a first written warning, the applicant responded in words to the effect of, "don't bother" and "make up my final cheque". This conduct and no contact over the weekend by the applicant left the respondent, according to Mr Clapton's testimony, in no doubt that the applicant was leaving the respondent's employment.

11. I turn to consider the relevant legal principles. The onus is on the applicant to establish that she was dismissed as a jurisdictional fact necessary to attract the Commission's jurisdiction under s 29(1)(b)(i) of the Act. If any authority is needed for that trite proposition of law I simply refer to the decision of the Industrial Appeal Court in the matter of the *Metropolitan (Perth) Passenger Transport Trust v Gersdorf* (1981) 61 WAIG 611. This is a question of mixed fact and law. Having established a dismissal, it is then for the applicant to establish that a dismissal was so effected by the employer in circumstances that it warrants the characterisation of being harsh, oppressive and unfair.

12. In this case the respondent contests that the applicant was dismissed at all and says that in reality, the applicant terminated her employment and not as a consequence of any act of the employer. Whether or not circumstances of the kind of exchange between the applicant and the respondent's representative on the day in question does constitute a resignation or a dismissal has been the subject of considerable judicial comment both in this jurisdiction and elsewhere. In the matter of *AFMEPKIU v G&G Steelworks* (1999) 79 WAIG 880 before the Commission as presently constituted, I dealt with the relevant legal principles at some length at 883. I do not quote those principles, but simply rely upon them for present purposes. Also the agent for the respondent, Mr Rea, has properly brought to the Commission's attention observations by both the Commission as presently constituted and other members of the Commission in relation to the same issue, and I simply refer to my judgment in *Harich v ARCA Pty Ltd* (2005) 85 WAIG 3331, and also a decision of Senior Commissioner Fielding, as he was, in *Ellis v Pentagon Freight Services Pty Ltd* (1997) 77 WAIG 2988. I adopt and apply what I said in *G&G Steelworks* for present purposes and also refer to the other authorities.

13. It is also relevant to point out that in this case, as in many cases in which there is alleged to be a constructive dismissal at common law, it is not so much whether there was a dismissal which was constructive, but really who terminated the employment relationship, and I refer to the decision of the Industrial Appeal Court in *The Attorney General v Western Australian Prison Officers' Union of Workers* (1995) 75 WAIG 3166.

14. Having set out the relevant principles, I now turn to my conclusions having regard to the applicable law. In this matter the first issue to be determined is whether the applicant was dismissed by the respondent, as a consequence of discussions on 9 September 2005 with the respondent's management. The applicant maintains that she was in a state of shock and upset in the course of meeting with Mr Clapton and as a consequence says her resignation, if there was one, was given in the heat of the moment and was not intended by her to have the effect of terminating her employment. For the respondent, the applicant's alleged state is denied and it is said at all material times the applicant appeared to know what she was doing and did not seem stressed or upset as a consequence of the meeting on the day in question, although Mr Clapton accepted in his evidence that the applicant was somewhat angry.

15. In my view, on all of the evidence before me, I have no doubt the position was that the applicant resigned and it was she who terminated the employment. What the employer did on 9 September was no more than what it was entitled to do and, indeed, obliged to do. If it had not done so and subsequently a dismissal by it ensued, then the respondent may well be criticised for not giving the employee a fair warning of what concerns it had with his or her employment, in this case the applicant. In this case the meeting did not progress to its conclusion. It was abruptly brought to an end by the action of the employee in saying words to the effect of, "forget the written warning write a cheque for my final pay", or words along those lines.

16. Whilst the applicant may have felt affronted by the respondent raising these matters, the applicant's words and conduct in my view were clear and unambiguous and led, no doubt in the employer's mind, to a conclusion that the applicant was resigning from her employment. I am also not persuaded that the respondent conducted itself in such a fashion to procure the applicant's resignation. In my view, on the evidence, far from it. Also, simply because the employee tendered a resignation in some anger does not mean that no resignation was given and I refer to *Ellis v Pentagon Freight Services* in that regard.

17. Also it is the case that in this matter the applicant did have ample opportunity to withdraw her resignation after the Friday 9 September 2005 meeting if she really wished to. Both over the weekend and in a telephone conversation with Mr Clapton on Monday 12 September there was ample opportunity, in my view, for any resignation given to be withdrawn, but it was not withdrawn. There is ample authority for the proposition that if a resignation is given in the heat of the moment, then an obligation is on the employee to act swiftly to revoke it, if that is what they wish to do.

18. For all the foregoing reasons, the Commission cannot be satisfied on balance that the applicant was dismissed as a matter of fact and of law. Whilst, no doubt, the applicant feels aggrieved by the circumstances which confronted her on the day, I am not able to come to the view that there was a dismissal as a matter of law and therefore the application must be dismissed. The Commission will so order.

2005 WAIRC 03021

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES KIM IRENE MAGUIRE

APPLICANT

-v-

TREVOR CLAPTON, MANAGER OF KALBARRI BEACH RESORT

RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE THURSDAY, 10 NOVEMBER 2005
FILE NO/S U 74 OF 2005
CITATION NO. 2005 WAIRC 03021

Result Application dismissed for want of jurisdiction
Representation
Applicant In person
Respondent Mr E Rea as agent

Order

HAVING heard the applicant on her own behalf and Mr E Rea as agent on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed for want of jurisdiction.

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

2005 WAIRC 03102

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES CAROL PATRICIA MALONE

APPLICANT

-v-

TYLORD HOLDINGS PTY LTD TRADING AS JESTERS JAFFLE PIE CO BUNBURY

RESPONDENT

CORAM COMMISSIONER J H SMITH
HEARD WEDNESDAY, 19 OCTOBER 2005
DELIVERED MONDAY, 21 NOVEMBER 2005
FILE NO. APPL 621 OF 2005
CITATION NO. 2005 WAIRC 03102

CatchWords	Termination of employment - Harsh, oppressive and unfair dismissal - Whether Applicant resigned or was dismissed - Demotion - Applicant dismissed - Alleged poor performance - Turns on own facts - Industrial Relations Act 1979 (WA) s 23A and s 29(1)(b)(i)
Result	Dismissed
Representation	
Applicant	In person
Respondent	Mr K Kavanagh

Reasons for Decision

1 This is an application by Carol Patricia Malone ("the Applicant") under s 29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act") for orders pursuant to s 23A of the Act. The Applicant claims that she was unfairly dismissed by Tylord Holdings Pty Ltd trading as Jesters Jaffle Pie Co Bunbury ("the Respondent") on 13 June 2005.

2 The Respondent says that the Applicant was not dismissed but resigned voluntarily during a probationary period.

3 The Respondent's business is a small franchise business who makes and sells pies to a formula prescribed by a franchise agreement. From 7:00 am until 8:00 am each day the shop is open one person usually starts the pie making process. At 8:00 am another staff member starts work and the shop opens to customers at 8:30 am. During the day the total number of persons working in the shop may increase from two to at least three.

4 The Applicant was employed by the Respondent as a manager for nine or ten days from 30 May 2005 to 13 June 2005. It is common ground that the Applicant's employment came to an end during a training period.

The Applicant's Evidence

5 The Applicant is a mature woman who has spent 20 years in the fashion industry in New Zealand as a manager and owner of an apparel manufacturing business. In late 1999, she ceased to be involved in the apparel industry and undertook a one year training course in catering at the Wairarapa Community Polytechnic in New Zealand. In 2000 and 2001, the Applicant opened and ran her own café in New Zealand. The Applicant then moved to Australia and since that time she has held various positions including managing a convenience store at a holiday park.

6 The Applicant was employed by a Director of the Respondent, Kevin Kavanagh, after she answered a classified advertisement in the Bunbury Mail. The Applicant submitted a written application for the position and her curriculum vitae, in which she set out her employment experience. At the time the Applicant applied for the position with the Respondent, she had been employed as a casual cook for two years for a business in Bunbury who trades as "Pure & Natural". The Applicant says that she applied for the job with the Respondent because she wanted a full-time position.

7 Prior to being employed by the Respondent the Applicant was interviewed by Mr Kavanagh on two occasions. It is common ground that at those interviews Mr Kavanagh was impressed by the Applicant's employment history. The Applicant says that at both interviews Mr Kavanagh was extremely pleasant. At the first interview, Mr Kavanagh informed the Applicant that he wanted to hire a manager, as he was intending to open two other Jesters Jaffle Pie Co franchises. He asked her what could she bring into the business and after the Applicant asked whether the Respondent was restrained by the franchise, as to what they could sell, she suggested that they introduce salads, carrot cakes and muffins. The Applicant also told Mr Kavanagh that she was very good at making cakes. She says Mr Kavanagh told her that he wanted to hire her as a "front person" because she had a cheery smile and that he also said that he wanted her to introduce salads and cakes into the business and to get the coffee machine "pumping". She says there was no discussion about the terms and conditions of employment at the first interview. Mr Kavanagh later telephoned the Applicant and asked her to come in for a second interview because he wanted to offer her the position. At the second meeting, he asked the Applicant how much she was currently being paid and she told him she was being paid $16.35 an hour. He then told her that if she would accept the position, he would pay her the same rate of pay she was currently receiving and once she was trained as a manager, he would consider giving her a pay increase and a bonus. He also informed her she would be required to work between 40 to 60 hours a week. At the conclusion of the meeting it was agreed that the Applicant would commence work on Monday, 30 May 2005. When cross-examined, the Applicant denied that Mr Kavanagh had told her at both interviews that she would work under a workplace agreement and that one of those conditions would be that she would be subject to a three month probationary period.

8 The Applicant says from the first day she commenced work for the Respondent, Mr Kavanagh acted in an intimidatory manner towards her.

9 On 30 May 2005, the Applicant arrived at the Respondent's premises before 7:00 am and waited for Mr Kavanagh to arrive. She had been told by him that she could park her vehicle anywhere as it was a supermarket car park. When Mr Kavanagh arrived he told the Applicant that she had parked in his bay. She apologised and offered to move her vehicle, he told her not to but not to park in that bay again. When she commenced work, Mr Kavanagh told her to follow him around and she did so. After watching him for awhile, she started making pies and did so for seven and a half hours without a break. The Applicant testified that she found it very difficult to make pies on the first day, as the Respondent makes and sells 15 different types of pies. The Applicant tended into evidence a copy of the Respondent's list of pies which contains an explanation of the ingredients of each pie (*Exhibit 3*). On the list, it is indicated that each pie, when made, has on the top of it a symbol made out of pasty, such as a star or a triangle or a heart to indicate the type of pie. In the kitchen, where the Applicant was making pies, the ingredients which go into each pie were pre-prepared and marked. She was simply required to put the pre-prepared ingredients, using a potato scoop, into pie shells and put the pies into a pie cooker. Because there were so many different types of pies, the Applicant told Mr Kavanagh that she would have found it much easier if he had given her a copy of the pie symbols prior to commencing work so she could have become familiar with the types of pies.

10 The Applicant says that from the very first day she worked, Mr Kavanagh was very critical of her work. On one occasion she says he told her she had wasted 13 poppy seeds when she sprinkled poppy seeds onto a sausage roll. When cross-examined, she disagreed that Mr Kavanagh showed her how to shake the poppy seeds onto a sausage roll. She then agreed that he did but said he did so very slowly. A copy of two digital photos of the method used by the Applicant and by Mr Kavanagh to place poppy seeds on a sausage roll was tendered into evidence by the Respondent (*Exhibit 10*).

11 At the end of the first day, Mr Kavanagh asked her whether she minded if he had the next day off work. Mr Kavanagh arranged for another employee, Kristy, to open up the following morning and the Applicant worked with Kristy on the second day. The Applicant testified that Mr Kavanagh came into the shop about 11:00 am and said that he was concerned about Kristy opening up but said that he need not have worried. I gather from the Applicant's evidence in relation to this point that she had inferred from what Mr Kavanagh had said, was that Mr Kavanagh was satisfied with the way the business was running on that day.

12 On the third day when the Applicant arrived at work, Mr Kavanagh complained to her about the work of his staff. He told her a ledge had not been wiped properly and garbage bags had been wasted. The Applicant told him the ledge had been wiped as she could see the wipe marks. She then said to Mr Kavanagh, "Kevin, you're going to have a heart attack if you keep worrying about these things that are so silly", to which Mr Kavanagh replied that he already had a heart attack. When it was put to the Applicant when she was cross examined that the purpose of showing her a bin that had not been properly cleaned out, discussing cleaning and inspecting the shop to see how well it had been cleaned by the last night's roster was a management function, she testified that was not explained to her when she was employed.

13 At the end of the third day the Applicant worked, Mr Kavanagh told her that there was a bit of pie on a leg of a chair and she had failed to stock the fridge with drinks. In response, she told him she was not aware that it was her responsibility to ensure the fridge was stocked with drinks.

14 The Applicant testified on the fourth day she worked that Mr Kavanagh criticised her for leaving the grill and lid of the pie warmer open. On the same day, she says he gave her a "two minute lesson" on how to use the computerised till, during which, when she tried to ask him about how the till worked, he remarked, "Oh for goodness sake" and she felt scared to ask another question.

15 On the fifth day the Applicant worked, she arrived at work 20 minutes prior to her rostered commencement time with a list of questions which she wanted to ask Mr Kavanagh (*Exhibit 4*). The notes contained a list of approximately 11 different matters the Applicant wished to address. The Applicant said that when she tried to speak to Mr Kavanagh about these matters he told her, "We're here to make pies, not answer questions" and he would not look at her list. Although it was 20 minutes earlier than the time she was rostered to work, she started making pies. When cross-examined, it was put to the Applicant that on the Friday of the first week that she worked, she spoke to Mr Kavanagh and asked him whether he would like her to go. She agreed that she had said that to him. When it was put to her that Mr Kavanagh persuaded her not to leave because it was a strange place, a strange job and new job, she said, "No" that was not said but she testified that Mr Kavanagh did say, "Don't leave today".

16 The Applicant says that on the sixth day she worked was a Saturday. Prior to starting work at 11:00 am she spent $30 on ingredients for cakes and made a number of muffin sized carrot cakes. When she arrived at work she gave them to Mr Kavanagh and asked him to take them home. The following day, he told her that her carrot cakes were excellent but that was the only thing he would give her excellence in.

17 On the seventh day the Applicant worked, she asked Mr Kavanagh whether he was happy with the clean up from the day before and he told her, no, there were no drinks in the fridge, the cabinet had not been cleaned and there was pie on the leg of a chair.

18 On the eighth day the Applicant worked, it was Foundation Day (which the calendar records as 6 June 2005). The Applicant says that when she arrived at work at 7:00 am that day, she was told by Mr Kavanagh that she was early, that she was not meant to be there as they were not opening until 8:00 am but he had not been able to contact her as he did not have her telephone number. She said that it was extremely busy that day and on that day she worked for the first and only time with Mr Kavanagh's wife and partner, Mary Kavanagh. The Applicant testified that Mrs Kavanagh was very lovely to her (the Applicant). When the Applicant finished work at 2:00 pm, she asked Mr Kavanagh if he wanted her to stay behind and do the dishes in her own time but he said, "No".

19 On the ninth day the Applicant worked, she says that by the end of the day she felt that she had "nailed it", she was able to use the till and she was serving customers. However, she testified she knew Mr Kavanagh had doubts about her ability to do the job as he had told her on each of the nine days that he did not know if this was going to work and whether he had hired the wrong person. At the end of the ninth day, Mr Kavanagh asked to have "a word" with her. When she sat down, he told her that it was not working and that she had taken the Lord's name in vain by saying, "Oh, God" and he would have to dismiss her. He told her that he was a deeply religious Catholic. She told him that what he was proposing was unfair dismissal. He then clutched his chest and said to her, "I am a Christian. Please come back tomorrow". When the Applicant left work she contacted the Department of Consumer and Employment Protection and made an appointment to see a Mr Harris on the following Monday at 2:30 pm. It was put to the Applicant in cross-examination that she had not said, "Oh, God" but that on numerous occasions when she disagreed with an instruction that had been given to her, she had said, "Jesus" under her breath. The Applicant disagreed that she had done so and claimed that the Respondent's contention was most unlikely because Mr Kavanagh claims that he is slightly deaf, so how could he hear her (the Applicant).

20 Despite the fact the Applicant says she only worked nine shifts, she testified that she worked either on Saturday, 11 June 2005 or Sunday, 12 June 2005. When she arrived at work she immediately apologised to Mr Kavanagh for taking the Lord's name in vain and explained to him that she was also a Catholic. She says that he apologised to her and they worked well together that day. On the same day, the Applicant asked Kristy whether she could make a copy of her (the Applicant's) roster for the following week. Kristy provided her with a handwritten note of the roster for the following week (*Exhibit 7*) which indicated that the Applicant was rostered off work on Monday, 13 June 2005 and rostered on to work from 7:00 am to 1:00 pm on Tuesday, 14 June 2005, from 8:00 am to 2:00 pm on Wednesday, 15 June 2005 and from 1:00 pm to 6:30 pm on Sunday, 19 June 2005. The Applicant testified that she was unhappy about this roster because her hours appeared to be reduced to 16 hours. However, the Applicant in Exhibit 7 has written that she was rostered to work 17½ hours that week. She was also concerned about being rostered on 7:00 am, Tuesday 14 June 2005, because that indicated she would be the person who would have to open up and she did not have a key to the premises, nor did she have the alarm code. She says she thought to herself that was just another task she was obviously going to fail to do. At the end of that day, Mr Kavanagh gave her a copy of a workplace agreement. She says that he told her to sign it there and then and she told him, no, as she had an appointment with a Mr Harris, on the following Monday and she wished to discuss the document with him. The Applicant produced in her evidence a copy of the workplace agreement that was provided to her by Mr Kavanagh (*Exhibit 5*). The workplace agreement indicates that the Applicant was to be employed as a shop assistant/counter hand.

21 On Monday, 13 June 2005, the Applicant met with Mr Harris at the Department of Consumer and Employment Protection. She initially testified that after the meeting she telephoned Mr Kavanagh and she asked him whether she was being dismissed

as manageress. He told her, yes, so the Applicant told him that was unfair dismissal and she did not go into work again. When questioned further, she said she did not telephone Mr Kavanagh but she went into the shop and spoke to him on that day. When cross-examined, she denied Mr Kavanagh had told her that she could "stay on" for as long as she liked until she found something more suitable.

22 When it was put to the Applicant that she had failed in her task of properly making Jesters' pies, she said that that was not her role to make Jesters' pies, that she was hired as a manageress to introduce salads, make cakes, get the shop "pumping" as a front person and to deal with the Respondent's staff. She conceded, however, that she was also hired to have a fundamental knowledge of how the pies were made and to sell the pies. She claims that she was suitable and competent as a manager, as she had employed up to 54 employees when she was the owner and manager of an apparel manufacturing business in New Zealand. She says that Mr Kavanagh did not tell her prior to commencing work that she would be required to make pies for seven and a half hours a day. She also denied that it was explained to her that initially she would have to work a substantial number of hours to learn how to make all the pies and after she had received that training, her hours would be reduced and the ongoing number of hours she would be rostered to work would depend upon the volume of business. The Applicant said that although she denied that had been said to her when she first started work she said that that was what Mr Kavanagh told her when she was dismissed.

23 The Applicant complained when she received her first pay for her first week of work that $181.00 of PAYG income tax had been withheld from a gross payment of $616.00. She had also been underpaid for two hours or two and a half hours and had only been paid $16.00 an hour instead of $16.35 per hour. The Applicant asked to speak to Mr Kavanagh about her pay but he yelled at her, told her he was not interested in her. As she had not completed a tax file declaration, a large amount of income tax had been deducted from her pay. The Applicant said that in her opinion it was the Respondent's responsibility to provide her with a tax file declaration and she had been waiting for Mr Kavanagh to ask her for her tax file number. However, she took steps to obtain a tax file declaration form which she completed and returned to the Respondent prior to receiving her second pay. The Applicant produced her payslips (*Exhibit 8*) which indicate that she was paid an additional two hours in her second pay which were the hours that she had not been paid for in her first pay. She was also re-credited $58.00 as income tax in her second pay, as by that time she had provided the Respondent with a tax file declaration.

24 After the Applicant's employment came to an end, she visited the Respondent's premises and told Mr Kavanagh that she wanted to check her tax file declaration to see if she had signed it. She says she made this request because Mr Harris told her to obtain the declaration and make sure she had written 40 hours a week on the document. Mr Kavanagh provided the tax file declaration form to her. She says that she observed that on the form where she had ticked the box "full-time employment", her tick had been crossed out and the box "casual" had been ticked. The Applicant says that she re-altered the form by deleting the casual tick and re-ticked the full-time box and she then returned the document to Mr Kavanagh. When the Applicant was cross-examined, it was put to her that when she first filled out the form, she had ticked casual and on the day she altered the form she crossed out casual and ticked full-time employment. In response she denied she had done so.

25 After the Applicant's employment came to an end, she applied for several positions and advertised for alteration work. She was offered three weeks' work with Pure & Natural to train their new cook. For that work she was paid $400.58 (gross) each week for three weeks. In response to the advertisement (which cost her $11.00) she received two jobs to alter garments and was paid $20.00. She recently obtained casual work and has worked 10 to 15 hours a week in a delicatessen, for which she has received $17.35 per hour, except when she worked on a Saturday, then she was paid $20.00 per hour or if she worked on a public holiday she was paid $30.00 per hour. For her casual work at the delicatessen, she earnt $168 (net) for one week's work and $250 net for another week's work. For three weeks, she carried out the assistant manager's job at the delicatessen whilst the assistant manager was in hospital. During that period of time she worked an average of 35 hours a week for three weeks and she was paid $502 (net), $508 (net) and $400.00 (net). The work at the delicatessen is on going and the Applicant says that she expects that at the end of the week beginning Monday, 17 October 2005, she will be paid $280.00 (net).

26 The Applicant is not seeking an order for reinstatement but is seeking an order for compensation. She says that she has never been dismissed before and she was extremely humiliated not only by the dismissal but by the treatment she received each day from Mr Kavanagh on each of the days she worked for the Respondent. In particular, she says that at the end of each shift she was tearful and could not sleep.

The Respondent's Evidence

27 Kevin Kavanagh testified that until 12 months prior to the date of hearing the Respondent owned two franchises. Although Mr Kavanagh closed one shop, he sought to obtain a manager for his shop at Bunbury, as he had plans for re-expansion as he intended to open at least one other shop. Mr Kavanagh says that he contemplated a person who would take up the role as manager of the Bunbury shop, would carry out all duties involving both the "front and the back" of the shop. When he interviewed the Applicant, he explained what the business was, the Jesters' policy and the reason why he wanted to employ a manager. He says he explained that a training period would be involved and it was most important that the manager be proficient in making pies, as the business was a pie store and she would be expected to do everything from washing dishes to making pies to serving customers. At the initial interview he had no idea what wage he would pay. He says, however, he explained to the Applicant that her terms and conditions of employment would be set out in a workplace agreement and part and parcel of that agreement would be that she would be engaged for a three month probationary period. He says that he also explained to the Applicant that during the training period she would be given as many hours a possible but after she had completed her training, her hours of work each week would be less predictable, as it was all to do with the trade and she would probably work approximately 30 to 34 hours each week. He says, however, he told her that he hoped they would be so busy they could all work hundreds of hours each. He also explained that he thought that the person who he employed as manager would bring something to the role. He said that the Applicant did not say much at the first interview but she seemed receptive to what he had to say about the position. At the second interview, Mr Kavanagh offered the Applicant the position of manager and he asked her what her current rate of pay was. He says that she told him that she was currently being paid $16.00 per hour and he agreed to pay her that rate for each hour worked. He then told her that once she had completed her training period he would review her wage rate and build in a bonus depending on her performance.

28 Mr Kavanagh testified that when the Applicant arrived at work on the first day on 30 May 2005, he greeted her in the car park and they had a joke about her parking in his car parking space. When they were inside the premises, he showed her where the toilets were and where to put her bag. He said that usually who ever opens at 7:00 am works alone until 8:00 am when another person comes in to commence their shift, then they usually work the remainder of the day with two people. When he is training a new staff member the trainee is an additional person in the shop so he can provide one on one training. On the day the Applicant commenced work, he says they discussed hygiene and he then proceeded to make pies. He asked the Applicant to "shadow" him. Mr Kavanagh says that he explained to the Applicant there was a great urgency to get the pies

out and have a sufficient quantity of pies baked by 8:30 am but to "bear with him" and to ask questions. Mr Kavanagh says that nothing unusual occurred on the first day, there were some mistakes made by the Applicant but that was not unexpected. He said that he simply regarded the first day as a normal training day and that nothing out of the unusual occurred. When she made mistakes he brought them to her attention. For example, he told her to keep the lid down on the pie cooker because keeping the lid up results in the loss of energy and a loss of heat in the cooker. In relation to the sausage rolls, he says that he watched her put poppy seeds on some sausage rolls but observed the way she did it was awkward, so he showed her what he regarded was the best way of putting poppy seeds on a sausage roll.

29 On the second day the Applicant worked, Mr Kavanagh testified that he also worked on that day but he did not work the opening shift. He says that nothing happened of note on that second day. On the third day the Applicant worked, her training continued and she continued to make mistakes. He continuously told her to put the lid of the pie maker down, to make sure the right fillings go in the right pies and make sure the right symbols went on the pies. Despite this Mr Kavanagh was confident that the Applicant would in time be a good pie maker. On the fourth day the Applicant worked, Mr Kavanagh said that he observed the Applicant had great difficulty reading the signs on the pie warmer and he told her that he would arrange for new signs and he said to her as a joke, "I can't get them in Braille" and they had a good laugh. He said that he did not recall if she had a break while she worked but he said that it would be unusual not to do so.

30 Friday, 3 June 2005 was the fifth day the Applicant worked. Mr Kavanagh testified that the Applicant continued to make the same errors on that day and there was very little improvement in her performance. He says that during that day she approached him and said to him, "Would you like me to leave?" He told her, no, to give it a go, that she had only been there a few days, that to give it a chance, that it was a strange place, a strange system and new people. He said that it was obvious to him that the Applicant was having difficulty complying with his instructions. He often heard her muttering "Jesus" when he corrected her.

31 Mr Kavanagh testified that he does not recall whether the Applicant worked on the following Saturday or Sunday but when the second week of work commenced he continued with her training by introducing her to the retail part of the business. He observed that when she served customers, she was very uncomfortable at the front of the house. He says she gave customers the wrong pies and made pies with the wrong symbols. In addition, her performance in the kitchen did not improve. She was still making the same mistakes such as placing the wrong amounts of ingredients into pies and leaving ingredients out. He concluded that these matters were seriously about to affect his business, so he thought it was prudent to discuss these matters with the Applicant. When he did so, he explained, so he thought, that they both had made a mistake and she did not have what it takes to manage a Jesters' store, but she did not have to worry because she did not have to leave, as she could stay as long as she liked until she found something more suitable. Mr Kavanagh says that the Applicant responded by saying many things. On of the things she said stuck in his mind and that was, her friends told her, she should not take up the position as manager and she should have taken their advice. He says that it was apparent to him that she was not happy. Mr Kavanagh rostered the Applicant on for a third week of work. Despite their conversation the Applicant returned to work the following day and worked her shift. He gave her two copies of the workplace agreement and told her to take them home, study them, then if she had any questions he would try to explain any issues and if he could not, he would obtain someone who was able to explain these matters. It was plain from his evidence that there was no discussion about the terms of the workplace agreement, nor was there any discussion about the wage rate of the changed role. On Monday, 13 June 2005, the Applicant came into the shop and said to him, "So you're sacking me", to which he replied, "No, Carol. I'm not sacking you. I'm just saying that we both made a mistake, that you have not got what it takes to manage the place, but you can stay on as long as you like." He says that the Applicant began to scream and told him that his conduct constituted unfair dismissal and she would bring a claim. He says she then stormed out of the shop. He said that during this conversation there were two other employees present, one of whom was Kristy and the other was a young employee, Jacob.

32 Some time later, the Applicant came into the Respondent's shop and asked Mr Kavanagh if she could have a copy of her tax file declaration as she wanted to check the signature. He located the document, gave it to her and she went and sat out in the main part of the shop. When she returned the document to him he noticed that she had altered the form by deleting the box "casual" and ticking the box "full-time" employment. Mr Kavanagh said that he then made note of the alteration on the declaration form. Mr Kavanagh said that it was his view that the Applicant was employed as a casual employee. Consequently, he did not pay the Applicant any accrued annual leave entitlements, as she was not entitled to take annual leave or be paid accrued annual leave as she was a casual employee.

33 When cross-examined, Mr Kavanagh conceded that he makes mistakes when making pies and sometimes when pies are unsuitable or not properly made they have to be declared as waste and are entered into the computer in the till as waste. He says if mistakes are made they should be brought to his attention, as it was important not to sell pies that were not made in accordance with the requirements of Jesters.

34 Mr Kavanagh says that he had never intentionally intimidated the Applicant.

35 Mary Kavanagh, Mr Kavanagh's wife and partner in the business, testified that she has worked with every staff member at the Respondent's shop and that she worked with the Applicant on two occasions in the second week of the Applicant's employment. Mrs Kavanagh said that when she worked with the Applicant, she (Mrs Kavanagh) worked on the front counter whilst the Applicant made pies. Mrs Kavanagh testified that it was very trying working with the Applicant as the Applicant was very slow keeping up supplies of cooked pies to the front counter. Mr Kavanagh says that she expected that after a week's training the Applicant would not have been as slow as she was or would make so many mistakes. She testified the Applicant put the wrong pies in the wrong sections of the bain-marie and pies were coming out from the kitchen which had the wrong symbols on them which resulted in customers returning pies. She said that she had to apologise to customers, give them another pie and in some cases something extra. On one occasion, a customer asked for a vegetarian pie which turned out to be a meat pie. The customer returned it after consuming part of the pie. She initially assumed she gave the customer the wrong pie but then she opened a pie containing a vegetable symbol on top of the pie and found it contained meat. She also noticed that some pies did not weigh enough. She opened a "Morning Glory", which is a breakfast pie and found that it did not contain bacon which was a major ingredient. Consequently, she had to remove the whole batch of Morning Glory pies from sale as she was not confident the whole batch contained bacon. Mrs Kavanagh said that she also observed the Applicant serve customers. She noticed that the Applicant was very slow when she used the cash register and she saw the Applicant on more than one occasion peering into bags of pies after she had placed pies in bags prior to handing the pie to the customer. She said that the way the Applicant peered into the bags gave the impression to customers she had breathed on the pie, which was not a good practice. When cross-examined, Mrs Kavanagh conceded that she never raised any of these issues with the Applicant, but said that it was not her role to train the Applicant and she could not leave the front counter to address these issues with the Applicant in the kitchen as it was her (Mrs Kavanagh's) role to serve customers. When it was put to Mrs Kavanagh that on one occasion she (Mrs Kavanagh) had burnt 12 party pies, Mrs Kavanagh said that she did not recall doing so but she could have done so. Mrs Kavanagh was also asked about the labels indicating the types of pies on the oven

and Mrs Kavanagh said that she can see the labels quite clearly but she was so familiar with the layout of the oven she did not need to read them.

36 Alan Wall is a regular customer of the Respondent who for the past 12 months has visited the Respondent's shop for coffee and a pie almost every day. He testified that he knew the Applicant as someone who had worked in the Respondent's business. Mr Wall said that when he comes into the shop, it is his practice to go out the back to say hello to Mr Kavanagh and then after he has obtained his pie and a coffee, he sits outside the shop next to the door to the shop to consume his coffee and a pie with a cigarette. He testified on one occasion, he overheard a conversation between the Applicant and Mr Kavanagh. He says that he saw Mr Kavanagh ask the Applicant from the back of the shop to sit with him (Mr Kavanagh) at a table in a corner at the front of the shop and then he overheard Mr Kavanagh say to the Applicant, "This is not really working out. I'm not dismissing you. You're quite welcome to stay here as long as you like or until another position comes up." He then heard the Applicant respond by saying, "I'm going to take you to the Commission over this" and then he saw her storm out of the shop. When cross-examined about this conversation Mr Wall said that when he overheard the conversation, he was about 10 feet away from Mr Kavanagh and the Applicant and he could hear everything that was said.

37 Karen Harkness was employed by the Respondent as a trainee manager from sometime in October 2004 until sometime in January 2005. Ms Harkness testified that she was trained by Mr Kavanagh. During the first days of her training she simply watched Mr Kavanagh work. She testified that she was allowed to ask questions at anytime and Mr Kavanagh never yelled at her. She says she found the Respondent's business to be a pleasant place to work and she enjoyed working there. She also testified that she found her training was in depth and it covered all things that were necessary to know. She said that her terms and conditions were regulated by a workplace agreement and she was engaged on a period of a three months probation which was explained to her when she was interviewed for the position. She says after her probationary period expired she was employed as a permanent employee. She said that she left the position because she was offered another opportunity to work in another industry.

Was there a Dismissal?

38 Whether a change of duties amount to a termination of the contract of employment, or a variation of the original contract is a question of fact (*Quinn v Jack Chia (Australia) Ltd* [1992] 1 VR 567 at 576–579 per Ashley J). In *Real Estate Institute of Western Australia Inc v The Federated Clerks' Union of Australia Industrial Union of Workers, WA Branch* (1993) 73 WAIG 3316 at 3320, the Full Bench observed:

> "Where an employer and employee agree to an alteration in the employee's duties and responsibilities, which is profound, a court should be more ready to hold (unless the original contract of employment provided for contingency) that a new contract has replaced the old, or at least that the old contract, as varied, contained terms objectively appropriate to the new relationship created (see *Quinn v Jack Chia (Australia) Ltd (op cit)*)."

39 As to a demotion, in *Malcolm v Mobil Exploration & Producing Australia Pty Ltd* [2000]; (2000) 80 WAIG 4590 AT 4597, Sharkey P, observed:

> "It is undoubtedly the case that a person who is unilaterally demoted but who otherwise continues to be employed by the same employer may nonetheless seek relief in respect of the demotion, it being considered a dismissal from employment in the former position. That much is clear from the decided authorities to which counsel for the Appellant referred and to which could be added *Woolworths (SA) Pty Ltd v Russian* (1996) 66 IR 13 and *Boo Hwa Chan v Christmas Island Administration* [1999] 47 AILR 4-246. However, for the demotion to be considered a dismissal, it must be a unilateral demotion. The employee concerned must not accept, in a real sense, the demotion. Where the employee is offered continued employment on the basis of a new, albeit different, position which offer the employee accepts, there will not be a demotion and the employee will not have a remedy under the legislative provision in question. As Bleby J pointed out in *Advertiser Newspapers v Industrial Relations Commission of South Australia and Another (supra)* at 220, this "is not because there has been no termination of employment but because there has been no termination by the employer. The action may have been initiated by the employer, but it has resulted in an agreement to terminate."
>
> Whether or not there has been a dismissal in particular case is essentially a question of fact: (see: *Clark v Pittwater RSL Club Ltd* (1988) 84 IR 309.) Specifically, whether or not there has been an agreement to terminate, rather than a dismissal through unilateral demotion, is a question of fact. (see: *Advertiser Newspapers v Industrial Relations Commission of South Australia and Another (supra)* at 219)."

40 When the facts of this matter are considered carefully, it is clearly apparent that Mr Kavanagh demoted the Applicant and offered her a different position of shop assistant/counter hand. Pursuant to the terms of the workplace agreement (*Exhibit 5*), it was a term of the agreement that the Applicant be employed on three months' probation and the hourly rate for that position under Schedule B during the probationary period was $13.50 per hour and following the expiration of that period the rate was $14.70. However, it was also a term of the workplace agreement under the heading "Wages" that at the sole discretion of the employer, the employee may be paid at a rate above the rates specified in Schedule B.

41 In this matter, whilst there was no discussion between the parties of the hourly rate the Applicant would have been paid had she accepted the position of shop assistant/counter hand, this was a new and different position to the position of manager and the new position was rejected by the Applicant. As there was no acceptance by the Applicant of the decision made by Mr Kavanagh to demote her from the position of manager, there was at law, a termination of the Applicant's contract of employment.

Was the Termination Unfair?

42 The Respondent says it dismissed the Applicant from her position as manager on grounds of poor performance.

43 In *Ishmael v Turk Ellis Pty Ltd of Elverston Nominees* (1990) 70 WAIG 3532, at page 3533 the Full Bench observed:

> "The question of competence is tested in matters of unfair dismissal in the following manner.
>
> Generally, there is no finding of unfair dismissal when the termination has been due to incompetence or unsatisfactory performance.
>
> The Industrial Appeal Court considered this matter in Industrial Inspector of OIR v Holliday 66 WAIG 477. In that case Olney J set out a number of considerations:-
>
> (1) Incompetence of an employee may be sufficient justification for the exercise of the right of summary dismissal.
>
> (2) This will arise where there has been an express or implied representation by the employee that he was competent to fulfil the job and has been shown to be incompetent.

(3) A right of summary dismissal for inefficiency arises if an employee who possesses a particular skill fails or neglects to exercise that skill.

(4) If there is no general or particular representation as to ability or skill the workman undertakes no responsibility.

…

The Commission has usually modified the strict right of an employer to dismiss for incompetence by requiring that some warning be given to the employee that his or her work is not satisfactory before terminating the employment (see *Margio v Fremantle Arts Centre Press* 70 WAIG 2559)."

44 In *Margio v Fremantle Arts Centre Press* (1990) 70 WAIG 2559 ("*Margio*"), the Commission at first instance found that the appellant was assessed as not meeting the required level of performance over a lengthy period of time and concluded that it was not unreasonable for management to conclude that it would terminate the services of the appellant. The Full Bench found that the Commission at first instance gave no, or insufficient, weight in relation to a number of issues including volume of work, staffing and to the inadequacy of the warning. Accordingly the Full Bench in *Margio* held there was a wrongful termination of contract as there was inadequate evidence of incompetence and there was insufficient warning given to the appellant. In particular, there was no adequate warning or opportunity for the appellant to improve his work if improvement were needed or justified. The decision in *Margio* was affirmed recently by the Full Bench of this Commission in *DVG Morley City Hyundai v Fabbri* [2002] WAIRC 07057 on 21 November 2002. In that case the Respondent employee had been demoted on two occasions whilst employed by the appellant. The appellant claimed that the Commission at first instance erred by not finding that the Respondent was dismissed for non-performance. In the reasons for decision by Sharkey P with whom Wood C agreed, the President held at [97-100]:

"Nonetheless, I also want to make it clear that I do not consider it to be only procedurally unfair if an employee is dismissed without reprimand or warning that his position is in jeopardy, or without being given the chance to remedy defects in her or his performance.

There was clear evidence in defining that he was dismissed in this manner (see paragraph 54-55). There may well be exceptions to this requirement in relation to a particularly serious matter (but this is not one of them).

The failure to give such warnings or reprimands or an opportunity to improve a performance amounts in my opinion to substantive unfairness. In this case the failure, which the Commissioner found, amounted to both procedural and substantive unfairness.

It was manifestly unfair that an employee who had received no reprimand, no chance to improve his performance, no written warning, no other warning and no indication that he was to be dismissed if he did not improve was dismissed."

45 The Respondent in this matter says that the Applicant represented herself as a trained chef. The Applicant denies that to be the case and says that she did not complete her training in New Zealand to qualify as a chef. However, the Applicant made an unequivocal representation that she was not only a trained chef but an experienced manager. The Applicant in her application for the position of manager (*Exhibit E*) says, "Because I had always had a passion for cooking, I retrained as a chef and then opened my own café 'Mad about Food' which I managed for two years, before selling and moving to Australia." Attached to her application for the position was a certificate in General Catering and a 1999 Record of Learning from the Wairarapa Community Polytechnic. The Applicant also stated in her application for the position that she had owned and managed a very successful apparel manufacturing business for 20 years and recently managed a convenience store in Bunbury.

46 The question in this matter to be determined is whether the Applicant was incompetent and whether she was given adequate warning that her employment was to be terminated. In part, the answer to that question turns on the credibility of the witnesses. Having heard each of the witnesses give evidence and having observed them whilst they gave their evidence, except in relation to the issue as to whether the Applicant was engaged as a casual employer, I prefer the evidence given by the Respondent's witnesses to the evidence given by the Applicant where their evidence departs. The reason why I have made this finding is that whilst I understand that unrepresented litigants find giving evidence and presenting their case to be difficult and stressful, I found the Applicant to be erratic. Her demeanour when giving evidence and when presenting her case ranged from demure to forceful. Sometimes she spoke quietly, at other times without provocation she expressed anger and sometimes she became tearful or hostile. The Applicant kept a diary when she was employed by the Respondent. The Applicant claimed on a number of occasions during the hearing that she has an excellent memory. During her evidence she referred to her notes in her diary to refresh her memory. Whilst I make no comment about doing so, I observed that the Applicant's recollection of events was not in some respects consistent or correct. In particular, the Applicant initially claimed that the last day she worked was on the ninth day, yet the Applicant stated in her evidence that the Respondent informed her he was demoting her on the ninth day she worked and yet she worked the following day which was a Saturday. As to the tax file number declaration (*Exhibit A*), whilst it is apparent from the form that the form has been altered, a bare examination of the form does not, of itself, reveal who altered the form as the form is a carbon copy on which the markings are faint. However, I do not accept that the Applicant ticked the "casual" box as there is no reliable evidence before me on which I could conclude that the Applicant was engaged as a casual employee. There is nothing in the advertisement for the position (*Exhibit 1*) which states the position was to be casual, nor was any evidence given by Mr Kavanagh that at any time prior to the Applicant commencing employment that the Applicant was to be engaged as a casual employee. Further, the nature of the role of a manager contemplates an ongoing role which is inconsistent with the nature of casual employment.

47 As to the Respondent's witnesses, whilst I did not accept Mr Kavanagh's assertion that the Applicant was engaged as a casual employee, I generally found him to be a reliable and honest witness. His demeanour was consistently calm and he gave his evidence without embellishment. I made the same general observations in relation to Mrs Kavanagh, Mr Wall and Ms Harkness. However, I have not given any weight to the evidence given by Ms Harkness as she was not present anytime at the Respondent's shop from 31 May 2005 to 13 June 2005.

Legal Principals Unfair Dismissal

48 The question to be determined by the Commission, is whether the Respondent exercised its legal right to dismiss the Applicant in such a way that the right has been exercised harshly or oppressively against the employee as to the amount of abuse of that right (see *Mills and Ors trading as Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous (WA) Branch* (1985) 65 WAIG 385 at 368).

49 The onus is on the Applicant to prove that the dismissal was unfair on the balance of probabilities. However, there is an evidential onus upon the employer to prove in a case of summary dismissal that the dismissal is justified (*Newmont Australia Ltd v The Australian Workers' Union, Western Australian Branch, Industrial Union of Workers* (1988) 68 WAIG 677 at 679). In this matter it cannot be disputed that the Applicant was summarily dismissed.

50 It is plain that the Applicant was not competent, as she failed to carry out tasks that given her experience should not have been difficult for her. Further, she failed to comprehend that it was the role of a manager to attend to such matters as cleanliness and wastage. In fact, she regarded these matters as trivial. The Applicant conceded when cross-examined that at the end of the first week she had a discussion with Mr Kavanagh about terminating her employment. It is clear that she was aware her employment was in jeopardy and she was afforded an opportunity to improve her performance. In all the circumstances, I am satisfied that the Respondent has satisfied its onus that the dismissal was justified and I will make an order that the application be dismissed.

2005 WAIRC 03193

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CAROL PATRICIA MALONE
	APPLICANT
	-v-
	KEVIN KAVANAGH
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	WEDNESDAY, 23 NOVEMBER 2005
FILE NO/S	APPL 621 OF 2005
CITATION NO.	2005 WAIRC 03193

Result	Respondent's name substituted
Representation	
Applicant	In person
Respondent	In person

Order

Having heard Ms C P Malone on her own behalf and Mr K Kavanagh on his own behalf, 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, Tylord Holdings Pty Ltd trading as Jesters Jaffle Pie Co Bunbury.

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

2005 WAIRC 03103

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CAROL PATRICIA MALONE
	APPLICANT
	-v-
	TYLORD HOLDINGS PTY LTD TRADING AS JESTERS JAFFLE PIE CO BUNBURYTYLORD HOLDINGS PTY LTD TRADING AS JESTERS JAFFLE PIE CO BUNBURY
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	WEDNESDAY, 23 NOVEMBER 2005
FILE NO/S	APPL 621 OF 2005
CITATION NO.	2005 WAIRC 03103

Result	Dismissed
Representation	
Applicant	In person
Respondent	Mr K Kavanagh

Order

HAVING heard the Applicant and Mr K Kavanagh, on behalf of the Respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the s 29(1)(b)(i) application be and is hereby dismissed.

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

2005 WAIRC 03206

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SASHA MILOSEVIC
	APPLICANT
	-v-
	MILDESA PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
HEARD	WEDNESDAY, 14 SEPTEMBER 2005
DELIVERED	THURSDAY, 1 DECEMBER 2005
FILE NO.	APPL 1684 OF 2004
CITATION NO.	2005 WAIRC 03206

Catchwords	Termination of employment - Harsh, oppressive and unfair dismissal - Contractual benefits claim - Jurisidiction - Whether applicant an employee or director - Applicant found to be an employee - Jurisdiction found - Application for discovery of documents - Whether documents relate to applicant's role as an employee or director - Documents found to relate to role as an employee - Industrial Relations Act 1979 (WA) s 29(1)(b)(i) and (ii)
Result	Declaration that jurisdiction found and documents requested as part of discovery relate to the applicant's role as an employee.
Representation	
Applicant	Mr I Tait (of counsel)
Respondent	Mr N Dillon (of counsel)

Reasons for Decision

1 This is an application by Sasha Milosevic ("the applicant") pursuant to s29(1)(b)(i) and (ii) of the *Industrial Relations Act 1979* ("the Act") against Mildesa Pty Ltd ("the respondent") claiming that he was unfairly terminated and that he is owed benefits under his contract of employment with the respondent. The respondent denies that the applicant was unfairly terminated or that he is owed benefits under his contract of employment.

2 The respondent disputes that it employed the applicant and this matter was therefore set down for hearing to determine whether or not the Commission has jurisdiction to deal with this application. As there was also a dispute between the parties about discovery of the applicant's credit card statements if the Commission found that it had jurisdiction to deal with this application, this issue was listed for hearing at the same time.

Applicant's evidence

3 The applicant stated that he commenced employment with the respondent on 1 July 2000 and that the relationship between the parties ceased on 21 December 2004. The applicant gave evidence that he was employed by the respondent to manage its restaurant ("the restaurant") and that he worked between 60 to 70 hours per week at the restaurant.

4 The applicant gave evidence that when he first started working at the restaurant it was owned by a partnership between the applicant, his mother Ms Milica Milosevic and his brother Danny Milosevic and that on or about 1 May 2001 on the advice of the respondent's accountant this partnership became a proprietary limited company with three shareholders and three directors, the applicant, Ms Milosevic and Danny Milosevic. On or about 1 January 2002 Danny and Ms Milosevic ceased to be the respondent's directors and the applicant became its sole director. In October 2004 Danny Milosevic and Ms Milosevic again became the respondent's directors and the applicant ceased to be a director on 21 December 2004. The applicant has always been the respondent's secretary and currently remains in this position and Ms Milosevic was also appointed as the respondent's secretary with effect from 20 January 2005. The applicant has an equal shareholding in the respondent's operations along with Danny Milosevic and Ms Milosevic. The applicant stated that apart from being a shareholder and director Danny Milosevic has no involvement with the restaurant.

5 The applicant stated that Ms Milosevic has always been and remains the restaurant's head chef.

6 The applicant stated that as the restaurant's manager he undertook all duties necessary for the smooth running of the restaurant. The applicant dealt with all staff matters, including interviewing and disciplining staff, he kept the restaurant's time and wages records and payroll details, he trained staff, from around 2003 onwards when the restaurant obtained a liquor licence he structured the restaurant's wine lists, he developed and changed menus, he ordered stock, he regularly did the banking, he occasionally assisted the chefs and undertook basic food preparation in the kitchen, he handled the restaurant's cash, he supervised the till, he reconciled orders with goods coming in, he placed orders with suppliers and he ordered what food and goods were necessary after consulting the head chef. The applicant also kept the restaurant's records, he dealt with invoices and he entered relevant data into a MYOB computer program and when Ms Milosevic had a day off, which was either a Tuesday or Wednesday, the applicant worked in the kitchen.

7 The applicant stated that until the latter half of 2004 he usually worked six days a week from 9.15 am until late and his finishing time depended on the time the restaurant closed.

8 The applicant stated that during the period he worked with the respondent he had two breaks, one was from 26 July 2004 through to 1 September 2004 and on another occasion he had three days off in 2002 when he married. The applicant stated that when he returned to work at the restaurant on 1 September 2004 he resumed his role as the restaurant's manager however he worked three to four days per week and he undertook a reduced range of duties.

9 The applicant stated that he was paid $750 nett each week and in July 2004 this payment was increased to $758 nett and the applicant stated that he was paid his weekly wages at the same time as the other employees who worked in the restaurant. The applicant tendered his taxation returns for the financial years ending 2002, 2003 and 2004 confirming his earnings and the PAYG tax paid by the respondent on his behalf for this period (Exhibit A2). The applicant also tendered some pay slips

confirming his weekly earnings for various weeks throughout 2002, 2003 and 2004 and the applicant submitted a summary of weekly payments made to him by the respondent (Exhibits A3 and A7). The applicant also tendered pay slips for various weeks worked by Ms Milosevic confirming that she was paid the same wage as the applicant as well as a summary of weekly payments made to her (Exhibits A4 and A8). The applicant stated that the respondent did not pay his brother any remuneration because he did not work at the restaurant. The applicant stated that the respondent took out a workers' compensation insurance policy for its staff which also covered the applicant and Ms Milosevic who were described in this policy as working directors (Exhibit A9).

10 The applicant commented on his role as the respondent's director. The applicant stated that his role as the respondent's director was to ensure that the respondent met all legislative requirements and to ensure that creditors were paid. The applicant stated the respondent held annual meetings in May or June each year when Danny Milosevic returned from overseas, even when the applicant was the sole director of the respondent and the applicant stated that at these meetings the respondent's business was reviewed and relevant issues discussed.

11 The applicant stated that as some of the restaurant's suppliers required payment by credit card or cash, from time to time he used his personal credit card to make these payments and that he made these payments in his role as the respondent's director. The applicant stated that he would not have made these payments if he was not the respondent's director.

12 Under cross-examination the applicant confirmed that he was involved with two other entities Armenia Investments Pty Ltd and the Astor Property Group Pty Ltd (Exhibits R1 and R2) and that he was involved in a land sub-division project with Ms Milosevic and Danny Milosevic (Exhibit R3). The applicant confirmed that as at 30 June 2004 the respondent had outstanding loans and was owed money by Astor Property Group Pty Ltd, Armenia Investments Pty Ltd and Ms Milosevic. The applicant confirmed that his partner Natalie Milosevic, the SM & D Milosevic partnership and the applicant were owed money by the respondent. The applicant stated that the loans made by the respondent were approved by the respondent's board.

13 The applicant stated that he did not have a specific contract with the respondent and the applicant stated that he and Ms Milosevic took leave when each person thought it was appropriate to do so. The applicant stated that he did most of the respondent's banking, he decided which suppliers would supply goods to the restaurant and what was purchased and that when he was unavailable to reconcile the till and the eftpos facility Ms Milosevic undertook this role. The applicant stated that the respondent owned two motor vehicles and that he occasionally used these vehicles as well as his own vehicle. The applicant stated that he made decisions about whether to fit out and refurbish the restaurant and which equipment to insure. The applicant understood that he would be entitled to long service leave if he worked long enough for the respondent and he stated that his performance was reviewed when the respondent's shareholders met. The applicant stated that the respondent's shareholders were his boss.

14 The applicant gave evidence that his credit card had a $15,000 limit and that he paid some of the restaurant's debts using this card and the applicant stated that the respondent reimbursed him by cheque for these payments. The applicant stated that these amounts were reconciled by the applicant and by the respondent's accountants on a quarterly and annual basis when the respondent's Business Activity Statements were prepared.

15 Two persons previously employed by the respondent, Mr Attila Virga and Ms Cassandra Smith, were summonsed to give evidence. Both former employees of the restaurant confirmed that the applicant was their manager when they worked for the respondent and that he undertook a range of duties including being in charge of the till, training employees, helping in the kitchen, distributing pay slips, determining rosters and hiring and firing staff.

16 The respondent did not call any evidence.

Submissions

17 The applicant maintains that a director of a company can also be an employee and relies on *Bearings Incorporated (Australia) Pty Ltd v Treloar* (1999) 95 IR 169 in support of his argument and the applicant maintains that even though he was involved with other companies this does not impact on his capacity to be an employee of the respondent.

18 The applicant argues that there were a number of indicia demonstrating that he was employed by the respondent under a contract of service. The applicant was paid wages on a weekly basis, he was entitled to annual leave and sick leave as confirmed in the applicant's pay slips, the applicant was taxed as though he was an employee and superannuation was paid on behalf of the applicant by the respondent under the *Superannuation Guarantee (Administration) Act 1992*. The respondent's workers' compensation policy indicated that the applicant was a working director and only employees can be covered under a workers' compensation policy under the definitions contained in the Workers Compensation and Injury Management Act 1981.

19 The applicant maintains that as there was no evidence to the contrary the Commission should accept the applicant's evidence that he made credit card payments on behalf of the respondent as a director.

20 The respondent argues that as the applicant is not an employee as defined in the Act then the Commission lacks jurisdiction to deal with this claim. The respondent maintains that the control test as outlined in *Stevens v Brodribb* Sawmilling *Co Pty Ltd* (1986) 160 CLR 16 is a significant test to determine whether or not a person is an employee. Even though the respondent concedes that a director of a company can also be an employee it argues that in this instance the applicant was not an employee as he had complete control over the respondent's operations and he essentially undertook his role without any direction or control. Further, the applicant decided which hours he worked, when to take annual leave and how and when he was to be paid, which is indicative of a contract for service. The respondent maintains that the weekly payments made to the applicant by the respondent did not constitute wages but were in reality weekly drawings and the respondent argues that the applicant was the respondent's principal and the applicant acted as a director normally would and not as a manager of the business. The respondent invited the Commission to view the applicant's involvement in a range of other entities as demonstrating on the totality of the relationship that the family group of companies had a common aim and that the applicant, whilst acting as a director, was using funds gained from the respondent's business to generate other business activities.

21 The respondent argues that if the Commission finds that the applicant was an employee it claims that the applicant was incurring debts on his credit card to purchase items or supplies on behalf of the respondent as an employee not as a director and the respondent argues that as the applicant used a credit card in his name and not that of the respondent and as the applicant was reimbursed by the respondent this adds weight to its argument that the applicant used his card in his role as an employee.

Findings and Conclusions

Credibility

22 I listened carefully to the evidence given by the applicant. In my view he gave his evidence in a considered and consistent manner and to the best of his recollection. On this basis I accept the evidence given by the applicant. I take no issue with the evidence of the two other witnesses as their evidence was straightforward and uncontroversial.

23 There was no dispute and I find that the applicant worked in the restaurant as its manager from 1 July 2000 to 21 December 2004, initially on a full-time basis and then part-time from 1 September 2004, and that the applicant undertook the roles he specified in his evidence. There was also no dispute and I find that the applicant was paid in the manner described by the applicant and that he was due entitlements such as annual leave and long service leave, that the respondent made superannuation payments on behalf of the applicant and that he was covered under the respondent's workers' compensation policy as a working director.

24 The first issue in dispute is whether or not the applicant was both a director and employee of the respondent. A director of a company can also be an employee. The law in relation to this issue was recently canvassed by Smith C in *Paul Victor Genovesi v Affluence Pty Ltd t/as Swan Districts Real Estate* (2005) 85 WAIG 1314. At page 1318 Commissioner Smith observed as follows:

> "It is not for the Respondent to show that the Applicant was not an employee but for the Applicant to show, on the balance of probabilities, that he was an employee (*The Western Australian Builders' Labourers, Painters and Plasterers Union of Workers v R B Exclusive Pools Pty Ltd t/as Florida Exclusive Pools* (1996) 77 WAIG 4 at 8 per Fielding SC).
>
> I observed in *Howe v Intercorp Services Pty Ltd trading as West Vision Painting Company* [2001] WAIRC 2643 at [24] and [25]; (2001) 81 WAIG 1212 at 1214 that:
>
> > "The relationship of employer and employee is a contract of service where an employee contracts to provide his or her work and skill (typically to enable an employer to achieve a result). An independent contractor works in his or her own business on his or her own account. Whilst the authorities do not establish a conclusive test for determining whether a person is an employer, regard must be had to the whole of the relationship. In *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 Mason J at 24 and Wilson and Dawson JJ at 36 held that a prominent factor is the degree of control which the person (who engages the other) can exercise over the person engaged to perform work. The High Court also held that the existence of control is not the sole criteria, other relevant matters include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to provide exclusive services, provision for holidays, deduction of income tax, delegation of work, the right to suspend or dismiss, the right to dictate the place of work and hours of work. Further, Mason J in *Stevens v Brodribb Sawmilling Co Pty Ltd* at 26 to 27 also observed that in some cases the organization test can be a further factor to be weighed (along with control), in deciding whether the relationship is one of employment or of independent contractor. The organization test is whether the party in question is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not for a superior (*Montreal v Montreal Locomotive Works* [1947] 1 DLR 161 per Lord Wright at 169).
> >
> > Whilst regard can be had to whether the parties regarded their contractual relationship one of employee/employer or independent contractor, if the evidence shows otherwise the parties cannot alter the truth of that relationship by putting another label on it (*Massey v Crown Life Insurance Co* (1978) 1 WLR 676 and *Narich Pty Ltd v Commissioner of Pay-Roll Tax* (1983) 2 NSWLR 601)."'
>
> …
>
> "The notion of "control" and its adjustment to the circumstances of contemporary life was recently re-considered by the majority of High Court in *Hollis v Vabu Pty Ltd* [2001] HCA 44 at [43-44]; (2001) 181 ALR 263 at 276; where Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ observed:
>
> > "… In *Humberstone* [62], Dixon J observed that the regulation of industrial conditions and other statutes had made more difficult of application the classic test, whether the contract placed the supposed employee subject to the command of the employer. Moreover, as has been pointed out [63]:
> >
> > > 'The control test was the product of a predominantly agricultural society. It was first devised in an age untroubled by the complexities of a modern industrial society placing its accent on the division of functions and extreme specialisation. At the time when the courts first formulated the distinction between employees and independent contractors by reference to the test of control, an employer could be expected to know as much about the job as his employee. Moreover, the employer would usually work with the employee and the test of control and supervision was then a real one to distinguish between the employee and the independent contractor. With the invention and growth of the limited liability company and the great advances of science and technology, the conditions which gave rise to the control test largely disappeared. Moreover, with the advent into industry of professional men and other occupations performing services which by their nature could not be subject to supervision, the distinction between employees and independent contractors often seemed a vague one.'
> >
> > It was against that background that in *Brodribb* [64] Mason J said that, whilst these criticisms might readily be acknowledged:
> >
> > > 'the common law has been sufficiently flexible to adapt to changing social conditions by shifting the emphasis in the control test from the actual exercise of control to the right to exercise it, 'so far as there is scope for it', even if it be 'only in incidental or collateral matters': *Zuijs v Wirth Brothers Pty Ltd* [65]. Furthermore, control is not now regarded as the only relevant factor. Rather it is the totality of the relationship between the parties which must be considered.'"
>
> The Industrial Appeal Court recently considered the test for a contract of service in *Personnel Contracting Pty Ltd T/AS Tricord Personnel v The Construction Forestry Mining and Energy Union of Workers* [2004] WASCA 312; (2004) 85 WAIG 5. Simmonds J at [102] observed that the difficulty in applying the test was acknowledged in *Stevens v Brodribb Sawmilling Co Pty Ltd* (op cit), *Hollis v Vabu Pty Ltd* (op cit) and *Building Workers' Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104."
>
> …

"When considering the facts of this matter the Commission must bear in mind that the fact that some of the "usual' incidents of an employment relationship such as lack of supervision do not arise when a person works as a real estate salesperson which is turn does not mean that an employment relationship does not arise (see *Federal Commissioner of Taxation v Barrett* (1973) 129 CLR 395 per Stephen J at 406-407).

It was recognised by Olney J in the *Western Australian Carpenters and Joiners, Bricklayers and Stoneworkers Industrial Union of Workers v Izzo* (1984) 64 WAIG 411 at 415:

> "There is of course no infallible test that may be applied in every case. There is infinite scope for parties to contract with one another in relation to the execution of work and every contract will of course be peculiar to the parties to it."

It is necessary to ascertain the terms of the contract in this matter so that obligations and the benefits and can be ascertained (see *Tricord Personnel* (op cit) per Steytler J at [26]). In *Sargant v Lowndes Lambert Australia Pty Ltd* [2001] WAIRC 2603 at [67]; (2001) 81 WAIG 1149 at 1155, the President observed:

> "It is always necessary, if a contract is relied upon, to determine the terms of a contract (whether it is an employment contract or any other contract) (see *Re Transport Workers Union of Australia* (1993) 50 IR 171 at 196 per Munro J). A contract may be oral or in writing, partly oral and partly in writing, the contractual terms may be express or implied, there may be a series of contracts, and indeed the written terms of the contract may not reflect the substance of the agreement between the parties. There may be terms of the contract derived from custom and usage too (see Macken, McCarry & Sappideen *The Law of Employment*, 4th edition, at page 94)."'

…

"In the same way that it is well established that one person can function in dual capacity as a company director and also as an employee of the company employed under a contract of service, a person can also function in dual capacity as an owner of a company and as employee of the company employed under the contract of service.

In *Koivisto v Barrett Koivisto Scatena Pty Ltd* (op cit) at pages 870-871 Fielding C observed:

> "Whether a director of a company is also an employee of that company is largely a matter of fact. The main factors to be considered in determining that question were outlined in *Eaton v Robert Eaton Ltd and Secretary of State for Employment* (1988) IRLR 83. Amongst the factors said to be indicative of an employment relationship was the existence of a board minute constituting an agreement to employ, although the non-existence of such a minute or other formal contract was not fatal to the existence of such a relationship. The payment of a salary by weekly instalments, as opposed to a director's fee, is indicative of an employment relationship, particularly if the director performs a function unconnected with his directorial responsibilities."

In the Matter of a claim for relief relating to the dismissal of Carole Lynds by Altiplano Distributors Ltd [1998] NSWIRComm 233 an arrangement was entered into by Mr and Mrs Lynds with a Mr Kelt to establish a company to set up a business. Mr Kelt held 50% of the shareholding and Mr and Mrs Lynds worked in the business full time. It was agreed Mr and Mrs Lynds would be renumerated $2,500.00 each per month. In 1996 the company acquired a similar business and a new equity partner which resulted in Mr and Mrs Lynds reducing their shareholding to jointly 33% and later to 20% in 1997. Bishop C held that the arrangement was effectively a "partnership" and a joint venture. Mrs Lynds was a minority shareholder and that over time M Kelt had taken overall control of the company. When Bishop C looked at the totality of the relationship he concluded that in 1997 the employment status of Mrs Lynds changed to that of an employee. In particular he found that there was no evidence of real decision making, delegation or control exercised by Mrs Lynds to indicate she was an "owner" of the business and not an employee."

25 In Bearings *Incorporated (Australia) Pty Ltd v Treloar* (op cit) a Full Bench of the Australian Industrial Relations Commission stated the following at page 189 when deciding if the director of a company was also an employee:

"In our view there is nothing inconsistent with an employment contract having as its employee party a senior manager or company director who are themselves the very persons whose work largely consists of exercising the control that qualifies their subordinates for the status of employee. A person may at the one time be an employee while also having some other status.

A common example is where one of the directors is also appointed by the company as a managing director. A managing director has two functions and two capacities, in *Anderson v James Sutherland (Peterhead) Limited* Lord Normand, with whom Lord Keith agreed, said:

> "The managing director's powers and functions are defined by the terms of his appointment, his tenure of office is governed by these terms, his salary is specifically fixed by them, and he is subject to direction by the board. The difference between his position and that of a manager who is not a director is that he is also a director. But the functions of a director and manager are not identical. This seems to me too obvious to require support from authority. In my opinion, therefore, the managing director has two functions and two capacities. Qua managing director he is a party to a contract with the company, and this contract is a contract of employment; more specifically I am of opinion that it is a contract of service and not a contract for services. There is nothing anomalous in this; indeed it is a commonplace of law that the same individual may have two or more capacities, each including special rights and duties in relation to the same thing or matter or in relations to the same persons."

The mere fact that someone is a director of a company is no impediment to that person entering into a contract of service with the company. This dual role - director and employee - can occur even if the person concerned is the sole governing director with full control of the company, and acts as the company's agent in arranging her or his own contract of service. These things are possible because the company is a separate legal entity, distinct from the corporators, officers and employees of the company. It has been held that there is no problem about the sole governing director exercising control, say by giving orders to herself or himself as employee; the orders given would be the orders of the company transmitted by the person concerned as the company's agent to her or him as employee.

Third, Bearings relied on the fact that Mrs Treloar controlled, managed and directed all of the finances of Bearings. It was also put that Mrs Treloar was not subject to control or direction by the Managing Director. In this context Bearings referred to Mrs Treloar's ability to decided (sic) when she would work and when she would take holidays.

While Mrs Treloar was effectively in control of the company's financial operations she maintained contact with Mr Hill, by telephone, about what was happening with the business.

Mrs Treloar decided when she would take annual leave, but conferred with Mr Hill about the matter. Mrs Treloar usually took three weeks leave in the January to February period.

In our view the evidence establishes that Mrs Treloar regularly attended for work on Mondays, Wednesdays and Fridays, but there was some flexibility in terms of the actual hours worked and in relation to start and finish times.

The fact that a particular worker exercises a high degree of skill, personal judgement and autonomy in the course of work does not preclude the existence of a contract of service. As the High Court decided in *Zuijs v Wirth Brothers*, "What matters is lawful authority to command so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters".

The question of control is relevant but its importance lies not so much in its actual exercise, although clearly that is relevant, as in *the right* of the employer to exercise it.

In *Articulate Restorations and Development Pty Limited v Crawford* (1984) 57 IR 371 at 379 Kirby P dealt with this issue in the following terms:

> "In a sense the existence of indicia of the ultimate right of control and its exercise is more telling than the existence of indicia of independence. This is because a high measure of independence of skilled workers is now commonplace in the workforce. Thus the existence of flexible hours, a large discretion in the performance of work, a lack of effective real control and supervision may not, in a particular case, be determinative. In today's employment market, these features of the relationship between the putative employer and worker may be neutral as to the nature of the relationship which was established between them. But where there are clear indications of the right of control, and especially where there are indications that the right of ultimate control has actually been asserted, a Court may more readily draw the inference that a contract of service (employment) has been established. Where it is, a contract for services (independent contractor) will have been excluded."

Persons have been held to be employees despite the fact that they exercise considerable autonomy in terms of when and for how long they work. We are satisfied that the requisite ultimate right of control existed in this case."

26 In order to determine the applicant's employment status I am required to review the character of the relationship between the applicant and the respondent and apply the relevant tests taking into account the authorities cited above.

Control Test

Whilst there nobody controlled the way in which the applicant undertook his day to day managerial responsibilities when running the restaurant I conclude that this is not a significant factor when determining the employment relationship in this instance as it is not unusual for an employee who has been appointed as a manager and carries out the normal duties of a manager to decide how to conduct the activities of a business, in this instance a restaurant, and to make the major decisions concerning the day to day running of the business. I also accept that when undertaking his managerial role the applicant was answerable to the respondent's Board and to the respondent's three shareholders. I therefore find this indicia to be neutral when determining the applicant's employment status.

Organisation Test

I find that the applicant was an integral part of the respondent's operations. The applicant's role was to ensure that the restaurant operated effectively and to that end he dealt with all staff issues and he hired and terminated staff. The applicant controlled the running of the restaurant which included ordering supplies, changing menus and wine lists, till operations and he undertook kitchen duties when required. In my view these activities indicated that the applicant was an essential element in the running of the restaurant and that as a result this is indicative of a contract of service. Furthermore, the restaurant relied on the applicant to regularly turn up each day for work, except for the one day a week he had off.

Income

I find that the applicant was paid weekly at the same time as other employees who worked in the restaurant which in my view is distinguishable from a Director's fee or drawings from the business and the applicant was given pay slips confirming the weekly payments made to him. These elements are indicative of a contract of service.

Hours

I find that the applicant worked on set days and his hours varied according to when the restaurant closed which is not unusual for a managerial employee working in a business of this nature. This points to a contract of service.

Taxation

I find that as the respondent paid PAYG taxation on behalf of the applicant this is indicative of a contract of service.

Worker's Compensation

I find that as the applicant was covered as a working director under the respondent's workers' compensation insurance policy this points to a contract of service.

Annual Leave and Long Service Leave

I find that as the applicant took annual leave at a time agreed with Ms Milosevic and his service with the respondent accumulated towards a long service leave entitlement, these elements are indicative of a contract of service.

Superannuation

As the respondent made superannuation contributions on behalf of the applicant, which an employer is required to do by law in relation to its employees, I find that this payment is indicative of a contract of employment.

Intention of the Parties

Whilst there was no written contract of employment between the parties it is clear that there were a number of elements of the employment relationship which were agreed between the applicant and the respondent such as weekly payments in the form of wages, an entitlement to paid leave, and the payment of superannuation pursuant to the *Superannuation Guarantee (Administration) Act 1992* which in my view points to the intention of the parties to have a relationship characterised as a contract of service.

27 The respondent argues that as the applicant was involved with entities which owed money to the respondent and that as a director the applicant was using the restaurant to generate funds for his other business activities then the applicant should

therefore not be regarded as an employee. It is my view that the respondent, through its three shareholders and directors, had the right to decide how to allocate the funds it held and controlled to other entities and I find that the respondent's actions in this regard was not relevant to the question of whether or not the applicant was employed under a contract of employment as the respondent is an entity which operates separately to the applicant performing his role as the restaurant's manager.

28 After carefully reviewing the way in which the applicant worked for the respondent and taking into account the relevant indicia and my findings in relation to these indicia I conclude that there is sufficient evidence before me to find that the employment relationship between the applicant and the respondent was characterised by a contract of service throughout the applicant's employment with the respondent.

29 I therefore find that as the applicant was an employee of the respondent the Commission has jurisdiction to deal further with this application.

30 I find the claim by the applicant that the payments he made on his credit card in relation to supplies for the restaurant were incurred on behalf of the respondent whilst acting in his role as the respondent's director to be implausible. As I have found that the applicant was an employee when he was the manager of the restaurant I find that the applicant was acting in his role as an employee when he incurred debts on his credit card for the purchase of goods for the restaurant. I find that as part of the applicant's role as restaurant manager he regularly ordered goods and supplies for the restaurant and because some suppliers required payment by credit card the applicant had an arrangement whereby he used his personal credit card for this purpose and was later reimbursed by the respondent. I find that in doing so the applicant was acting as an employee not as a director when he undertook this task as it is my view the payment for the goods and supplies formed part of the normal day to day activities of the restaurant's manager. I therefore find that the debts the applicant incurred on his personal credit card related to his role as an employee and not of that as the respondent's director. In the circumstances I propose to hear further from the parties as to the specific credit card statements which the applicant should discover to the respondent.

31 A minute of proposed order will now issue.

2005 WAIRC 03234

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SASHA MILOSEVIC
	APPLICANT
	-v-
	MILDESA PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 6 DECEMBER 2005
FILE NO/S	APPL 1684 OF 2004
CITATION NO.	2005 WAIRC 03234

Result	Declaration that jurisdiction found and documents requested as part of discovery relate to the applicant's role as an employee.

Order

HAVING HEARD Mr I Tait of counsel on behalf of the applicant and Mr N Dillon of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby:

1) DECLARES that the applicant was an employee of the respondent and the Commission therefore has jurisdiction to deal with this application.

2) DECLARES that the debts the applicant incurred on his personal credit card on behalf of the respondent related to the applicant's role as an employee of the respondent.

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

2005 WAIRC 02349

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHANE MOYLAN
	APPLICANT
	-v-
	T & T DRILLING SERVICES
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
HEARD	FRIDAY, 5 JULY 2005
DELIVERED	MONDAY, 15 AUGUST 2005
FILE NO.	APPL 112 OF 2005
CITATION NO.	2005 WAIRC 02349

Catchwords	Industrial law - Termination of employment - Contractual benefits claim - Entitlements under contract of employment - Implied term of annual leave - Issues of jursidiction raised - Principles applied - Commission lacks jurisdiction - Application in part dismissed for want of jurisdiction - Order issued - *Industrial Relations Act 1979* (WA) s 29(1)(b)(i), s 29 (1)(b)(ii), s 83(3) - *Minimum Conditions of Employment Act 1993* (WA) , s 5
Result	Order issued
Representation	
Applicant	Mr K Trainer as agent
Respondent	Mr E Rea as agent

Reasons for Decision

1 The substantive claim in this matter is one by which the applicant alleges that he was unfairly dismissed and denied certain contractual benefits. The claims are brought pursuant to s 29(1)(b)(i) and (ii) of the Industrial Relations Act 1979 ("the Act"). An element of the applicant's contractual benefits claim relates to a claim for $12,000 in respect of an accrual of annual leave. This claim is based on an implied term in the applicant's contract of employment, arising from the combined effects of Division 3 and s 5 of the Minimum Conditions of Employment Act 1993 ("the MCE Act").

2 By consent, and with the agreement of the Commission, the issue of the Commission's jurisdiction to entertain the applicant's claim in respect of annual leave is dealt with as a preliminary issue. The parties were directed by the Commission to file and serve outlines of submissions in relation to this issue, and for the matter to be determined on the basis of those written submissions.

Contentions of Parties

3 *In summary the applicant submitted that the Commission does have jurisdiction to deal with this aspect of the applicant's claim because as an implied term in the applicant's contract of employment, the claimed entitlement is a benefit under the applicant's contract of employment for the purposes of s 29(1)(b)(ii) of the Act. Furthermore, the applicant draws support for its submissions from observations of the Industrial Appeal Court in BGC (Australia) Pty Ltd v Phippard (2002) 82 WAIG 2013 at 2017 to the effect that an implied term of annual leave arising under the MCE Act, can be characterised as a claim for a benefit under a contract of employment, within the meaning of the then s 23A(1)(a) of the Act.*

4 On the other hand, the respondent refers to and relies upon decisions of the Commission as presently constituted in *Oates v Sanders Executive Pty Ltd t/as LJ Hooker Morley* (1998) 79 WAIG 1198 and of the Commission otherwise constituted in *Ian McFarlane Parlour v Halperin Fleming & Meertens* (2002) 82 WAIG 150 applying *Oates,* and also in *Ross Glenn Solter v Bewick Holdings Pty Ltd t/as DVG* (2004) 84 WAIG 2332. The submission was that the Commission in those decisions, determined that when the relevant provisions of the MCE Act where read with the now s 83(3) of the Act, conferring an exclusive jurisdiction on the Industrial Magistrates Court to enforce MCE Act implied terms in contracts of employment, then the Commission has no jurisdiction to deal with those matters.

Consideration

5 I have carefully considered the submissions of both parties. As noted above, the issue arising in this matter was dealt with by me in *Oates and* the other decisions referred to and also in a recent decision of the Full Bench of this Commission in *Brown v The University of Western Australia* (2004) WAIG 189. In all of those cases, the Commission has held that a claim such as the present matter under consideration is, by the now s 83(3) of the Act, within the exclusive jurisdiction of an Industrial Magistrates Court.

6 It is important to observe that decisions of the Commission on this point, have only considered circumstances where a term as to a minimum condition of employment is implied by reason of s 5 of the MCE Act only, in the absence of any evidence of an express term as to such entitlement, either by the express incorporation of the benefit itself, or by the express incorporation of the terms of the MCE Act into the relevant contract of employment.

7 The applicant relies on observations of the Industrial Appeal Court in *BGC,* which observations were obiter, as support for its submissions. Furthermore, it may also be said that comments of EM Heenan J in *Garbett v Midland Brick Co Pty Ltd* (2003) 83 WAIG 893 at pars 83 and 84 provide support for the applicant's contentions. However, it is clear that the observations of the court in both of those cases were obiter and not essential for the purposes of dealing with the appeals before them. Significantly also, the court did not consider the terms of s 83(3) of the Act, as conferring exclusive jurisdiction on an Industrial Magistrates Court for the enforcement of implied MCE Act terms into contracts of employment, which exclusivity is also referred to in s 46 of the MCE Act, dealing with proceedings for offences alleged under that legislation.

8 In light of these considerations, I am not persuaded to adopt a view different to that adopted by me in *Oates* and as that taken by the Full Bench more recently, in *Brown*.

9 Very different considerations would apply in the case of express terms of contracts of employment as mentioned above, or terms implied otherwise than by s 5 of the MCE Act. However, those circumstances do not arise in this case.

10 Therefore, I conclude that this element of the applicant's claim is beyond the jurisdiction of the Commission and it must be dismissed.

2005 WAIRC 01850

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHANE MOYLAN
	APPLICANT
	-v-
	T & T DRILLING SERVICES
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 10 JUNE 2005
FILE NO.	APPL 112 OF 2005
CITATION NO.	2005 WAIRC 01850

Result	Direction issued
Representation	
Applicant	Mr K Trainer as agent
Respondent	Mr E Rea as agent

Direction

HAVING heard Mr K Trainer as agent on behalf of the applicant and Mr E Rea as agent on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs –

1. THAT each party shall give an informal mutual discovery by serving its list of documents by 1 July 2005.
2. THAT inspection of documents shall be completed by 8 July 2005.
3. THAT the respondent file and serve an outline of submissions in respect of the preliminary issue of the Commission's jurisdiction as to the applicant's annual leave claim and any list of authorities upon which they intend to rely by 22 July 2005.
4. THAT the applicant file and serve an outline of submissions in respect of the preliminary issue of the Commission's jurisdiction as to the applicant's annual leave claim and any list of authorities upon which they intend to rely by 29 July 2005.
5. THAT the parties have liberty to apply on short notice.

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

2005 WAIRC 02348

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHANE MOYLAN
	APPLICANT
	-v-
	T & T DRILLING SERVICES
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 15 AUGUST 2005
FILE NO/S	APPL 112 OF 2005
CITATION NO.	2005 WAIRC 02348

Result	Application in part dismissed for want of jurisdiction
Representation	
Applicant	Mr K Trainer as agent
Respondent	Mr E Rea as agent

Order

HAVING heard Mr K Trainer as agent on behalf of the applicant and Mr E Rea 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 applicant's claim for ten weeks accrued annual leave in the sum of $12,000 in the herein application be and is hereby dismissed for want jurisdiction.

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

2005 WAIRC 03065

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHANE MOYLAN
	APPLICANT
	-v-
	T & T DRILLING SERVICES
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 15 NOVEMBER 2005
FILE NO/S	APPL 112 OF 2005
CITATION NO.	2005 WAIRC 03065

Result	Application discontinued by leave
Representation	
Applicant	Mr K Trainer as agent
Respondent	Mr E Rea as agent

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

2005 WAIRC 03188

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN RAYMOND PURCELL
	APPLICANT
	-v-
	HYDE PARK MANAGEMENT LTD T/AS THE CABLE BEACH CLUB RESORT HOTEL
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
HEARD	19 AND 20 SEPTEMBER 2005
DELIVERED	30 NOVEMBER 2005
FILE NO.	APPL 1466 OF 2004
CITATION NO.	2005 WAIRC 03188

Catchwords	Termination of employment – Harsh, oppressive and unfair dismissal – Applicant unfairly dismissed – Reinstatement ordered – Reinstatement of accrued entitlements ordered – *Industrial Relations Act 1979* (WA) s 29(1)(b)(i)
Result	Application alleging unfair dismissal upheld and order for reinstatement issued.
Representation	
Applicant	Ms S Auburn (of counsel)
Respondent	Mr A D Wilson (of counsel)

Reasons for Decision

1. This is an application by John Raymond Purcell ("the applicant") pursuant to s29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act"). The applicant alleges that he was unfairly terminated from his position as a porter with Cable Beach Club Resort ("the respondent") ("the Resort") on 14 October 2004.

2. During the hearing it became apparent that the respondent had been incorrectly named and that the correct name of the respondent was Hyde Park Management Limited trading as the Cable Beach Club Resort Hotel. As the respondent consented to this application being amended to reflect the true name of the respondent and given the Commission's powers under s27(1) of the Act, and having formed the view that it was appropriate in the circumstances to grant the amendment, I propose to issue an order that Cable Beach Club Resort be deleted as the named respondent in this application and be substituted by Hyde Park Management Limited trading as the Cable Beach Club Resort Hotel.

Background

3. There are a number of relevant facts that were not in dispute. The applicant commenced employment with the respondent on 22 March 2002 as a casual employee working in the respondent's laundry section and approximately two months later he was appointed to the position of porter. His terms and conditions of employment were confirmed in writing and the most recent contractual arrangement that was signed between the applicant and the respondent was dated 9 May 2002 and signed by the applicant on 13 May 2002 (Exhibit A2). The applicant's employment was also regulated by an employee handbook (Exhibit

A6), and this handbook was updated in May 2004 (Exhibit A4). The applicant completed a quiz about the handbook as well as an orientation checklist (Exhibits A7 and A8). The applicant was employed on a casual basis and worked approximately 40 hours per week.

4. The applicant was given a number of certificates and service awards by the respondent throughout his employment and the applicant was also given a bonus in August 2004 which was not given to all of the respondent's employees (see Exhibits A9 and A10).

5. The applicant received two warnings whilst employed with the respondent. The first warning was given to the applicant on 19 August 2003 and he was given a second warning on 3 September 2003. The applicant accepted the first warning but contested the second warning (see Exhibits A11 and A13).

6. There was no dispute that the applicant was terminated on 14 October 2004 over his interactions with a guest Ms Marie Lewis and after the applicant was terminated he was sent a letter confirming the reasons for his termination. This letter dated 25 October 2004 reads as follows (formal parts omitted):

> "**Work Performance/Behaviour under discussion: Sexual harassment of a guest and stealing.**
>
> **Details**
>
> Further to our discussion, listed below are those areas of your performance/behaviour that have been unsatisfactory.
>
> You kissed a female guest;
>
> You discussed your personal relationship and family situation with a female guest;
>
> You invited the same female guest out for dinner on at least two separate occasions; and
>
> You gifted a bottle of champagne belonging to the Resort from yourself to the guest without authority.
>
> Cable Beach Club Resort has conducted a thorough investigation and ensured that all duty of care and procedural fairness has been followed. In addition, you admitted to the above stated facts to Mr Steve Attenborough and Mr Ben Woelders when presented with the said facts.
>
> You signed a declaration on 21 March 2002 indicating you had been made aware of the Resorts (sic) policy in relation to harassment and the Resorts (sic) Code of Conduct. As such the Resort had provided you with information relating to the standard of conduct expected of you whilst employed with the Resort."
>
> (Exhibit A16)

Applicant's Evidence

7. The applicant stated that he undertook a broad range of duties in his role as a porter. The applicant stated that he was required to greet guests, pick up guests from the airport, check and tag luggage, carry guests throughout the Resort on buggies to their rooms, liaise with guests, give out tourist information and generally ensure that guests' needs were attended to in an open and friendly manner which involved regularly engaging in conversations with guests.

8. The applicant stated that he was proud of the job he did, he enjoyed his work, he found his position fulfilling, he enjoyed the versatility of the job and he looked forward to going to work every day and being part of the respondent's team.

9. The applicant stated that he felt that the first warning he was given was harsh. The warning concerned an accident which took place on 9 August 2003 and he believed that he was acting in the best interests of guests when he moved an unattended bus that was parked across an entrance to part of the Resort and hit the driver who was unhitching the trailer. The applicant stated that he apologised to the bus driver and stated that his actions were not intentional and that he was upset about the incident.

10. The applicant stated that he believed the second warning given to him on 3 September 2003 was unfair and the respondent was incorrect to claim that he had left the respondent's premises without advising his supervisor. The applicant stated that he made a number of attempts on 3 September 2003 to let his supervisor know that he was assisting a guest whose taxi had not arrived to take him into town to undertake important business and that after he was unable to contact his supervisor he liaised with the respondent's Duty Manager Ms Patina Reading, as well as another porter called Scott, about using one of the respondent's vehicles to take the guest into town. The applicant stated that he was distressed and insulted when he received this warning because he felt that he was performing his duties to assist one of the respondent's guests. The applicant stated that even though he signed the warning letter given to him he did not accept that the warning should have been given to him and he made this clear to the respondent at the time (see Exhibit A13). The applicant stated that he could not understand why he was given a warning when he was providing a service to a guest and he felt that the warning was unjustified.

11. The applicant stated that after these two incidents he was not given any further warnings and that things were going well.

12. The applicant gave evidence about the days leading up to his termination. The applicant stated that three or four days prior to his termination a tour bus arrived whilst he was working on the afternoon shift. The applicant stated that he was unloading luggage from the bus with other porters and a person who he later became aware was Ms Lewis, recognised him and called him by name as she walked towards him. The applicant said that even though he later became aware that she had previously visited the Resort he did not recognise her. The applicant welcomed her back even though he did not recognise her and he then engaged in a discussion with Ms Lewis as though he remembered her. The applicant stated that because Ms Lewis came up close to him he moved towards her and brushed his cheek against Ms Lewis' cheek and he stated that in doing so he did not kiss Ms Lewis. The applicant stated that he told Ms Lewis that he was busy and that he would catch up with her later on.

13. After the applicant finished taking some guests to their rooms he returned to the Resort's entrance and as Ms Lewis was still there he ferried her and six other guests on a buggy to their rooms. The applicant stated that during this journey Ms Lewis sat next to him and she asked him about his family. The applicant stated that Ms Lewis asked if he was still living in the same house and the applicant told Ms Lewis that he had left this house and he was now divorced and the applicant stated that Ms Lewis also asked him about his children. The applicant stated that it was a normal social conversation.

14. The applicant stated that when he arrived at Ms Lewis' bungalow her friend was waiting to greet her and the applicant stated that he took Ms Lewis' bags into the bungalow and did a final check of the room. The applicant stated that he expected to see a bottle of wine in the bungalow as Ms Lewis was a return guest and it was the Resort's normal practice for room service to place a bottle in the return guest's room. The applicant stated that he was very busy and he did not have time to call anyone and he told Ms Lewis that he would take care of this. The applicant stated that as he had a bottle of sparkling wine stored in a fridge in the porters' storeroom, which had been given to him as a gift by a guest, he put this bottle in an ice bucket and took two glasses for Ms Lewis and her friend back to her room when he was dropping off luggage for other guests.

15. The applicant stated that later that evening he was driving past Ms Lewis' bungalow and he saw Ms Lewis and her friend sitting outside their bungalow and he stopped and had a chat. The applicant stated that he asked Ms Lewis if she enjoyed the sparkling wine and when he was asked if he wanted a drink, the applicant declined and stated that he was on duty. The applicant stated that he was asked what time he was finishing and he said 11pm and the applicant stated that either Ms Lewis or her friend told him that they would be going to the Zoo Café later for drinks. The applicant stated that he said nothing in response.

16. The applicant stated that the following afternoon he saw Ms Lewis in the distance and waved to her.

17. The applicant stated that the day after, which was his day off, he telephoned Ms Lewis through the Resort's reception however Ms Lewis was unavailable. At approximately 2:00 pm that day he again telephoned Ms Lewis and asked her if she wanted to have a drink or dinner with him at the Resort's sunset bar. The applicant stated that Ms Lewis sounded upset and she responded that she was married and said no and the applicant stated that she was a bit snappy. The applicant stated that he was not expecting this response and that he only rang her because he told Ms Lewis that he would catch up with her. The applicant stated that he then apologised to Ms Lewis for contacting her. The applicant stated that the following day he saw Ms Lewis at the front of the Resort and again apologised to her as he wanted to clarify any misunderstanding between them.

18. The applicant stated that on 14 October 2004 his supervisor, Mr Peter Thomas called him and told him to attend a meeting in the General Manager's office with the Human Resources Manager Mr Steve Attenborough and the Resort's Front Officer Manager Mr Ben Woelders. At this meeting the applicant was told that a complaint had been made against him and he was handed an incident report with another report attached to it (Exhibit A14). The applicant stated that after he read the incident report he was confused.

19. The applicant stated that Mr Attenborough conducted the interview and Mr Woelders said he was there to observe. The applicant stated that Mr Attenborough was aggressive and as a result it was difficult for him to answer the questions put to him and explain his position. The applicant stated that he felt he was being interrogated and he believed that Mr Attenborough could have been drinking because he could smell beer on him. The applicant stated that he was never advised that asking a guest out was a sackable offence and he maintained there was no physical contact with Ms Lewis apart from the initial cheek to cheek contact and the applicant stated that he did not explain himself well because he was not prepared to respond to the accusations against him. The applicant stated that he became upset because the report attached to the incident report was completed by a colleague Mr Romani Tadros with whom the applicant had court dealings at the time over a dispute which was unrelated to work. The applicant stated that Mr Woelders was aware of this dispute because he had asked him to talk to Mr Tadros when he was threatened by Mr Tadros whilst at work. At the end of the interview the applicant was told he was terminated and he was required to return his uniform and keys. The applicant stated that he then walked out of the Resort and has not been back since. The applicant stated that he understood that Mr Woelders had spoken to the Resort's General Manager Mr John Woodworth before the meeting and that he had been told to terminate the applicant.

20. The applicant stated that not all of the allegations which were outlined in the letter confirming his termination were put to him at the meeting on 14 October 2004. The applicant stated for example that it was not put to him that he had stolen the respondent's property when he gave Ms Lewis the bottle of wine, nor was he asked if he had twice asked Ms Lewis out to dinner.

21. The applicant is seeking reinstatement as he was very happy working with the respondent, he still has some friends who work with the respondent and he stated that it has been difficult for him to obtain alternative employment given that the respondent had dismissed him. The applicant stated that he looked for jobs with a number of employers and that it took three or four months for him to obtain employment. The applicant stated that he applied for jobs through employment agencies, Centrelink and newspapers, he applied for cleaning jobs, courier positions and security work and he eventually obtained employment at Coles working 5:00 am to 2:00 pm on the weekends and then a cleaning job at a caravan park four hours per day Monday to Friday. The applicant stated he is currently earning approximately $850 per fortnight nett.

22. Under cross-examination it was put to the applicant that during the meeting held on the 14 October 2004 with Mr Attenborough and Mr Woelders he admitted kissing Ms Lewis. The applicant maintained that his contact with her was not a kiss and that his cheek brushed Ms Lewis' cheek and that he stated this at the meeting. The applicant stated that during the meeting he admitted that he telephoned Ms Lewis twice on his day off and that he had asked her out for drinks and dinner at the Sunset Bar and he admitted that he gave Ms Lewis a bottle of sparkling wine however he stated that he did not admit that it was the respondent's property. The applicant explained that the wine was from the porters' fridge and he considered the wine to be the porters' property. The applicant agreed that this type of wine was the type normally supplied to guests by the Resort. The applicant stated that it was not usually his role to provide sparkling wine to a guest and that he should have told someone else to arrange it, but he stated that as the Resort was busy when Ms Lewis arrived it would have taken sometime for the wine to be delivered to Ms Lewis and he believed that his decision to give her the wine was in the Resort's and the client's best interests and he stated that part of his role was to improvise. The applicant maintained that he did not ask Ms Lewis out on more than one occasion. The applicant admitted at this meeting that he told Ms Lewis about his personal life and that he was separated from his wife and the applicant stated that he twice stopped at Ms Lewis' bungalow whilst performing his duties.

23. The applicant agreed that when he was interviewed by Mr Attenborough and Mr Woelders he told them that could not see any harm in his actions. The applicant maintained that his cheek to cheek contact with Ms Lewis on the day she arrived was spontaneous as she was standing close to him and she had touched him on the arm. The applicant maintained it was appropriate that he provide the wine to Ms Lewis because she was a return guest and a bottle should therefore have been given to her and the applicant agreed that it was not the normal procedure for him to provide a bottle of wine to a guest.

24. The applicant was asked about his conversation with Ms Lewis when he asked her out to dinner. The applicant stated that he thought he was Ms Lewis' friend but when she became upset when he asked her out he apologised a couple of times. The applicant stated that when he apologised to Ms Lewis the following day she was still upset. The applicant stated that in hindsight he was aware that it was a mistake to ask Ms Lewis out to dinner and the applicant stated that he would not act in a similar way again because of the implications of his actions in this regard.

25. The applicant disagreed that Mr Woelders asked him to attend the meeting held on 14 October 2004. The applicant stated that he was aware that Mr Woelders spoke to Ms Lewis prior to the meeting held on 14 October 2004 as he told the applicant that he had done so and the applicant recalled that Mr Woelders said that he had already spoken to Mr Woodworth about the applicant's actions and that he was to be sacked.

26. The applicant stated that whilst he did not seek reinstatement to his former position when he filed this application he stated that on reflection he missed his job.

27. Under re-examination the applicant stated that there was no discussion about fraternising with guests during his induction and he was not advised that asking a guest out would result in him being terminated and the applicant stated that it was not unusual for him to chat to guests in passing. The applicant stated that he knew that he had made a mistake during his telephone conversation with Ms Lewis.

28. The applicant stated that the respondent did not have any discussions with him about alternatives to termination at the meeting held on 14 October 2004.

29. Mr Tadros worked for the respondent for two and a half years in the engineering department and he left the respondent in May 2005. Mr Tadros stated that when he visited Ms Lewis' bungalow to undertake some maintenance work in October 2004 she told him that one of the porters had done something she did not like and Mr Tadros told her to report the matter to a supervisor. Mr Tadros stated that Ms Lewis started to tell him her story and he stated that he did not want to hear it. Mr Tadros stated that Ms Lewis said that the porter had driven her all around the resort before dropping her off at her bungalow and that that when the porter dropped her off he had given her a kiss on the cheek and later in the afternoon dropped off a bottle of wine to her and Ms Lewis told him that the porter had asked her out to dinner the previous evening. Mr Tadros stated that Ms Lewis also mentioned making her shutters secure as she felt scared. Mr Tadros said that he told Ms Lewis she would need to report her concerns to someone else and then left her at the bungalow. Mr Tadros stated that he reported Ms Lewis' complaint to his manager, Mr Thomas and the following day Mr Tadros was asked to make a statement about what Ms Lewis had told him and did so.

30. Mr Tadros stated that in October 2004 he had a dispute with the applicant.

31. Under cross-examination Mr Tadros stated that Ms Lewis wanted her windows secured because she had some calls from the applicant inviting her out. Under re-examination, Mr Tadros stated that he could not recall if he went with Ms Lewis to see Mr Attenborough.

Respondent's Evidence

32. Mr Woelders has been employed with the respondent since July 2001 and is currently the Resort's Rooms Division Manager. Mr Woelders oversees housekeeping, reception, reservations, concierge, butler and laundry areas. Mr Woelders stated that on 12 October 2004 he received a telephone call from Mr Attenborough about Ms Lewis' complaints and he was asked to follow up these complaints. Mr Woelders stated that he then telephoned Ms Lewis to verify the information she had given to Mr Attenborough. Ms Lewis told Mr Woelders that the applicant had asked her out to dinner, he had kissed her and given her a bottle of wine and Ms Lewis asked that this matter not be dealt with until after she had left the Resort.

33. Mr Woelders stated that at the meeting held on 14 October 2004, which took approximately 20 minutes, Mr Attenborough asked the applicant a number of questions about Ms Lewis' complaints and the applicant was given the opportunity to respond to these questions. Mr Woelders stated that Mr Attenborough was direct in his questioning of the applicant but not aggressive. Mr Woelders stated that the applicant did not deny that he had asked Ms Lewis out to dinner, that he had kissed Ms Lewis on the cheek when welcoming her back to the Resort and that he had given a bottle of wine to Ms Lewis. Mr Woelders stated that it was established during the meeting that the wine was the Resort's property and he stated that no porter had the authority to determine which return guests are to be given a bottle of wine. Mr Woelders stated that the applicant conceded that he had been to Ms Lewis' room to deliver the wine and that on other occasions he stopped to have a chat with Ms Lewis when the applicant was driving past Ms Lewis' bungalow but Mr Woelders was unsure how many times this occurred. Mr Woelders stated that the applicant said that if he was in the same situation he would act in the same way again. Mr Woelders stated that after the applicant answered the questions put to him, Mr Attenborough then advised him that he was terminated and that after handing over his keys the applicant was asked to leave the Resort. Mr Woelders stated that after the meeting both he and Mr Attenborough agreed that is was appropriate to terminate the applicant given his actions. Mr Woelders gave evidence that the decision to terminate an employee could be made by Mr Attenborough.

34. Mr Woelders said that it was possible that Mr Thomas asked the applicant to attend this meeting. Mr Woelders denied that he told the applicant that he had already spoken to Mr Woodworth prior to this meeting and he had been told to sack the applicant.

35. Mr Woelders stated that even though the incident report drawn up in relation to this matter referred to him advising that it was appropriate to give the applicant a warning he did not give any advice to Mr Attenborough to this effect. When asked if it was appropriate to give the applicant a warning Mr Woelders stated that the applicant should have been given at least a written warning if Ms Lewis' account was correct but he stated that no decision about the applicant's ongoing employment would be made until a full investigation was undertaken.

36. Under cross-examination Mr Woelders stated that the applicant was reliable but occasionally forgetful and Mr Woelders was aware that after being nominated by other staff members the applicant had received a number of service awards.

37. Mr Woelders stated that when he investigated Ms Lewis' complaints it was sufficient for him to speak to Ms Lewis over the telephone about the issues she had with the applicant and he agreed that he raised the accusations Ms Lewis made to Mr Attenborough about the applicant with her for verification. Mr Woelders then stated that he probably should have taken a written statement from Ms Lewis. Mr Woelders could not recall if the incident report was given to the applicant during the meeting held on 14 October 2004 but Mr Woelders stated that he recalled that the applicant became upset when Mr Tadros was mentioned at the meeting. Mr Woelders stated that he did not see the incident report prior to the meeting taking place.

38. Mr Woelders stated that he was aware that Mr Attenborough and the Resort's Operations Manager, Mr Tony Alloca had discussed the applicant's behaviour with Mr Woodworth prior to the meeting on 14 October 2004, but he was unaware whether Mr Woodworth told Mr Attenborough to terminate the applicant. Mr Woelders stated that when the applicant was asked to attend the meeting held on 14 October 2004 he was not advised of the purpose of the meeting and Mr Woelders stated that prior to the meeting Mr Attenborough did not advise him that a decision had been made to terminate the applicant. Mr Woelders denied that the purpose of the meeting was to terminate the applicant. Mr Woelders stated that no minutes of this meeting were taken.

39. Mr Woelders maintained that the applicant was given an adequate opportunity during the meeting to respond to the questions asked of him and he stated that the applicant did not deny the claims Ms Lewis made against him. Mr Woelders disagreed that Mr Attenborough was under the influence of alcohol at this meeting.

40. Mr Woelders stated that he was surprised that Mr Attenborough terminated the applicant at the meeting.

41. Mr Woelders stated that the applicant agreed at the end of the meeting that the bottle of wine was not his to give away or to give to a guest.

42. Mr Woelders stated that he prepared a statement on 31 March 2005 about his recollection of the applicant's termination (Exhibit A21). Mr Woelders stated that normally Mr Attenborough would have completed this statement, however Mr Attenborough is deceased. After reading this statement Mr Woelders stated that he understood that the applicant tried to kiss Ms Lewis on the lips and Mr Woelders understood that she turned away from the applicant and Mr Woelders was unable to explain why his statement referred to the applicant going inside Ms Lewis' room.

43. Mr Woelders stated that the gifting of a bottle of wine to a return guest was common practice at the Resort, that this was at the management's discretion and it was unusual for a porter to do this on his or her own volition as decisions about gifting bottles of wine are made by a manager.

44. Mr Woelders stated that he did not recall every detail of what took place at the meeting on 14 October 2004.

45. Mr Woelders stated that prior to terminating the applicant alternatives to his termination were not considered by the respondent. When asked if asking a client out to dinner was a sackable offence, Mr Woelders said that the employee handbook refers to employees not fraternising with guests.

46. Mr Woelders stated that he believed the investigation conducted by the respondent into the applicant's actions was appropriate even though in hindsight a statement from Ms Lewis should have been taken.

47. Ms Lewis has stayed at the Resort on at least ten occasions and in October 2004 she visited the Resort along with a friend and her two children. Ms Lewis remembered the applicant greeting her with a kiss on the cheek but she was unsure when this occurred and Ms Lewis recalled "Mr Purcell driving around his buggy and sometimes chatting to" her.

48. Ms Lewis recalled the applicant contacted her one day when she was asleep and asked her out to dinner and Ms Lewis stated that she was angry at the time because she had been woken up. Ms Lewis stated that she was disappointed when the applicant asked her out and she told the applicant "John, I was asleep" and she told the applicant that she was a married woman and she was not interested. Ms Lewis stated that she was angry, shocked and disappointed by the applicant's invitation.

49. Ms Lewis stated that could not recall the applicant coming into her bungalow but she recalled the applicant giving her a bottle of wine and she stated that she was reluctant to take it and embarrassed because she did not want this bottle of wine however she accepted it graciously. Ms Lewis stated that she mentioned her concerns about the applicant to Mr Tadros as she was confused about her interactions with the applicant. In response, Mr Tadros told her that the porter's actions were 'not on' and that she should report him as it was not the Resort's policy for staff to have too much contact with guests. Ms Lewis stated that Mr Tadros took her to the Resort's human resource office where she spoke to Mr Attenborough. Ms Lewis told Mr Attenborough that she was uncomfortable with the applicant's personal interest in her and she wanted him dealt with but not whilst she remained at the Resort. Ms Lewis stated that Mr Attenborough told her that it was a common occurrence to be given a bottle of wine on arrival.

50. Ms Lewis recalled having a brief discussion with the applicant about the applicant separating from his wife and about his children when he was driving past her bungalow. Ms Lewis stated that she thought the applicant was "a nice guy" and she only wanted to interact with him as a friend and Ms Lewis stated that she did not want to know about his personal life and she was not happy about being asked out to dinner. Ms Lewis stated that the applicant asked her out to dinner once on his day off. Ms Lewis stated that she was unaware of what had happened to the applicant after she made her complaints until she was contacted to attend this hearing in July 2005.

51. Under cross-examination Ms Lewis confirmed that she did not prepare a written summary of her interactions with the applicant for the respondent and Ms Lewis stated that it could have been the case that she remembered the applicant when she arrived at the Resort and not vice versa. Ms Lewis could not remember if the applicant gave her an 'air kiss' to cover his embarrassment and she could not recall if the applicant kissed her with his lips. Ms Lewis stated that she could not recall if her conversations with the applicant were one sided on her part and she could not recall if she asked the applicant about his house and children. Ms Lewis stated that she did not know where the applicant lived and she did not believe that she initiated a discussion about this issue with the applicant.

52. Ms Lewis gave evidence that she told the applicant where she and her friend were going one night and stated that in doing so she was probably being friendly. Ms Lewis stated that when the applicant gave her the bottle of wine he told her that it was common practice for return guests to be given a bottle of wine. Ms Lewis agreed that the applicant was eager to please and that this was the nature of his personality. Ms Lewis stated that she was offended and shocked when she was woken up by the applicant and asked out and Ms Lewis could not recall if the applicant apologised to her during this conversation. Ms Lewis stated that she was offended that her friendly nature had been misread by the applicant and that it was probable that she made a complaint about the applicant to have him back off and to treat her in an appropriate manner. Ms Lewis stated that a series of events led to her making a complaint about the applicant and Ms Lewis stated that being asked to dinner was the most offensive action by the applicant.

53. Ms Lewis stated that if the applicant had apologised to her she would probably have dropped her complaints. Ms Lewis stated that she did not set out to have the applicant terminated and that she only wanted him disciplined. Ms Lewis stated that she felt uneasy about the applicant because he was being over-friendly on a persistent basis.

Submissions

54. The applicant maintains that is was inappropriate for him to be summarily terminated as the respondent did not have sufficient reason to terminate him. The applicant maintains that even though he made a mistake when he asked Ms Lewis out to dinner this was the only behaviour that should be taken into account when reviewing the actions which led to his termination and the applicant argues that his actions in this regard were not sufficient to warrant summary termination.

55. The applicant maintains that he gave a frank and credible account of what took place in the days prior to his termination and that his evidence was largely unchallenged and the applicant argues that he gave a credible explanation for his interaction with Ms Lewis and claims that his evidence was not broken down in relation to these issues. The applicant maintains that there was a misunderstanding and a breakdown of communication between Ms Lewis and the applicant.

56. The applicant argues that the respondent did not sufficiently particularise the boundaries of employee fraternisation with guests and that its policies were unclear and vague on this issue. The applicant also argues that fraternising with patrons was part of his job description.

57. The applicant argues that the warnings given to him prior to his termination were irrelevant as they were not considered when the applicant was terminated and that in any event these warnings should be disregarded as they were of a minor nature.

58. The applicant argues that the respondent's investigation into his actions was flawed as no records were made of the respondent's investigation into the applicant's interactions with Ms Lewis or of the meeting held on 14 October 2004, no notice of the meeting held on 14 October 2004 was given to the applicant and the applicant argues that the respondent's enquiries into Ms Lewis' complaints were perfunctory. The applicant also maintains that the respondent's own documentation concerning the applicant's behaviour towards Ms Lewis was inconsistent (see the incident report [Exhibit A1], the termination advice [Exhibit A16] and Mr Woelders' statement [Exhibit A21]).

59. The applicant argues that he was treated unfairly as alternatives to termination were not canvassed at the time the respondent decided to terminate the applicant.

60. The applicant argues that he should be reinstated as reinstatement is the primary remedy under the Act. The applicant claims he was highly regarded by the respondent, the applicant loved his job and was very competent and the applicant argues that his termination has had a severe impact on him given the small town in which he lives. If the applicant is not reinstated he is seeking the full compensation to which he is entitled.

61. The respondent maintains that it had every right to summarily dismiss the applicant. The respondent argues that it undertook a proper investigation into the circumstances surrounding the applicant's interactions with Ms Lewis and that the applicant was not denied procedural fairness given the manner of his termination. At the meeting held on 14 October 2004 the applicant was given every opportunity to explain his conduct, he confirmed that he had committed the actions alleged against him and the applicant stated that he would behave in the same manner in the same situation.

62. If procedural fairness was lacking in relation to the way in which the applicant was terminated, which the respondent does not concede, the respondent argues that it has demonstrated that the applicant's actions were serious enough to warrant summary dismissal as the applicant breached the terms of his contact of employment with the respondent as detailed in the respondent's employee handbook and the applicant caused the respondent embarrassment as one of its guests was distressed by the applicant's actions. The respondent argues that as the applicant was incapable of recognising inappropriate contact with a guest the respondent had lost faith in him.

63. The respondent opposes the applicant's reinstatement and argues that regard should be had to the applicant initially not seeking reinstatement when he lodged his application.

Findings and Conclusions

Credibility

64. I listened carefully to the evidence given by each witness. I find that Mr Woelders gave his evidence to the best of his recollection however there were some inconsistencies in his oral evidence and some of the documentation tendered as evidence in these proceedings. For example, some of Mr Woelders' oral evidence did not accord with the written statement he made in March 2005, Mr Woelders did not give evidence confirming that the two warnings previously given to the applicant were taken into account when deciding to terminate the applicant as detailed his statement dated 31 March 2005 and Mr Woelders did not give evidence at the hearing confirming that the applicant visited Ms Lewis' room on several occasions, which was also mentioned in his statement. Furthermore, Mr Woelders stated that he did not recommend that the applicant be given a written warning in relation to his interactions with Ms Lewis yet there is reference to Mr Woelders being minded to do so in the incident report dated 13 October 2004 (see Exhibit A14).

65. I found Mr Tadros to be selective about his recollection of relevant events. For example, Mr Tadros gave evidence that during his discussion with Ms Lewis about her concerns with the applicant he was not told the name of the porter about whom Ms Lewis was complaining which contrasts with the statement he gave to Mr Attenborough soon after Ms Lewis spoke to him about the applicant. I therefore treat his evidence with caution.

66. I find that Ms Lewis' evidence was vague as Ms Lewis did not remember much about her interactions with the applicant when she was at the Resort in October 2004. However, I accept that Ms Lewis was distressed due to personal reasons during October 2004 and this may have affected her ability to remember the details of her interactions with the applicant.

67. In contrast I find that the applicant gave straightforward, plausible, consistent, and in my view credible evidence about the events leading up to his termination and his evidence was not broken down during extensive cross-examination. In the circumstances I therefore conclude that where there is any inconsistency in the evidence given by the applicant, Mr Woelders, Mr Tadros and Ms Lewis I prefer the evidence given by the applicant.

68. The applicant was summarily terminated. The onus is on the applicant to demonstrate that the dismissal was unfair on the balance of probabilities. However, there is an evidential onus upon the employer to prove that summary dismissal is justified (see *Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers* (1988) 68 WAIG 677 at 679).

69. The question of whether a person is guilty of misconduct justifying summary dismissal is essentially a question of fact and degree (see *Robe River Iron Associates v Construction, Mining Energy, Timberyards, Sawmills and Woodworkers Union of Australia – Western Australian Branch & Ors* (1995) 75 WAIG 813 at 819). In most cases the employee should be given an opportunity to defend allegations made against them. In *Bi-Lo Pty Ltd v Hooper* (1992) 53 IR 224 at page 229 the Full Bench of the South Australian Commission observed:

> "Where the dismissal is based upon the alleged misconduct of the employee, the employer will satisfy the evidentiary onus which is cast upon it if it demonstrates that insofar as was within its power, before dismissing the employee, it conducted as full and extensive investigation into all of the relevant matters surrounding the alleged misconduct as was reasonable in the circumstances; it gave the employee every reasonable opportunity and sufficient time to answer all allegations and respond thereto; and that having done those things the employer honestly and genuinely believed and had reasonable grounds for believing on the information available at that time that the employee was guilty of the misconduct alleged; and that, taking into account any mitigating circumstances either associated with the misconduct or the employee's work record, such misconduct justified dismissal. A failure to satisfactorily establish any of those matters will probably render the dismissal harsh, unjust or unreasonable."

70. On the facts as I find them I am satisfied, at least on balance that the respondent has not demonstrated that the applicant was guilty of gross misconduct justifying summary dismissal. Further, I am satisfied that the applicant was treated unfairly and harshly because in my view he was not given sufficient opportunity to defend himself against the allegations relied upon to effect his termination. He was not afforded "a fair go all round" (see *Undercliffe Nursing Home v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385).

71. Paragraphs 3 to 6 set out the undisputed background to the applicant's employment with the respondent. I find that throughout the applicant's employment with the respondent, spanning approximately two and a half years, the applicant enjoyed his job as a porter and that he took his role and responsibilities as an employee very seriously. I accept the applicant's evidence and I find that a major part of his role as a porter was to liaise with guests on both an informal and formal basis and that the applicant regularly undertook this role in a friendly manner and to the best of his ability. I find that the applicant was highly valued by the respondent throughout his employment and as recently as August 2004 the respondent gave the applicant a bonus which was not given to all employees and I find that the applicant was respected and well regarded by his colleagues as the applicant was given numerous awards which were generated at the initiative of fellow workers. Even though the applicant received two warnings in 2003 I find on the evidence that the second warning given to the applicant was trivial and resulted from a misunderstanding by the applicant's supervisor as to the applicant's whereabouts.

72. In my view the respondent has not demonstrated that the applicant misconducted himself in relation to the four issues relied on by the respondent to terminate the applicant. The applicant's letter of termination, which was dated 25 October 2004 and was sent to the applicant some time after he was terminated, refers to the applicant being terminated because of stealing and the sexual harassment of a guest and the respondent argues that the applicant breached the harassment policy and the Code of Conduct contained in its employee handbooks. Specifically the respondent maintained that the applicant:

> "You kissed a female guest;
>
> You discussed your personal relationship and family situation with a female guest;
>
> You invited the same female guest out for dinner on at least two separate occasions; and
>
> You gifted a bottle of champagne belonging to the Resort from yourself to the guest without authority."
>
> (extract from Exhibit A16)

73. I accept that the respondent's employee handbook, dated May 2004, formed part of the applicant's contract of employment at the time of his termination. Page 19 of this employee handbook states the following (in part) in relation to instant dismissal:

> "Instant Dismissal may take place where a person commits any one or more of the following offences:
>
> - Theft or Unauthorised Removal of Property
>
> …
>
> - Sexual harassment involving staff or patrons
>
> …
>
> - Fraternising with guests
>
> …
>
> In all cases, disciplinary action will depend upon:
>
> - Circumstances surrounding the offence
> - The seriousness of the offence
> - The time since the last misconduct occurred
>
> Suspension may be applied where circumstances need to be investigated or reviewed prior to action being taken. This will be without pay, up to a maximum of 4 weeks, depending on the situation."
>
> (Exhibit A4)

The Four Allegations

1. The applicant kissed a female guest.

As I accept the applicant's evidence in preference to the evidence given by Ms Lewis where there is any inconsistency, I find that the applicant did not kiss Ms Lewis. I find that after Ms Lewis' arrived at the Resort and prior to being escorted to her bungalow by the applicant, Ms Lewis walked towards the applicant as she recognised him from a previous visit and I find that Ms Lewis stood next to the applicant and that this close physical contact was initiated by Ms Lewis. I find that the applicant did not remember Ms Lewis at the time and was surprised by her friendly and open manner towards him. I find that as the applicant was caught off guard by Ms Lewis' approach he responded by moving towards Ms Lewis after she approached him and in doing so they touched each other cheek to cheek. In my view the touching of the cheeks in this manner does not constitute a kiss which would normally occur using the lips and at best it could be described as an 'air kiss'. In the circumstances I therefore find that the applicant did not kiss Ms Lewis as claimed by the respondent, as one would normally define a kiss to be and as a result I do not accept the respondent's claim that the applicant's actions in this regard lead to Ms Lewis being sexually harassed by the applicant.

2. The applicant discussed his personal relationship and family situation with a female guest.

The applicant did not dispute that he discussed his marital status and his children with Ms Lewis and I find that the applicant did so because Ms Lewis initiated a discussion with him about these issues and the applicant responded with relevant information. As I accept the applicant's evidence that part of his role was to be friendly and communicative with guests I find that this was not an unusual pattern of interaction with a guest and I find that this discussion did not constitute inappropriate fraternisation by the applicant with a guest as I find that it was more than reasonable for the applicant to respond to Ms Lewis' questions about his personal situation given that his role was to liaise with guests and engage in informal discussion. I also take into account that it can be inferred that the applicant had met Ms Lewis on a previous visit to the Resort. I therefore find that the applicant's interactions with Ms Lewis in this regard did not constitute inappropriate behaviour by the applicant, nor did it constitute harassment of Ms Lewis by the applicant. In the circumstances I find that the applicant did not behave in such a way as to warrant any disciplinary action being taken against him in relation to this allegation.

3. The Applicant invited this guest out to dinner on two separate occasions.

The applicant openly conceded that he invited Ms Lewis out for drinks and dinner at the Resort on one occasion when he was off duty, and there was no evidence given by anyone in these proceedings, including Ms Lewis that the applicant asked Ms Lewis out on two separate occasions. When reviewing the respondent's requirements of its employees and the offences listed in the respondent's employee handbook at page 19 I find that the applicant's actions in asking Ms Lewis out, notwithstanding the applicant being off-duty, was inappropriate and contrary to the provisions of the respondent's policy relating to fraternising with guests. However, I do not conclude that the applicant's actions in this regard constituted sexual

harassment as claimed by the respondent as it is my view that the applicant's actions in this regard do not constitute harassment of a sexual nature.

4. The applicant gifted a bottle of champagne belonging to the Resort to Ms Lewis without authority.

The applicant did not deny that he gave Ms Lewis a bottle of wine and in my view he gave a plausible reason for doing so and a plausible explanation as to how he obtained the wine. There was evidence that the gifting of a bottle of wine on the occasion of a guest's return visit was the respondent's custom and practice and Ms Lewis gave evidence that Mr Attenborough told her that the gifting of a bottle of wine for return guests was not unusual and there is reference to this being the case in Mr Attenborough's incident report (see Exhibit A14). The respondent did not give any evidence demonstrating that the bottle of wine that the applicant gave to Ms Lewis belonged to the Resort and that the applicant had stolen this bottle and in the absence of any explanation to the contrary I accept the applicant's evidence that the bottle was a gift given to him by a satisfied patron and that he kept this bottle in the porters' fridge because he did not drink sparkling wine. I therefore find that the applicant did not steal the bottle of wine as claimed by the respondent. Even though the respondent's management did not authorise the applicant to give this bottle of wine to Ms Lewis I accept the applicant's evidence that he used his initiative to give the wine to Ms Lewis on his own accord as it was a busy time for the Resort and it would be some hours before a bottle of wine would be brought to her bungalow by service staff. In the circumstances I find that the respondent has not demonstrated that the applicant stole the bottle of wine as alleged by the respondent.

Did the applicant admit to the above allegations?

I find that the respondent's claim that the applicant admitted to the four allegations during the meeting held on 14 October 2004 to be incorrect and I find that the applicant only conceded that he asked Ms Lewis out to dinner on one occasion at this meeting. The applicant gave evidence that during this meeting with Mr Attenborough and Mr Woelders he admitted to touching Ms Lewis check to cheek, that he asked Ms Lewis out to dinner on one occasion, that he discussed some issues about his private life with Ms Lewis and the applicant conceded that he gave Ms Lewis a bottle of wine. As I prefer the applicant's evidence to that given by Mr Woelders where there is any inconsistency, I find that during this meeting the applicant did not admit to stealing a bottle of wine from the respondent, he did not concede that he sexually harassed Ms Lewis and the applicant did not concede that he kissed Ms Lewis as a normal kiss would be.

74. Even though the applicant breached his contract of employment with the respondent when he asked a guest at the Resort out to dinner it is my view that his actions in this regard did not warrant him being summarily terminated notwithstanding the two warnings already given to the applicant approximately one year prior to his termination. The respondent's employee handbook provides that fraternising with a guest may constitute behaviour sufficient to warrant summary termination and that each contravention is to be considered on it merits and should be reviewed in light of the circumstances surrounding the offence, the seriousness of the offence and the time lapse since the last misconduct occurred. In reaching the view that the applicant's actions did not warrant summary termination I take into account that in this instance the applicant sought to fraternise with a guest in an open manner as he asked Ms Lewis out to a venue which was frequented by resort guests and staff, the applicant did not fraternise with Ms Lewis as she refused his invitation and the applicant apologised to Ms Lewis on two occasions after he became aware of his error of judgement. Additionally I have already found that the second warning given to the applicant was trivial and resulted from a misunderstanding between the applicant and his supervisor and it is clear that except for these two warnings, the applicant had an exemplary employment history with the respondent and was highly regarded and valued by the respondent.

75. In my view the respondent did not conduct an adequate investigation into the complaints raised by Ms Lewis against the applicant and I find that the respondent did not give the applicant sufficient opportunity to respond to the allegations made against him. I also find that the respondent treated the applicant unfairly by not canvassing alternatives to his termination as the applicant was terminated in a summary manner at the end of his meeting with Mr Woelders and Mr Attenborough.

76. I find that the respondent's investigations into Ms Lewis' allegations were seriously compromised by the way in which it investigated Ms Lewis' complaints against the applicant. The respondent did not take a written statement from Ms Lewis about her interactions with the applicant to properly clarify her allegations against the applicant and when Mr Woelders interviewed Ms Lewis over the telephone about her complaints he questioned Ms Lewis in regard to the information she had already given to Mr Attenborough and did not ask for Ms Lewis' version of events about the incidents. I find that as a result this compromised the information gathered by the respondent and led to some confusion about Ms Lewis' allegations against the applicant. For example, the respondent claimed that the applicant had twice asked Ms Lewis out to dinner yet there was no evidence to confirm this accusation, not even from Ms Lewis and there was also confusion about the bottle of wine given to Ms Lewis by the applicant.

77. It is my view that the applicant was denied procedural fairness given the manner of his termination and that as a result this contributed to the applicant being unfairly terminated. The applicant was not given any prior notice that the meeting held on 14 October 2004 was to be disciplinary in nature and could lead to his termination nor was the applicant advised that he could have a support person in attendance at this disciplinary meeting. It is also my view that as part of the respondent's investigation into the applicant's behaviour the applicant should have been provided with a statement confirming Ms Lewis' accusations prior to meeting with the respondent on 14 October 2004 so that the applicant had an adequate opportunity to put his version of events about the allegations.

78. The applicant is seeking reinstatement and argues that there are no barriers to his reinstatement as he enjoyed his work with the respondent and worked well with his colleagues. The onus is on the respondent to establish that reinstatement or re-employment is impracticable (*Quality Bakers of Australia Ltd v Goulding* (1995) 60 IR 327; *Gilmore v Cecil Bros & Ors* (1996) 76 WAIG 4434 and (1998) 78 WAIG 1099).

79. The issue of reinstatement was recently considered by the Full Bench in *Gonzalo Portilla v BHP Billiton Iron Ore Pty Ltd* (2005) 85 WAIG 3441. In this decision the Full Bench clarified the Commission's powers when dealing with employee's reinstatement. His Honour the President and Kenner C stated the following at page 3458:

> "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*).
>
> 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.

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

and further at page 3459:

> "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)).
>
> 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)).
>
> 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)).
>
> …
>
> "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)).
>
> 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."

80. The respondent opposes the applicant being reinstated but did not lead any evidence as to any problems which could arise if the applicant is reinstated.

81. After considering the circumstances of this case it is my view that the applicant should be reinstated to his former position with the respondent as at the date of the order. In reaching this conclusion I take into account that even though I have found that the applicant's interactions with Ms Lewis did not warrant summary termination I find that when the applicant asked out a guest he committed a serious offence particularly given the resultant negative impact on Ms Lewis. I also find that the applicant was aware of the provisions of the respondent's employee handbook and of which actions constituted inappropriate behaviour and should therefore have know that asking out a guest was inappropriate. However, I accept that the applicant realised that he had acted inappropriately soon after he asked Ms Lewis out as he apologised to her immediately and the next day for his actions and he gave evidence that he would not act in a similar way again.

82. In my view the applicant's reinstatement is practicable as the applicant sees no impediment to his return to work, there was no evidence that his reinstatement would present any difficulty to the respondent and I take into account the applicant's lengthy and successful employment history with the respondent. I will therefore order that the applicant be reinstated to his former position within the respondent's operations effective from the date of this Order. I will also order that the applicant's previous service and accrued outstanding entitlements be reinstated for the purposes of sick leave, annual leave and long service leave and that the applicant's service with the respondent be regarded as being continuous, excluding the period between the date of his termination and the date of his reinstatement.

83. A minute of proposed order will now issue.

2005 WAIRC 03233

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN RAYMOND PURCELL
	APPLICANT
	-v-
	HYDE PARK MANAGEMENT LTD T/AS THE CABLE BEACH CLUB RESORT HOTEL
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 6 DECEMBER 2005
FILE NO/S	APPL 1466 OF 2004
CITATION NO.	2005 WAIRC 03233

Result Application alleging unfair dismissal upheld and order for reinstatement issued.

Order

HAVING HEARD Ms S Auburn of counsel on behalf of the applicant and Mr A D Wilson of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby:

1) ORDERS that the name of the respondent be deleted and that Hyde Park Management Ltd trading as the Cable Beach Club Resort Hotel be substituted in lieu thereof.

2) DECLARES THAT the respondent harshly, oppressively and unfairly dismissed John Raymond Purcell on 14 October 2004.

3) ORDERS that the respondent shall reinstate Mr Purcell in its employment to his former position as at the date of this order.

4) ORDERS that the respondent reinstate Ms Purcell's previous service and accrued outstanding entitlements for the purposes of sick leave, annual leave and long service leave and that his service with the respondent be regarded as continuous excluding the period between the date of his termination and the date of his reinstatement.

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

2005 WAIRC 03135

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MATTHEW SMITH
	APPLICANT
	-v-
	JAMIE EASTOUGH T/AS BATAVIA COAST CAR CARE
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
HEARD	TUESDAY, 8 NOVEMBER 2005
DELIVERED	TUESDAY, 8 NOVEMBER 2005
FILE NO.	APPL 608 OF 2005
CITATION NO.	2005 WAIRC 03135

Catchwords	Industrial law - Termination of employment - Harsh, oppressive and unfair dismissal - Whether the applicant dismissed - Intent of parties considered - Principles applied - Applicant harshly, oppressively and unfairly dismissed - Application upheld - Compensation ordered - *Industrial Relations Act 1979* (WA) s 29(1)(b)(i)
Result	Order issued
Representation	
Applicant	In person
Respondent	Mr J Eastough

Reasons for Decision
(Ex Tempore)

1. The application brought before the Commission is one pursuant to s 29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act") by which the applicant alleges that on or about 31 May 2005 he was harshly, oppressively or unfairly dismissed by the respondent employer. The applicant does not seek reinstatement by the claim, but rather seeks compensation for loss of earnings.

2. The evidence in relation to this matter was adduced through both the applicant and the respondent, Mr Eastough, which is a trading business trading as Batavia Coast Car Care. The applicant, it was common ground, was employed on a casual basis as a car detailer. He testified, generally speaking, in summary as follows. He was employed as a casual car detailer in September 2004 at the respondent's business. He testified that his employment was on a regular and ongoing basis, that

he worked approximately 20 to 25 hours per week over 5 days per week, Monday to Friday, generally between the hours of 8.00am and 2.00pm to 3.00pm in the afternoon. He also testified that he was of one of four car detailers variously employed at the respondent during the period of his employment.

3. The controversial issue in this case is essentially what occurred at or about the time of the cessation of the employment. The applicant testified that approximately one week prior to his dismissal, he discussed with Mr Eastough of the respondent visiting Centrelink for the purposes of exploring, no doubt, other employment opportunities because, on the applicant's testimony, he discussed this with Mr Eastough on prior occasions. The applicant testified that he subsequently made an appointment to attend on Centrelink in Geraldton and informed the respondent of that fact. He informed him he had an appointment on 31 May 2005. According to the applicant the respondent was aware of and agreed for him to attend such an appointment and, indeed, according to the applicant's testimony, he was encouraged to do so.

4. The applicant testified that on the day in question he telephoned the respondent to advise that he would not be at work until 12.00pm because of the time that it was taking at Centrelink that day. He testified that he later rang back at about midday to inform the principal of the respondent Mr Eastough, indeed he said he spoke with his mother, that he was not going to be in that afternoon because he still had to attend to Centrelink and he said he waited at the premises of Centrelink for some two hours that afternoon to make whatever arrangements were necessary to be made. The applicant understood from his prior discussion both with Mr Eastough and, he says, with his mother, that that was not going to be a difficulty that particular day.

5. The next day at about 8.00am the applicant arrived at work, as he said, as usual. He testified that he heard Mr Eastough walk up behind him. Mr Eastough queried what had occurred the day prior and said that the respondent was busy and he needed employees to work. The applicant testified that Mr Eastough was upset and told him that he should now go and tell Centrelink about the reason why he had lost his employment.

6. The applicant testified he had no doubt that from that conversation he was being dismissed. He then left the premises of the respondent. The applicant informed the Commission that thereafter he immediately sought other employment and, indeed, found employment on his evidence about six weeks after his dismissal, although he wasn't sure as to precisely when that was. The applicant commenced other employment, initially casually, but is now permanently engaged. The applicant seeks compensation for his loss as a consequence of what he says was an unfair dismissal. He says he was dismissed for no good reason and also no complaints were made about his work performance prior to his dismissal.

7. Mr Eastough on behalf of the respondent generally agreed with the applicant's testimony as to the basis of his employment, its regularity, the hours worked and the income received. He also confirmed that the applicant discussed with him that he would attend on Centrelink at an arranged time, presumably in accordance with the applicant's testimony that this had been discussed previously, and it was suggested to be a good idea that he do so.

8. Mr Eastough's complaint was that he was informed initially that the applicant would not be in prior to 10.00am on the morning in question and according to his evidence there was no further contact with the respondent that day. The next morning, when the applicant attended work, Mr Eastough informed the Commission that he inquired of the applicant as to why he had not attended that day and why he had not informed the respondent of his absence during the day. Mr Eastough testified that he told the applicant that because of this, he should "have a day off". The applicant replied in words to the effect, "are you sacking me" and it appears that there was no real response to that. Mr Eastough's evidence was that he did not disimbue the applicant of that impression. Mr Eastough then said the applicant left the premises by storming off, according to his testimony, and it is common ground that the applicant did not return. It is also Mr Eastough's evidence that he confirmed the applicant's testimony that he was upset with the applicant on that morning.

9. Whilst the applicant was casually employed as a matter of common ground, it is trite law in this jurisdiction that casual employees, on the basis that they've been employed on a regular and ongoing basis, may be firstly, dismissed and secondly, as a matter of law, may be dismissed unfairly and I simply refer to a decision of the Full Bench of this Commission in *Swan Yacht Club v Bramwell* (1998) 78 WAIG 579. The only issue in dispute in this matter is what occurred on the morning of the termination of the employment. Having heard the evidence of both the applicant and the respondent, I must say I prefer the applicant's version of the events. I accept that the applicant did inform the respondent that he would be at a Centrelink appointment on the day prior to his dismissal with the agreement of the respondent. I also accept the applicant's evidence that these matters took longer than expected and contact was made with the respondent to advise of this on the last day of the employment. The evidence does establish that the respondent was upset with the applicant. In my opinion it is more likely than not that the applicant was told, as he was suggesting in his evidence, that he should inform Centrelink as to they being the reason for him losing his employment. In any event, there is no evidence that the respondent sought to alter the applicant's impression that he had as a consequence of that conversation. Also, the Commission has found that the respondent was upset with the applicant which, in my view, is more consistent with the applicant's version of the events. In any event, I have no doubt that the words used by the respondent conveyed the impression to the applicant that the employment was being terminated. Even if I accept what the respondent says and the applicant asked if he was being dismissed, the respondent did not correct the applicant's understanding of the situation.

10. Irrespective of these matters, even if the applicant was absent for longer than a prior approved period of time, in light of the context of the applicant's employment, the length of it, it being ongoing and regular, in my opinion that is not a sufficient reason of itself to dismiss the applicant without some warning.

11. In all the circumstances and as a matter of equity and good conscience, I find the applicant was dismissed and his dismissal was unfair.

12. I turn to the question of remedy. The applicant does not seek reinstatement and in my view it would be impractical in the circumstances. Clearly there has been a breakdown in the relationship between both the applicant and the respondent. The applicant immediately looked for other employment, as the law requires him to do. He found other employment some six weeks or so after his dismissal, although he was not sure of the timing of this on his evidence. I consider in the circumstances, compensation for loss in this matter in respect of four weeks of employment would be appropriate. Four weeks at the average rate of earnings set out in exhibit R1 is some $337.50 per week, by four weeks is $1,350.00. Therefore the Commission will declare and order as follows. That firstly, the applicant was harshly, unfairly and oppressively dismissed from his employment as a car detailer by the respondent on or about 21 May 2005. Secondly, reinstatement or re-employment of the applicant is impracticable. Thirdly, that the respondent pay to the applicant, as compensation for loss, compensation in the sum of $1,350.00 within 21 days of today.

2005 WAIRC 03088

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MATTHEW SMITH
	APPLICANT
	-v-
	JAMIE EASTOUGH T/AS BATAVIA COAST CAR CARE
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 18 NOVEMBER 2005
FILE NO/S	APPL 608 OF 2005
CITATION NO.	2005 WAIRC 03088

Result	Application upheld. Order issued
Representation	
Applicant	In person
Respondent	Mr J Eastough

Declarations and Order

HAVING heard Mr M Smith on his own behalf and Mr J Eastough on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby –

(1) DECLARES that the applicant was harshly, oppressively and unfairly dismissed from his employment as a car detailer on or about 31 May 2005.

(2) DECLARES that reinstatement or re-employment is impracticable.

(3) ORDERS that the respondent pay to the applicant the sum of $1,350.00 as compensation for loss less any amount payable to the Commissioner of Taxation pursuant to the Income Tax Assessment Act 1936 and actually paid within 21 days of the date of this order.

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

2005 WAIRC 02789

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JAMES PHILIP SUTTON
	APPLICANT
	-v-
	HOLLETT/DPT PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
HEARD	FRIDAY, 30 SEPTEMBER 2005
DELIVERED	TUESDAY, 11 OCTOBER 2005
FILE NO.	APPL 1570 OF 2004
CITATION NO.	2005 WAIRC 02789

Catchwords	Contractual benefits claim – Entitlements claimed under contract of employment – Principles – Application upheld – Application for Costs allowed – *Industrial Relations Act 1979* WA s 27, s 29(1)(b)(ii)
Result	Application for contractual benefits allowed.
Representation	
Applicant	Mr J Sutton on his 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 James Phillip Sutton ("the applicant") pursuant to s29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act") seeking benefits which he claims are due to him under his contract of employment with Hollett/DPT Transport ("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 its usual address on 23 August 2005 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 to proceed with the hearing in the respondent's absence.

3. I note that the respondent on the application has been named as Hollett/DPT Transport and I understand that the applicant believed that this was the name of his employer when he lodged the application. The applicant stated at the hearing that he now understands that the respondent's name has changed. Given the Commission's powers under the Act to amend an application, and in particular s27(1)(m) of the Act, I propose to issue an order that Hollett/DPT Transport be deleted as the named respondent in this application and replaced by Hollett/ DPT Pty Ltd which I understand is the entity which operates the respondent's business.

4. The applicant was employed by the respondent from 8 July 2004 to 24 September 2004 and the applicant is claiming that he is owed wages for the period from 23 August 2004 through to 24 September 2004 as he claims he was not paid for most of the hours that he worked during this period. The applicant was employed as a truck driver and his duties were to load and unload trucks and drive to various country locations.

Applicant's evidence

5. The applicant gave evidence that he was paid $20.00 per hour by the respondent for all hours worked and he stated that he worked lengthy hours in the period he worked for the respondent. The applicant kept a record of the hours he worked from the end of August 2004 onwards as the respondent did not always pay the applicant's wages on time.

6. The applicant gave evidence that in the week commencing 23 August 2004 through to 29 August 2004 he worked 71 hours and was paid $400 in wages for this week and he therefore calculates that he is owed $1020 for this week. In the week commencing 30 August 2004 through to 4 September the applicant worked 75.25 hours, in the week commencing 6 September 2004 through to 11 September 2004 the applicant worked 88.5 hours, in the week commencing 13 September 2004 through to 18 September 2004 the applicant worked 79.25 hours and in the week commencing 20 September 2004 through to 24 September 2004 the applicant worked 56 hours and the applicant gave evidence that he has not received payment for the hours worked during these weeks.

7. The applicant is also claiming pro-rata annual leave entitlements for the 11 weeks that he was employed by the respondent.

Findings and conclusions

8. I have no hesitation accepting the applicant's evidence as in my view he gave his evidence honestly and to the best of his recollection.

9. 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).

10. I am satisfied on the evidence that the applicant has made out his claim that under his contract of employment with the respondent he is owed the outstanding wages he is claiming for the hours he worked during the five weeks from 23 August 2004 onwards that he was not paid by the respondent. I accept the applicant's evidence that he worked the hours that he is claiming during this period and I find that the applicant should be paid for these hours at the rate of $20.00 per hour which was his normal rate of pay.

11. I find that the amounts owing to the applicant are as follows:

    1) Week commencing 23 August 2004 - 71 hours x $20.00 per hour less $400 already paid = $1,020.00 gross
    2) Week commencing 30 August 2004 - 75.25 hours x $20.00 per hour = $1,505.00 gross
    3) Week commencing 6 September 2004 - 88.5 hours x $20.00 per hour = $1,770.00 gross
    4) Week commencing 13 September 2004 - 79.25 hours x $20.00 per hour = $1,585.00 gross
    5) Week commencing 20 September 2004 - 56 hours x $20.00 per hour = $1,120.00 gross

    The total owing to the applicant is $7,000.00 gross in outstanding wages for the period 23 August 2004 through to 24 September 2004.

12. The applicant is also claiming that under his contract of employment with the respondent he is entitled to pro rata annual leave entitlements for the 11 weeks that he was employed by the respondent. I am satisfied that the applicant is entitled to a pro-rata annual leave payment as I find that the applicant worked for the respondent during this period and the respondent did not pay him this entitlement. I therefore find that the applicant should be paid $641.30 gross (based on 2.915 hours accrual each week) in pro rata annual leave entitlements.

Costs

13. The applicant is claiming $1,620.00 as reimbursement of the income he has lost which he says resulted from his attendance at the initial conference in relation to this matter and the hearing.

14. Section 27(1)(c) of the Act empowers the Commission to:

    "(c) order any party to the matter to pay to any other party such costs and expenses including expenses of witnesses as are specified in the order, but so that no costs shall be allowed for the services of any legal practitioner, or agent;"

15. The general policy in industrial jurisdictions is that costs ought not be awarded except in extreme cases and costs are usually only awarded in circumstances where an applicant or respondent has demonstrated that an application has been frivolously and vexatiously instituted or defended (see *Denise Brailey v Mendex Pty Ltd t/a Mair & Co Maylands* (1992) 73 WAIG 26 at 27). In this case I am satisfied that the respondent has acted frivolously and vexatiously as the applicant worked for some weeks and was not paid by the respondent and no reason was given by the respondent for not paying the applicant's wages. I therefore find that the respondent's refusal to accept this claim is without merit and I take into account that the respondent did not attend the conference or hearing and therefore made no attempt to respond to this application.

16. As the Commission can order expenses incurred by a witness I will allow the applicant the opportunity to put submissions to the Commission as to any expenses incurred in attending the hearing of this matter and any earnings lost by the applicant for the day he appeared before the Commission to give evidence.

17. The applicant is therefore owed the following amounts under his contract of employment with the respondent; $7,000.00 gross in outstanding wages for the period 23 August 2004 through to 24 September 2004 and $641.30 gross in annual leave payments.

18. A minute of proposed order will now issue that the respondent pay the applicant the amounts due to him and liberty to apply will be granted to the applicant to put submissions within 14 days of the date of these reasons for decision as to the costs incurred and any income lost for attending the hearing.

2005 WAIRC 02850

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JAMES PHILIP SUTTON
	APPLICANT
	-v-
	HOLLETT / DPT PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 19 OCTOBER 2005
FILE NO/S	APPL 1570 OF 2004
CITATION NO.	2005 WAIRC 02850

Result	Application for contractual benefits allowed.

Order

HAVING HEARD Mr J Sutton on his 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) ORDERS that the name of the respondent be deleted and that Hollett/DPT Pty Ltd be substituted in lieu thereof.

2) DECLARES that the respondent denied the applicant benefits under his contract of employment.

3) ORDERS that the respondent pay the applicant $7,641.30 gross within 7 days of the date of this order.

4) ORDERS that there be liberty to the applicant to apply for an order for costs exercisable within 14 days of the date of the reasons for decision.

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

2005 WAIRC 03078

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GRAEME EDWARD WRIGHT
	APPLICANT
	-v-
	MVM RAIL PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
HEARD	WEDNESDAY, 21 SEPTEMBER 2005
DELIVERED	THURSDAY, 17 NOVEMBER 2005
FILE NO.	APPL 905 OF 2005
CITATION NO.	2005 WAIRC 03078

CatchWords	Industrial Law – alleged harsh, oppressive and unfair dismissal – application referred outside of 28 day time limit – jurisdictional question determined – refusal to employ – application struck out – *Industrial Relations Act 1979* (WA)
Result	Application struck out for want of jurisdiction
Representation	
Applicant	Mr G.E. Wright
Respondent	Ms L. Gibbs (of counsel)

Reasons for Decision

1. This is a s 29(1)(b)(i) claim before the *Industrial Relations Act 1979* ("the Act") lodged in the Western Australian Industrial Relations Commission ("the Commission") on 29 August 2005. On its face, the claim is some three days out of time. Given the claim is outside of the 28 day limit required for applications to be filed under this section of the Act, the Commission listed the claim to determine whether it would be unfair not to accept the referral out of time under s 29(3) of the Act.

Background

2. Mr Wright ("the applicant") had been employed by Henry Walker Eltin on the Fremantle Rail Loop Project for the State Government, a joint venture between Henry Walker Eltin and MVM Rail Pty Ltd ("the respondent"). In respect of the project, each company operates as a separate entity. The applicant, as an employee of Henry Walker Eltin, was responsible for traffic control on the site. This included setting up traffic devices and looking after site safety. The applicant was made redundant by Henry Walker Eltin and received redundancy provisions in accordance with the relevant Australian Workplace Agreement.

3. The applicant was provided with an offer of employment by the respondent on 24 March 2005. That offer of employment specified:

> "24 March 2005
>
> Ms (sic) Graeme Wright,
>
> This letter is to confirm our offer of transfer with MVM Rail Pty Ltd (the company) on the Fremantle Loop Project.
>
> This offer of (sic) is conditional upon you accepting the terms and conditions of the Fremantle Rail Loop Australian Workplace Agreement (AWA), which is attached for your perusal.
>
> The offer is also conditional upon Henry Walker Eltin (Administrator appointed), MVM Rail and Fremantle Ports agreeing that MVM Rail would take on the task of completing the Fremantle Rail Loop Project on its own. This agreement is expected shortly.
>
> Summarised below are the specific details of your offer of employment:
>
> .....
>
> If you agree with the conditions specified in this letter of offer and the AWA, sign them in the appropriate place (overleaf on this letter of offer and page 17 of AWA) and return both copies to the site office marked to the attention of Sean Westerby. A copy will then be forwarded to yourself for your own records.
>
> ……
>
> On behalf of MVM Rail Pty Ltd I welcome you to this project.
>
> Yours sincerely
>
> Mr Greg Ferris
>
> General Manager
>
> MVM Rail Pty Ltd"

(Exhibit G 1)

4. The applicant received a letter of termination from Henry Walker Eltin dated 22 July 2005. That correspondence read as follows:

> "22 July 2005
>
> Graeme Wright
>
> 73 Spring Road
>
> THORNLIE WA 6108
>
> Dear Graeme
>
> It is with regret that I advise you that following a review of current operations and as a result of the scaling down of the Fremantle Rail Loop Project that your position is no longer required.
>
> As a consequence, your position will be made redundant, and your employment with HWE will cease close of business on 22 July 2005.
>
> Entitlements owing to you as of the date of termination and in respect of annual leave, payment in lieu of notice and severance payments, are currently being calculated by company staff, McGrath Nichol and Partners, the company Administrators will provide you with a summary of your entitlements shortly. Upon signing the appropriate documentation, they will endeavour to process the payment of your entitlements in approximately 14 days.
>
> If you require an Employment Separation Certificate to apply for benefits from Centrelink, please contract Greg Wright of Henry Walker Eltin payroll (08) 9389 4701.
>
> Thank you for your assistance and efforts while working with the Fremantle Rail Loop Project, and on behalf of the company we wish you the very best for the future.
>
> Yours sincerely
>
> Sam Buick
>
> Human Resource Superintendent"

(Exhibit G 2)

Applicant's evidence and submissions

5. The applicant led evidence that the Commission ought exercise its discretion and accept the application out of time given that the respondent had provided the employees with offers of employment and requested they not be signed, as there was doubt as to what was happening on the site with respect to the joint venture. On the evidence of the applicant:

> "… we were all assured that no matter what we would have employment there. … at the meeting he'd - - before the group of the entire employees, the project manager, Sean Westerby, said no matter what happened to Henry Walker we would

be taken on to continue the roles we were doing, because Henrys was supplying the employment part of the contract."

(Transcript page 6)

6. The applicant gave evidence that his position as traffic controller on the site had been made redundant by Henry Walker Eltin since 22 July 2005 however, that same position had been replaced by another person. The applicant led evidence in terms of Henry Walker Eltin:

> "When MVM said I was no longer required, Henry Walker did not have another job to send me to. Therefore they had to - - you know, that - - that was the end of my contract with them. But what I'm saying, there was still work at MVM on the rail look (sic). I don't believe Henry's acted unfairly towards me."

(Transcript page 7)

7. In cross-examination the applicant informed the Commission he became aware on or about 24 March 2005 that Henry Walker Eltin, his previous employer, was pulling out of the project and it was likely the respondent would continue. The applicant gave further evidence that he did not sign the contract of employment offered by the respondent because all employees were advised to wait. The applicant did agree in cross-examination, that he was aware that the offer was conditional upon the respondent taking over the whole project. The applicant in cross-examination agreed that although the respondent had made the applicant an offer of employment, he was never actually employed by them.

Respondent's submissions

8. At the outset, counsel for the respondent raised a jurisdictional issue submitting that the Commission ought to dismiss the application on the basis that the claim was not a dismissal from employment but rather a refusal or failure to employ. The respondent conceded, that an offer of employment was made to the applicant in March 2004 however, the requisite employment relationship never transpired.

9. The Commission was referred to case law in the area in particular the decision of Beech C as he then was, in *Sharon Lee* Dean *v. Edward Beale Salon* (2001) 81 WAIG 3125 and the decision of Scott C in *Sandercock v. Powell and Company* (2004) 84 WAIG 2674. In the latter decision Scott C notes at p 5:

> "I note that the refusal to employ is an industrial matter. However, section 29(1)(b) provides that individual employees have the capacity to refer only particular industrial matters to the Commission, one of them being a claim of harsh, oppressive or unfair dismissal from employment. There is no capacity for an individual employee to refer to the Commission any industrial matter and, in this case, a refusal to employ. The only matters which can be referred to by the individual are those which relate to dismissal from employment or denied contractual benefits. As I have noted in this case, there was no dismissal."

10. The respondent sought to have the application struck out on the basis that there was no dismissal currently before the Commission.

Findings and conclusions

11. The Commission finds on the basis of uncontested evidence, that at no stage was the applicant employed by the respondent. The applicant's claim which is referred under s 29(1)(b)(i) is limited to the consideration of matters as they relate to a dismissal. That particular section provides for individual employees to refer a claim alleging harsh, oppressive and unfair dismissal to the Commission.

12. The Commission finds the circumstances surrounding the applicant constitute an alleged refusal to employ, an industrial matter that can only be referred by a union on behalf of its member. On the basis of the Commission's finding that the applicant was never employed by the respondent it therefore follows that there was therefore no dismissal. On the basis of the applicant's own evidence there was no employment relationship with the respondent. The Commission finds that the applicant was provided with an offer of employment by the respondent, an offer that was conditional upon the project being taken over by the respondent. As events transpired an employment relationship between the applicant and respondent was never realised.

13. The Commission, in making this decision, has had regard for the principle considered in a number of matters in this Commission including the decision of Beech C in *Mark Davies v. HVAC Pty Ltd* (1999) 79 WAIG 2628 when it was said of the applicant:

> "Significantly, he is not able to bring a claim to the Commission against a company that was not his employer alleging that it refused to employ him. Whilst a refusal to employ any person or any class of persons is an "industrial matter" for the purposes of the Industrial Relations Act, 1979, an individual is only able to bring a claim to the Commission that he or she has been unfairly dismissed or has been denied by his or her employer a benefit due under his or her contract of employment. Mr Davies cannot have been dismissed by a company which had never been his employer."

14. There is no capacity therefore for the Commission to consider the matter as there was no employment relationship between the applicant and the respondent. The claim by the applicant does not give rise to a claim within the jurisdiction of this Commission. It follows therefore that the claim should be dismissed.

15. The Commission orders accordingly.

2005 WAIRC 03150

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GRAEME EDWARD WRIGHT
	APPLICANT
	-v-
	MVM RAIL PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 1 DECEMBER 2005
FILE NO/S	APPL 905 OF 2005
CITATION NO.	2005 WAIRC 03150

Result Application struck out for want of jurisdiction
Representation
Applicant Mr G.E. Wright
Respondent Ms L. Gibbs (of counsel)

Order

HAVING HEARD Mr G.E. Wright on his own behalf and Ms L. Gibbs (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 this application be, and is hereby struck out.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

SECTION 29(1)(B)—Notation of—

Parties		File Number	Commissioner	Result
Allan Leonard Berg	Resolve FM	U 22/2005	COMMISSIONER J H SMITH	Discontinued
Anthony Albert Bishop	Norwest Communications and Computers Pty Ltd	APPL 357/2005	SENIOR COMMISSIONER J F GREGOR	Discontinued
Anthony Vincenzo Silvestro	Devrose Pty Ltd T/A Express Powdercoaters	APPL 736/2005	COMMISSIONER S M MAYMAN	Dismissed
Armando Daou	AGC Industries Pty Ltd	U 57/2005	SENIOR COMMISSIONER J F GREGOR	Discontinued
Belinda Mary Simmons	Universal Sodexho (Food & Management Services)	APPL 487/2005	SENIOR COMMISSIONER J F GREGOR	Discontinued
Bradley Francis Sheridan	Universal Sodexho (Food & Management Services)	APPL 486/2005	SENIOR COMMISSIONER J F GREGOR	Discontinued
Bradley John White	Carey Mining Pty Ltd	APPL 575/2005	COMMISSIONER J L HARRISON	Discontinued
Brian Cook	Auspine Limited	APPL 773/2005	COMMISSIONER S M MAYMAN	Discontinued
Bruce James Sharman	WA Hardware Services Pty Ltd	APPL 605/2005	COMMISSIONER P E SCOTT	Discontinued
Cameron Bradley Hewat	Alex Lam	APPL 617/2005	COMMISSIONER J H SMITH	Dismissed
Chomba Ngweshe	Ocean Beach Backpackers	APPL 874/2005	COMMISSIONER S WOOD	Discontinued
Chris Hansen	Goad Resources	APPL 915/2005	COMMISSIONER S M MAYMAN	Discontinued
Clayton William Phillimore	Go-Crete Pty Ltd (A.B.N. 74 052 451 626)	APPL 924/2005	COMMISSIONER S WOOD	Discontinued
Colin William Fahy	Transport Management Group t/a Southern Coast Transit	U 33/2005	SENIOR COMMISSIONER J F GREGOR	Discontinued
Darryl John Reed	D.J. & M.B. Maccormick	APPL 765/2005	SENIOR COMMISSIONER J F GREGOR	Discontinued
David George Ingram	Skilled Group Limited	APPL 740/2005	CHIEF COMMISSIONER A R BEECH	Dismissed
David Higgins	Waigun Holdings Pty Ltd T/As Vulcanoes	APPL 464/2004	COMMISSIONER J H SMITH	Dismissed

Parties		File Number	Commissioner	Result
Dawn Brown	Alexandra Boyd Pty Ltd	APPL 229/2005	COMMISSIONER S J KENNER	Discontinued
Edward James Hart	RJ & ME Byrne	U 23/2005	SENIOR COMMISSIONER J F GREGOR	Discontinued
Jacinda Hogg	Julie McGowan	APPL 739/2005	COMMISSIONER J L HARRISON	Discontinued
Jacinda Hogg	Julie McGowan	APPL 794/2005	COMMISSIONER J L HARRISON	Discontinued
Jackqualine F Webb	Gemstone Holdings Pty Ltd T/as Ockerby Real Estate	APPL 830/2005	COMMISSIONER S M MAYMAN	Discontinued
Janelle Thomas	Teresa Michael	U 54/2005	COMMISSIONER S J KENNER	Discontinued
Janet Hickman	SCA Hygeine Australasia Pty Ltd	APPL 437/2005	COMMISSIONER S WOOD	Discontinued
Jean-Claude Tomas	Bernini Stone & Tiles Pty Ltd ACN 009 335 880	U 94/2005	COMMISSIONER S M MAYMAN	Discontinued
Johannes Willemsen	Geraldton Building Services & Cabinets	APPL 718/2005	COMMISSIONER J L HARRISON	Discontinued
John Mcgavin	Southern Trading	U 82/2005	COMMISSIONER S J KENNER	Dismissed
John Stanislaw Chodorowski	City of Gosnells	U 55/2005	COMMISSIONER S J KENNER	Discontinued
Jonathan Paul Mitchell	WA Department of Education	APPL 1348/2003	CHIEF COMMISSIONER A R BEECH	Dismissed
Judith Noreen Hardwick	I.C.E. Victoria Carlton	APPL 539/2005	SENIOR COMMISSIONER J F GREGOR	Discontinued
Julia Barratt-Hill	Finemark Nominees Pty Ltd t/a Access Realty	APPL 860/2005	SENIOR COMMISSIONER J F GREGOR	Discontinued
Katrina Sandra Elsasser	Heavan Dance Club	APPL 540/2004	SENIOR COMMISSIONER J F GREGOR	Discontinued
Kellie Anne Vaughan	Amtel Ltd Pty trading as Stramit Metal Building Products ABN 79009107733	U 42/2005	COMMISSIONER J L HARRISON	Discontinued
Kellie Patricia Reid	Lionore Australia Pty Ltd	APPL 744/2005	SENIOR COMMISSIONER J F GREGOR	Discontinued
Kenneth John Weaire	Greif Australia Pty Limited (ABN 45 008 415 478)	APPL 706/2005	COMMISSIONER S M MAYMAN	Discontinued
Kerry Lee Stephens	Glenise Tutt (Principal)- Albany Real Estate Pty Ltd, T/a Terensdale Pty Ltd	B 98/2005	COMMISSIONER J L HARRISON	Discontinued
Kevin Reed	Tiwest Pty Ltd	APPL 521/2005	SENIOR COMMISSIONER J F GREGOR	Discontinued
Leah Costigan	UN Plumbing	U 90/2005	COMMISSIONER J L HARRISON	Discontinued
Lorraine Batchelor	Mr Rory Burke - Burnakura Joint Venture Meekatharra (Tectonic Resources N.L.)	APPL 826/2005	SENIOR COMMISSIONER J F GREGOR	Discontinued
Lynne Frances Conder	AME Medical Services Pty Ltd ABN 88 009 136 118 t/a Mayne Health Western Diagnostic Pathology	APPL 825/2005	COMMISSIONER S J KENNER	Discontinued

Parties		File Number	Commissioner	Result
Mark Nitschinsk	Hillside Abattoirs	APPL 705/2005	SENIOR COMMISSIONER J F GREGOR	Discontinued
Mark Raymond Sheehan	Perth Solid Surfaces	APPL 889/2005	COMMISSIONER S J KENNER	Discontinued
Matthew Silvey	Munners Pty Ltd (ACN 075 680643) T/A Ord River Roadhouse	APPL 839/2005	SENIOR COMMISSIONER J F GREGOR	Discontinued
Meryl Grace McQueen	Brett Renouf - Axis Plasterboard Linings	APPL 618/2005	SENIOR COMMISSIONER J F GREGOR	Discontinued
Michael Barry Bailey	KRB Enterprise Pty Ltd t/as Haddril Construction	APPL 811/2005	COMMISSIONER J L HARRISON	Discontinued
Michael D. Dijkman	Peter F. Robinson	APPL 914/2005	COMMISSIONER S WOOD	Discontinued
Michael Robert Weddell	Midstone Investments Pty Ltd (t/as Ken Marshall Floorcoverings) ABN 28 109 497 770	B 1/2005	COMMISSIONER P E SCOTT	Discontinued
Michael Sean Casey	AGC Industries Pty Ltd	U 56/2005	SENIOR COMMISSIONER J F GREGOR	Discontinued
Montha Inatey	Satterley Property Group	APPL 1490/2001	CHIEF COMMISSIONER A R BEECH	Discontinued
Montha Inatey	Satterley Property Group Pty Ltd	APPL 1531/2001	CHIEF COMMISSIONER A R BEECH	Discontinued
Mr Nathan McNee	Anthony & Sons t/a Oceanic Cruises	APPL 80/2005	SENIOR COMMISSIONER J F GREGOR	Discontinued
Mrs Glynis Helen Marley	Abacus Calculators (WA) Pty Ltd	APPL 1652/2004	SENIOR COMMISSIONER J F GREGOR	Dismissed
Ms Leonie Dawn Chenery	Corporate Express Australia Limited	APPL 1649/2004	SENIOR COMMISSIONER J F GREGOR	Discontinued
Nikola Mekisic	A.M.W. Projects Pty Ltd (ACN 008 725 773) as Trustee for the M.A. Amusements Unit Trust trading as Mal Atwell Leisure Group Of Care Of Prosepera Partn	APPL 648/2005	SENIOR COMMISSIONER J F GREGOR	Discontinued
Paul Frederick Davidson	Strategic Marine Pty Ltd	APPL 828/2005	COMMISSIONER J L HARRISON	Discontinued
Paul Mansfield	Proton Promotional Advertising Pty Ltd	APPL 1461/2004	COMMISSIONER S J KENNER	Discontinued
Pauline Elizabeth Heywood	Domestic Textile Corp Pty Ltd	APPL 892/2005	COMMISSIONER J L HARRISON	Discontinued
Peta Radley	Southwest Printing and Publishing Co Ltd	APPL 851/2005	SENIOR COMMISSIONER J F GREGOR	Discontinued
Peter John Cochrane	Mr Robert Caruso of Landsmart Pty Ltd Trading as Raine & Horne Southern River	APPL 884/2005	COMMISSIONER P E SCOTT	Discontinued
Philip Peter Storey	Bettarange Pty Ltd T/A Livitalia	APPL 586/2005	COMMISSIONER J L HARRISON	Discontinued
Phillip Ellery	Dampier Salt Limited	APPL 694/2004	SENIOR COMMISSIONER J F GREGOR	Discontinued

Parties		File Number	Commissioner	Result
Phillip Vile	Hybrid Holdings (t/as Blinds by Derrick Sambrook Pty Ltd)	APPL 750/2005	SENIOR COMMISSIONER J F GREGOR	Discontinued
Robert Anthony Stein	Primewave Nominees Pty Ltd (ACN 107942067) T/A H.P.G. Realty	APPL 281/2005	COMMISSIONER J L HARRISON	Discontinued
Robert John Annesley	For Wood Tools & Machinery Sales ACN 069514236 ABN 66069258183	APPL 325/2005	COMMISSIONER J H SMITH	Discontinued
Ronald Page	Hardy Wine Company Ltd	APPL 710/2005	SENIOR COMMISSIONER J F GREGOR	Discontinued
Rory Muco	Mandurah Bolt Supply	APPL 554/2005	COMMISSIONER P E SCOTT	Discontinued
Rosemary Helen Radalj	Peter Boswell - Managing Director Bostech Drilling	APPL 916/2005	COMMISSIONER S J KENNER	Discontinued
Ruth Gleeson	Peak Group Asia Pacific Pty Ltd	APPL 763/2005	SENIOR COMMISSIONER J F GREGOR	Discontinued
Sahera Arthur	Morgan & Co Pty Ltd	APPL 717/2005	SENIOR COMMISSIONER J F GREGOR	Discontinued
Selina Veronica Barker	Echo Services	APPL 751/2005	COMMISSIONER J L HARRISON	Discontinued
Stephen James Comrie	Satterley Property Group Pty Ltd	APPL 1530/2001	CHIEF COMMISSIONER A R BEECH	Discontinued
Stephen Tsalis	Lapline Enterprises Pty Ltd T/A The Blinds Gallery	U 31/2005	COMMISSIONER P E SCOTT	Discontinued
Steven James Kay-Smith	The Holiday Club Fremantle (Aussie Marketing)	APPL 855/2005	COMMISSIONER J H SMITH	Discontinued
Steven Paul Shakespeare	Lane Ford	APPL 678/2005	COMMISSIONER S M MAYMAN	Discontinued
Sydney Hatch	Boral Formwork & Scaffolding	B 83/2005	COMMISSIONER S J KENNER	Discontinued
Terrence Marlowe	Tim Francis c/o Reclaim Industries	APPL 920/2005	COMMISSIONER P E SCOTT	Discontinued
Thomas Ross Malone	Caterlink, A division of Chrystal and Co Pty Ltd	APPL 812/2005	SENIOR COMMISSIONER J F GREGOR	Discontinued
Tiernan Howard Vincent	Brierty Contractors Pty Ltd	APPL 880/2005	SENIOR COMMISSIONER J F GREGOR	Discontinued
Wayne Seagrave	Pacific Industrial Company	B 53/2005	COMMISSIONER S M MAYMAN	Discontinued
Wendy-Marie Baker	Cashcity Guildford	APPL 772/2005	COMMISSIONER S J KENNER	Dismissed

CONFERENCES—Matters arising out of—

2005 WAIRC 03208

A DISPUTE REGARDING AN ALLEGED UNFAIR TERMINATION OF OH&S DELEGATE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPLICANT
	-v-
	JOHN HOLLAND PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 1 DECEMBER 2005
FILE NO/S	C 178 OF 2005
CITATION NO.	2005 WAIRC 03208

Result	Orders cancelled
Representation	
Applicant	Mr T. Kucera, of counsel
Respondent	Mr S. Harben, of counsel

Order

WHEREAS on 14 and 19 October 2005 the Commission otherwise constituted issued interim orders ("the orders") pursuant to s. 44 which, amongst other things, required further conciliation to occur;

AND WHEREAS as a result of a conference held before me on 24 November 2005 the parties have reached an agreement in settlement of C178 of 2005 in terms set out in the letter to the parties dated 25 November 2005;

AND WHEREAS part of the agreement provides that the respondent will no longer proceed with its dismissal of Mr Kavanagh, that there will be no further proceedings in the application and that the Commission will give consideration to cancelling the orders;

AND WHEREAS the Commission requested the parties to advise it by 4.30 pm on 28 November 2005 whether they wished to be heard in relation to the Commission's consideration and neither party has so requested;

AND WHEREAS the Commission, being of the view that the circumstances leading to the making of the orders no longer apply given the agreement of the parties and that the orders are therefore nugatory, intends to cancel the orders,

NOW THEREFORE I, Chief Commissioner of the WA Industrial Relations Commission pursuant to the powers under s.27(1)(a) of the Industrial Relations Act, 1979 hereby order:

THAT the orders in this matter dated 14 and 19 October 2005 (being Orders 2005 WAIRC 02829 and 2005 WAIRC 02848 respectively) are hereby cancelled.

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

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Australian Liquor, Hospitality and Miscellaneous Workers Union of Western Australian Branch	Department of Education and Training	HARRISON C	C 114/2004	8/06/2005	Proposed termination of a Union Member	Discontinued
Australian Liquor, Hospitality and Miscellaneous Workers Union of Western Australian Branch	Challenger TAFE	HARRISON C	C 66/2004	2/04/2004	Members employment classification pursuant to the Technical and Further Education Home Economics Assistants General Agreement2002	Discontinued
Civil Service Association of Western Australia Incorporated	Director General, Department of Justice	HARRISON C	PSAC 10/2005	05/04/2005, 11/04/2005, 29/04/2005, 02/05/2005	Dispute regarding conditions of employment in the workplace for union member	Referred
Civil Service Association of Western Australia Incorporated	Director General, Department of Education and Training	SCOTT C	PSAC 44/2005	N/A	Dispute regarding the personal leave entitlements of a union member	Concluded

Parties		Commissioner	Conference Number	Dates	Matter	Result
Civil Service Association of Western Australia Incorporated	Director General, Department of Justice	HARRISON C	PSACR 10/2005	29/09/2005	Dispute regarding conditions of employment in the workplace for union member	Discontinued
Civil Service Association of Western Australia Incorporated	Director General, Department of Justice	KENNER C	PSACR 39/2005	N/A	A dispute regarding alleged denial of permanent status of a union member	Discontinued
Health Services Union of Western Australia (Union of Workers)	Honorable Minister for Health in his capacity as the Hospital Board for Metropolitan Health Services, and the Board of the South West Area Health Serv and South West Area Health Service	SCOTT C	PSAC 28/2005	N/A	contractual entitlements for a union member	Concluded
Independent Education Union of Western Australia, Union of Employees	The International School of Perth Inc	HARRISON C	C 99/2005	13/06/2005, 16/06/2005	Dispute regarding award entitlements to union members	Discontinued
Independent Education Union of Western Australia, Union of Employees	Ms Trina Corruna, Chairperson Culunga Aboriginal Community School	SMITH C	CR 88/2005	29/06/2005	Dispute regarding the dismissal of a union member	Discontinued
Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Town Inn Pty Ltd T/as Miss Maud	HARRISON C	C 129/2005	3/08/2005	A dispute regarding alleged unfair dismissal of a union member	Discontinued
Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Murdoch University	HARRISON C	C 152/2005	1/09/2005	A dispute regarding alleged unfair dismissal of a union employee	Referred
Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Director General, Department of Education and Training	HARRISON C	C 68/2005	02/06/2005, 23/06/2005	Dispute regarding commuting distance to place of employment	Discontinued
Metropolitan Health Service Board – Kalamunda Health Service	Hospital Salaried Officers Association of Western Australia (Union of Workers)	SCOTT C	PSAAG 25/1997	3/08/2005	Hospital Salaried Officers Kalamunda Health Service Enterprise Bargaining Agreement 1997	Closed
The Australian Workers' Union, West Australian Branch, Industrial Union of Workers and The Construction, Forestry, Mining and Energy Union of Workers	Tiwest Pty Ltd	KENNER C	CB 116/2005	N/A	A dispute regarding clarification of outstanding matters between the Respondent and union employees	Discontinued
The Australian Workers' Union, Western Australian Branch, Industrial Union of Workers	BHP Billiton Iron Ore	WOOD C	C 112/2005	30/6/06, 29/7/06, 21/10/05	Dispute regarding union member being stood down from work.	Discontinued
The Construction, Forestry, Mining and Energy Union of Workers	Works Infrastructure Pty Ltd	GREGOR SC	CR 108/2005	N/A	Dispute regarding termination of employee	Discontinued
The Food Preservers' Union of Western Australia, Union of Workers	Kailis and France Foods Pty Ltd	SCOTT C	C 179/2005	13/10/2005	Dispute regarding employment conditions	Concluded

CORRECTIONS—

2005 WAIRC 03029

BUILDING AND ENGINEERING TRADES (NICKEL MINING AND PROCESSING) AWARD, 1968

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIV.
	APPLICANT
	-v-
	WMC RESOURCES LTD AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S WOOD
DATE	FRIDAY,11 NOVEMBER 2005
FILE NO.	APPL 797 OF 2005
CITATION NO.	2005 WAIRC 03029

Result Correction Order

Correction Order

WHEREAS on 28 October 2005 an order in this matter was deposited in the Office of the Registrar amending the Building and Engineering Trades (Nickel Mining And Processing) Award 1968; and

WHEREAS the said order had an error in the amendment to Clause 9 Continuous Shift Employees; and

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

THAT the amendment to Clause 9 in the schedule to the Order issued by the Commission in Application 797 of 2005 on 28 October 2005 be replaced by the amendment to Clause 9 in the attached schedule.

(Sgd.) S WOOD,
[L.S.] Commissioner.

SCHEDULE

1. Clause 9. – Continuous Shift Employees: Delete subclause (7) of this Clause and insert in lieu thereof the following:

7) When an employee, without being notified on the previous day, is required to continue working after the usual knock-off time for more than one hour, such employee shall be provided with a suitable meal by the employer or be paid **$8.60** in lieu thereof.

2005 WAIRC 03093

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS
	APPLICANT
	-v-
	AMBERLEY ESTATE AND OTHERS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 21 NOVEMBER 2005
FILE NO/S	APPL 925 OF 2004
CITATION NO.	2005 WAIRC 03093

Result	Award varied. Order issued
Representation	
Applicant	Mr G Trotter
Respondent	Mr J Uphill as agent

Correction Order

HAVING heard Mr G Trotter on behalf of the applicant and Mr J Uphill as agent on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders –

THAT the Wineries Award 1969 No. 31 of 1969 be varied in accordance with the following schedule and that such variation shall have effect on and from 3 December 2005.

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

SCHEDULE

1. Delete subclause 2.4(3)(c) and insert the following in lieu thereof:

(c) The amounts must be worked out on the basis of the ordinary working hours to be worked by the employee; and

(i) The amounts payable to the employee for the hours including for example, allowances, loading and penalties; and

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

2. Delete the heading 5. ALLOWANCES AND FACILITIES and insert the following heading in lieu thereof:

PART 5 – ALLOWANCES AND FACILITIES

PROCEDURAL DIRECTIONS AND ORDERS—

2005 WAIRC 01763

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAUL MANSFIELD
	APPLICANT
	-v-
	PROTON PROMOTIONAL ADVERTISING PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 7 JUNE 2005
FILE NO.	APPL 1461 OF 2004
CITATION NO.	2005 WAIRC 01763

Result	Direction issued
Representation	
Applicant	Mr G Stubbs of counsel
Respondent	Mr L Pilgrim as agent

Direction

HAVING heard Mr G Stubbs of counsel on behalf of the applicant and Mr L Pilgrim as agent on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs –

1. THAT each party shall give an informal discovery by serving its list of documents by 21 June 2005.
2. THAT inspection of documents shall be completed by 28 June 2005.
3. THAT the parties have liberty to apply on short notice.

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

2005 WAIRC 02955

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RUSSELL ANCURIN DEWSON-JONES
	APPLICANT
	-v-
	THE WALK CAFE
	RESPONDENT
CORAM	SENIOR COMMISSIONER J F GREGOR
DATE	THURSDAY, 3 NOVEMBER 2005
FILE NO/S	APPL 619 OF 2005
CITATION NO.	2005 WAIRC 02955

Result Production of Documents

Order

WHEREAS on 16th June 2005 Russell Ancurin Dewson-Jones (the Applicant) applied to the Commission for an order pursuant to the *Industrial Relations Act, 1979;* and

WHEREAS on 4th August 2005 Deputy Registrar Judith Wickham pursuant to a delegation under Regulation 111 of the *Industrial Relations Commission Regulations 1985* conducted conciliation proceedings between the parties and conciliation being unavailing the matter was referred for hearing and determination 11th November 2005 and later amended to 12th December 2005; and

WHEREAS on 19th October 2005 The Walk Café (the Respondent) applied for Production of Documents from Russell Ancurin Dewson-Jones; and

WHEREAS on 2nd November 2005 the Commission convened a conference between the parties; and

WHEREAS having heard from the Applicant and the Respondent the Commission decided to order the Applicant to produce copies of any payment records, time sheets and/or rosters between August 2004 and May 2005; any applications or employment made by the Applicant, and/or offers of employment made to the Applicant since May 2005; and income records regarding his job at the "Atlantic" restaurant and the "Buddah Bar Curry House" in Subiaco where he was working night shifts during his casual employment with the Respondent.

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

1. the Applicant to produce copies of any payment records, time sheets and/or rosters between August 2004 and May 2005;
2. the Applicant to produce copies of any applications or employment made by the Applicant, and/or offers of employment made to the Applicant since May 2005;
3. the Applicant to produce copies of income records regarding his job at the "Atlantic" restaurant and the "Buddha Bar Curry House" in Subiaco where he was working night shifts during his casual employment with the Respondent; and
4. the Applicant to produce the above documents within 14 days of the date of this order.

[L.S.]

(Sgd.) J F GREGOR,
Senior Commissioner.

2005 WAIRC 03095

DISPUTE REGARDING ABOLISHMENT OF EMPLOYEE'S LEVEL 3 POSITION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
APPLICANT

-v-

COMMISSIONER OF POLICE
RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
COMMISSIONER P E SCOTT

DATE MONDAY, 21 NOVEMBER 2005

FILE NO PSAC 15 OF 2005

CITATION NO. 2005 WAIRC 03095

Result Discovery Order issued

Order

HAVING heard Ms J van den Herik on behalf of the applicant and Ms R Lavell on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

1. THAT within 7 days of the date of this Order, the respondent is to provide to the applicant a complete, accurate and detailed list of all the documents in its power, possession and/or control in relation to Ms Priestley's grievance and any other related issues, and
2. The list shall include the following documents:
   (a) all documents produced and/or considered by the respondent in connection with Ms Priestley's grievance or any related issue, including but not limited to any reports, notes, memorandums, briefing notes or letters;
   (b) the report or any other documents produced by Inspector Neil Royle in relation to Ms Priestley;
   (c) any documentation sent to or received from any other entity by the respondent in relation to Ms Priestley's grievance, (e.g. Police Union, Equal Opportunity Commission);
   (d) and any other document which may be relevant to the matters in question.
3. For the purpose of these orders, "documents" include any hard copy (paper) or electronic recording of information (including but not limited to e-mails), whether typed or handwritten or otherwise, whether formally filed or not.

4. The list of documents is to contain the following information on the documents.
   (a) a brief description of each and every document (purpose or document type – i.e. letter, report, email etc);
   (b) creation date of each document;
   (c) author/s of each document;
   (d) to whom the document was sent/for whom it was created.
5. Within 7 days of the applicant receiving the list from the respondent, the applicant is to provide to the respondent in writing, the numbers of the documents the applicant wishes to be produced for inspection by the respondent.
6. Within 7 days of the respondent receiving this written notification from the applicant, the respondent is to provide to the applicant with copies of all of the documents so nominated by the applicant. Such documents must be provided to the applicant in unaltered, unedited and complete condition.

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

2005 WAIRC 02876

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED **APPLICANT** **-v-** DIRECTOR GENERAL, DEPARTMENT OF JUSTICE **RESPONDENT**
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 24 OCTOBER 2005
FILE NO.	PSACR 39 OF 2005
CITATION NO.	2005 WAIRC 02876

Result	Direction issued
Representation	
Applicant	Ms S Thomas as agent
Respondent	No appearance

Direction

HAVING heard Ms S Thomas as agent on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs –

1. THAT each party shall give an informal mutual discovery by serving its list of documents within 14 days.
2. THAT inspection of documents shall be completed 7 days thereafter.
3. THAT the applicant file and serve witness statements no later than 21 days prior to the date of the hearing. Documents referred to in the witness statements are to be annexed.
4. THAT the respondent file and serve witness statements no later than 14 days prior to the date of the hearing. Documents referred to in the witnessed statements are to be annexed.

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

ENTERPRISE BARGAINING AGREEMENT—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Airmain Pty Ltd / CFMEUW Industrial Agreement 2005-2008 AG 155/2005	11/11/2005	The Construction, Forestry, Mining and Energy Union of Workers	Airmain Pty Ltd	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
Allcon Steel / CFMEUW Industrial Agreement 2005-2008 AG 165/2005	8/11/2005	The Construction, Forestry, Mining and Energy Union of Workers	Allcon steel Construction Unit Trust t/a Allcon Steel Construction	SENIOR COMMISSIONER J F GREGOR	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
C & L Ceilings P/L / CFMEUW Industrial Agreement 2005-2008 AG 218/2005	28/11/2005	The Construction, Forestry, Mining and Energy Union of Workers	C & L Ceiling Contractors Pty Ltd	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
CASC Constructions / CFMEUW Industrial Agreement 2005-2008 AG 167/2005	8/11/2005	The Construction, Forestry, Mining and Energy Union of Workers	C.A.S.C Constructions Pty Ltd	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
CDJ Carpentry and Ceiling Contractors / CFMEUW Industrial Agreement 2005-2008 AG 198/2005	8/11/2005	The Construction, Forestry, Mining and Energy Union of Workers	Craig & Donna Allan t/a CDJ Carpentry & Ceiling Contractors	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
City of Stirling (Building Maintenance Section) Enterprise Agreement 2004/2005 AG 96/2005	25/11/2005	The Construction, Forestry, Mining and Energy Union of Workers	City of Stirling	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
Civenco Pty Ltd / CFMEUW Industrial Agreement 2005-2008 AG 136/2005	1/12/2005	The Construction, Forestry, Mining and Energy Union of Workers	Civenco Pty Ltd	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
CMI Industrial Agreement 2005 AG 233/2005	21/11/2005	Combined Metal Industries, The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers-Western Australian Branch	(Not applicable)	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
Crown Construction Services / CFMEUW Industrial Agreement2005-2008 AG 172/2005	28/11/2005	The Construction, Forestry, Mining and Energy Union of Workers	The Trustee for Crown Construction Services Unit Trust t/a Crown Construction Services Pty Ltd	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
Derek Rowland / CFMEUW Industrial Agreement 2005-2008 AG 214/2005	28/12/2005	The Construction, Forestry, Mining and Energy Union of Workers	Derek Rowland Pty Ltd	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
Design Commercial Interiors / CFMEUW Industrial Agreement2005-2008 AG 169/2005	15/11/2005	The Construction, Forestry, Mining and Energy Union of Workers	Alfieri Family Trust and P & E Larsen Family Trust t/a Design Commercial Interiors	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
Distinct Carpentry / CFMEUW Industrial Agreement 2005-2008 AG 156/2005	11/11/2005	The Construction, Forestry, Mining and Energy Union of Workers	The Trustee for the Bolton Family Trust and the trustee for the Rhodes Family Trust trading as Distict Carpentry	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
Drilling & Grouting Services / CFMEUW Industrial Agreement2005-2008 AG 130/2005	8/11/2005	The Construction, Forestry, Mining and Energy Union of Workers	Drilling and Grouting Services Pty Ltd	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
G & N Conform / CFMEUW Industrial Agreement 2005-2008 AG 141/2005	1/12/2005	The Construction, Forestry, Mining and Energy Union of Workers	Corpheus Pty Ltd t/a G & N Conform	SENIOR COMMISSIONER J F GREGOR	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
G & N Formwork Pty Ltd / CFMEUW Industrial Agreement 2005-2008 AG 142/2005	1/12/2005	The Construction, Forestry, Mining and Energy Union of Workers	G & N Formwork Pty Ltd	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
Huhtamaki Australia Limited - Western Australian Site Enterprise Agreement 2005 AG 147/2005	21/10/2005	Huhtamaki Australia Limited	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch, The Shop, Distributive and Allied Employees' Association of Western Australia	COMMISSIONER J L HARRISON	Agreement Registered
Independent Living Centre of WA Incorporated Salaried Officer's Industrial Agreement 2005 AG 264/2005	7/12/2005	Health Services Union of Western Australia (Union of Workers)	Independent Living Centre of WA Incorporated	COMMISSIONER P E SCOTT	Agreement Registered
Intonhouse Pty Ltd / CFMEUW Industrial Agreement 2005-2008 AG 174/2005	28/11/2005	The Construction, Forestry, Mining and Energy Union of Workers	Intonhouse Pty Ltd	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
Keller Ground Engineering / CFMEUW Industrial Agreement 2005-2008 AG 200/2005	1/12/2005	The Construction, Forestry, Mining and Energy Union of Workers	Keller Ground Engineering Pty Ltd	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
Kleenit Metro / CFMEUW Industrial Agreement 2005-2008 AG 207/2005	11/11/2005	The Construction, Forestry, Mining and Energy Union of Workers	The Trustee for Dongray Family Trust & the Trustee for The Paul Dongray Family Trust t/a Kleenit Metro	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
La Bianca Marketing and Supervision / CFMEUW Industrial Agreement2005-2008 AG 213/2005	28/11/2005	The Construction, Forestry, Mining and Energy Union of Workers	The Trustee for La Bianca Family Trust t/a La Bianca Marketing Services	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
Levent Painting Sr P/L / CFMEUW Industrial Agreement 2005-2008 AG 204/2005	11/11/2005	The Construction, Forestry, Mining and Energy Union of Workers	Levents Home Painting & Signwriting Services Pty Ltd	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
Masterfloors / CFMEUW Industrial Agreement 2005-2008 AG 132/2005	3/11/2005	The Construction, Forestry, Mining and Energy Union of Workers	Masterfloor Unit Trust t/a Masterfloors	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
Methodist Ladies' College Non-Teaching Staff (Enterprise Bargaining) Agreement 2005 AG 258/2005	11/11/2005	Independent Education Union of Western Australia, Union of Employees, Liquor, Hospitality and Miscellaneous Union, Western Australian Branch, The Australian Nursing Federation, Industrial Union of Work	(Not applicable)	COMMISSIONER J L HARRISON	Agreement Registered
Might Construction / CFMEUW Industrial Agreement 2005-2008 AG 153/2005	11/11/2005	The Construction, Forestry, Mining and Energy Union of Workers	Might Construction Pty Ltd	SENIOR COMMISSIONER J F GREGOR	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Newave Contracting / CFMEUW Industrial Agreement 2005-2008 AG 131/2005	8/11/2005	The Construction, Forestry, Mining and Energy Union of Workers	Newave Contracting Pty Ltd	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
Newmast Commercial Painters / CFMEUW Industrial Agreement2005-2008 AG 206/2005	11/11/2005	The Construction, Forestry, Mining and Energy Union of Workers	Dalind Pty Ltd t/a Newmast Commercial Painters	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
North Coast Concrete / CFMEUW Industrial Agreement 2005-2008 AG 187/2005	28/11/2005	The Construction, Forestry, Mining and Energy Union of Workers	The Bevis Family Trust t/a North Coast Concrete	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
Onsite Engineering / CFMEUW Industrial Agreement 2005-2008 AG 127/2005	8/11/2005	The Construction, Forestry, Mining and Energy Union of Workers	Onsite Engineering Pty Ltd	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
Osborne Ceilings & Partitions / CFMEUW Industrial Agreement2005-2008 AG 157/2005	11/11/2005	The Construction, Forestry, Mining and Energy Union of Workers	Parkmead Holdings Pty Ltd trading as Osborne Ceilings and Partitions	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
Perth Concrete Cutting Services / CFMEUW Industrial Agreement2005-2008 AG 133/2005	1/12/2005	The Construction, Forestry, Mining and Energy Union of Workers	McKee, Dean Craig t/a Perth Concrete Cutting Services	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
Perth Rigging Co Pty Ltd / CFMEUW Industrial Agreement 2005-2008 AG 154/2005	11/11/2005	The Construction, Forestry, Mining and Energy Union of Workers	Perth Rigging Co Pty Ltd	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
Q Contracting / CFMEUW Industrial Agreement 2005-2008 AG 143/2005	1/12/2005	The Construction, Forestry, Mining and Energy Union of Workers	Q Contracting Pty Ltd	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
QED Fabrication Pty Ltd / CFMEUW Industrial Agreement 2005-2008 AG 171/2005	8/11/2005	The Construction, Forestry, Mining and Energy Union of Workers	Q.E.D Fabrication Pty Ltd	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
Quake Holdings / CFMEUW Industrial Agreement 2005-2008 AG 215/2005	28/11/2005	The Construction, Forestry, Mining and Energy Union of Workers	Quake Holdings Pty Ltd	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
Reo Craft / CFMEUW Industrial Agreement 2005-2008 AG 151/2005	28/11/2005	The Construction, Forestry, Mining and Energy Union of Workers	Mel Hopa and Loise Hopa trading as Reo Craft	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
Reoright Pty Ltd / CFMEUW Industrial Agreement 2005-2008 AG 168/2005	8/11/2005	The Construction, Forestry, Mining and Energy Union of Workers	Reoright Pty Ltd	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
Roofmart Certified Agreement 2005 AG 221/2005	17/11/2005	Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	Industrial Progress Corporation Pty Ltd t/as Roofmart	COMMISSIONER J L HARRISON	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
S & L Demolition / CFMEUW Industrial Agreement 2005-2008 AG 158/2005	11/11/2005	The Construction, Forestry, Mining and Energy Union of Workers	Haystead Holdings Pty Ltd trading as S & L Demolition	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
Structural Systems (Western) / CFMEUW Industrial Agreement2005-2008 AG 173/2005	28/11/2005	The Construction, Forestry, Mining and Energy Union of Workers	Structural Systems (Western) Pty Ltd	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
Supercut (WA) P/L / CFMEUW Industrial Agreement 2005-2008 AG 199/2005	8/11/2005	The Construction, Forestry, Mining and Energy Union of Workers	Supercut (WA) Pty Ltd	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
Total Reo / CFMEUW Industrial Agreement 2005-2008 AG 138/2005	1/12/2005	The Construction, Forestry, Mining and Energy Union of Workers	Total Reo Pty Ltd	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
Total Trade Services / CFMEUW Industrial Agreement 2005-2008 AG 175/2005	28/11/2005	The Construction, Forestry, Mining and Energy Union of Workers	Total Trade Services Pty Ltd	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
Traditional Scaffolding & Rigging / CFMEUW Industrial Agreement2005-2008 AG 152/2005	11/11/2005	The Construction, Forestry, Mining and Energy Union of Workers	Traditional Scaffolding and Rigging Pty Ltd	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
Tubelok Constructions / CFMEUW Industrial Agreement 2005-2008 AG 210/2005	11/11/2005	The Construction, Forestry, Mining and Energy Union of Workers	Tubelok Constructions Pty Ltd	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
Universal Commercial Cleaners / CFMEUW Industrial Agreement2005-2008 AG 195/2005	8/11/2005	The Construction, Forestry, Mining and Energy Union of Workers	Langley Scott Family Trust t/a Universal Commercial Cleaners	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
Waterproofing W.A. / CFMEUW Industrial Agreement 2005-2008 AG 128/2005	8/11/2005	The Construction, Forestry, Mining and Energy Union of Workers	The Trustee for Waterproof Trust t/a Waterproofing WA Pty Ltd	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
Wesley College (Enterprise Bargaining) Agreement 2004 AG 259/2005	22/11/2005	Wesley College, Independent Education Union of Western Australia, Union of Employees	(Not applicable)	COMMISSIONER J L HARRISON	Agreement Registered
West Australian Newspapers (Equipment Upgrade and Redundancy Agreement) 2005 AG 228/2005	1/12/2005	Western Australian Newspapers Limited	The Construction, Forestry, Mining and Energy Union of Workers, Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering & Elec	COMMISSIONER S WOOD	Agreement Registered

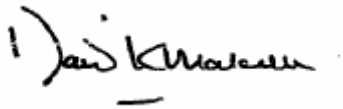
Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
West Australian Newspapers Production Employees (Enterprise Bargaining) Rollover Agreement 2006 AG 229/2005	1/12/2005	Western Australian Newspapers Limited	The Construction, Forestry, Mining and Energy Union of Workers, Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers' Union of Australia, Engineering and El	COMMISSIONER S WOOD	Agreement Registered
West Coast Coring & Sawing / CFMEUW Industrial Agreement2005-2008 AG 211/2005	28/11/2005	The Construction, Forestry, Mining and Energy Union of Workers	D & B Allcock t/a West Coast Coring & Sawing	SENIOR COMMISSIONER J F GREGOR	Agreement Registered
Western Australian Police Agency Specific Agreement 2005 PSAAG 25/2005	11/11/2005	Commissioner of Police	Civil Service Association of Western Australia Incorporated	COMMISSIONER P E SCOTT	Agreement Registered
Wroxton / CFMEUW Industrial Agreement 2005-2008 AG 159/2005	11/11/2005	The Construction, Forestry, Mining and Energy Union of Workers	Wroxton Pty Ltd	SENIOR COMMISSIONER J F GREGOR	Agreement Registered

NOTICES—Appointments—

Industrial Relations Act 1979

I, the undersigned, the HONOURABLE DAVID KINGSLEY MALCOLM AC, Chief Justice of Western Australia, in exercise of the powers conferred on me by section 85(6) of the *Industrial Relations Act 1979* (WA), DO HEREBY NOMINATE THE HONOURABLE LEONARD WILLIAM ROBERTS-SMITH, a Judge of the Supreme Court of Western Australia, to be Acting President of the Western Australian Industrial Appeal Court from 1 December until 31 December 2005 or until the completion of the hearing and determination of any proceedings his Honour may be participating in at the expiration of that period.

As witness my hand this 16th day of November 2005.



CHIEF JUSTICE OF WESTERN AUSTRALIA

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 agreement, namely the -

HSU GALLIERS PRIVATE HOSPITAL ENTERPRISE AGREEMENT 2004

NO. AG 264 OF 2004

on the grounds that there are no longer any persons employed under the agreement.

Any person who has a sufficient interest in the matter may, within 30 days of the date of the publication of this notice, object to the Commission making such order.

Please quote 317/2005 on all correspondence.

Dated this 17th day of November 2005

J. SPURLING,
Registrar.

RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 30 of 1999	Christine Faye Godchild	Albany Regional Hospital	Scott C.	Dismissed	21/11/05
PSA 12 of 2000	Heather Rose Green	Kimberley Health Service	Scott C.	Dismissed	21/11/05
PSA 36 of 2000	Lisa Suzanne Kerrigan	Geraldton Health Service	Scott C.	Dismissed	21/11/05
PSA 37 of 2000	Vanda Sue Langham	Board of Management, Geraldton Health Service	Scott C.	Dismissed	21/11/05