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NOTICES—General Matters—

2007 WAIRC 00006

LONG SERVICE LEAVE GENERAL ORDER

The *Long Service Leave General Order*, normally printed in this Gazette sub part, is no longer being produced because, with effect from 4 July 2006, that General Order was repealed by section 64 of the *Labour Relations Legislation Amendment Act 2006.* As a consequence of that amendment, any reference in an industrial instrument (Award, Order, Agreement etc) to the *Long Service Leave General Ord*er is to be read as a reference to the *Long Service Leave Act 1958 (WA).*

The *Long Service Leave Act 1958 (WA)*, in lieu of the Commission's General Order, now regulates long service leave for all Western Australian employees including those covered by Awards, EBA's, Employer and Employee Agreements, or the Minimum Conditions of Employment Act 1993.

The *Long Service Leave Act 1958 (WA)* continues to have effect notwithstanding the changes to the (Federal) *Workplace Relations Act (Commonwealth)* because that Act, at section 16(3)(f), allows the *Long Service Leave Act 1958 (WA)* to continue to have effect. Therefore the *Long Service Leave Act 1958 (WA)* applies to all Western Australian employees.

(Sgd.) J. SPURLING,
[L.S.] Registrar.

2 January 2007

FULL BENCH—Appeals against decision of Commission—

2006 WAIRC 05839

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES FISHER & PAYKEL AUSTRALIA PTY LTD

APPELLANT

-and-

KENNETH JAMES SKINNER

RESPONDENT

CORAM FULL BENCH
THE HONOURABLE M T RITTER, ACTING PRESIDENT
COMMISSIONER S J KENNER
COMMISSIONER S WOOD

HEARD THURSDAY, 9 NOVEMBER 2006

DELIVERED WEDNESDAY, 13 DECEMBER 2006

FILE NO. FBA 24 OF 2006

CITATION NO. 2006 WAIRC 05839

CatchWords	Industrial Law (WA) - Appeal against decision of Commission - Alleged harsh, oppressive or unfair dismissal - Whether Commission failed to adequately set out its findings of fact - Issues relating to assessing credibility of witnesses - Role of Full Bench in appeals against findings based on credibility of witnesses - Whether Commission properly considered documentary evidence before it - If appellant's evidence accepted in its entirety, would respondent's dismissal be harsh, oppressive or unfair - Appeal dismissed - *Industrial Relations Act 1979* (WA) (as amended)
Decision	Appeal dismissed
Appearances	
Appellant	Mr D Jones, as agent
Respondent	Mr A Lynn (of Counsel), by leave

Reasons for Decision

THE ACTING PRESIDENT:

1 I have had the benefit of reading in draft form the reasons to be published by Kenner C and Wood C.

2 I gratefully adopt the summary of the applicable principles on appeal of this type, set out by Kenner C. Kenner C has also comprehensively summarised the facts, the reasons of the Commissioner at first instance, and the grounds of appeal, which I also gratefully adopt.

3 I agree with Kenner C, for the reasons he has expressed, that grounds of appeal 1.1, 1.2, 1.5, 1.6, 1.7 and 3 should not be upheld.

4 With respect to ground 2, I respectfully agree with Kenner C that the Commissioner ought to have, but did not, clearly set out why she formed the view that the dismissal of the respondent was unfair. I also agree with Kenner C that the impact which this failing has, on the appeal overall, is bound up with the resolution of grounds of appeal 1.3 and 1.4.

5 With respect to grounds 1.3 and 1.4, I agree with Kenner C, as agreed to by Wood C, that the reasons for decision of the Commissioner do not, with respect, adequately indicate that the evidence identified by Kenner C was taken into account by the Commissioner. I think this is so despite the Commissioner saying at paragraph [43] of her reasons:-

> "*43. The Commission has considered all of the evidence and submissions presented by the applicant and the respondent in these proceedings*."

6 The difficulty with such a broad statement is that the absence of any clear reference to the documentary evidence which supported the claim of meetings and warnings leading up to and the issue of the letter of final warning on 25 February 2005 and Mr Healey's evidence about meetings with the respondent from February-August 2005, is that there remains at least the appearance that this evidence has been overlooked. Also, there is no relevant analysis of the evidence.

7 I agree with Kenner C and Wood C that the documentary evidence had the potential to impact upon the credibility findings made by the Commissioner at first instance.

8 I also agree that whether the appeal should be upheld depends upon whether the evidence I have referred to had the potential to impact upon the final decision made by the Commissioner. If it could be so categorised, then the appeal should be upheld on the basis that critical evidence had been seemingly overlooked. I also agree with the approach to the resolution of this issue, adopted by Kenner C and Wood C. This is to take the evidence in support of the appellant's case at its highest and consider whether, on this basis the Commissioner could have found in favour of the appellant, that the respondent's dismissal was not harsh, oppressive or unfair.

9 A similar approach, in the context of an inadequate statement of reasons, is referred to by Meagher JA in *Beale v GIO of NSW* (1997) 48 NSWLR 430 at 444 and the Full Court in *Mt Lawley Pty Ltd v WAPC* (2004) 29 WAR 273 at [29].

10 It is at this point that Kenner C and Wood C differ. Kenner C is unable to reach the conclusion referred to, whereas Wood C, after considering the respondent's case and the relevant evidence, decides in effect that the Commissioner would have been bound to find that the dismissal was unfair on the *Undercliffe Nursing Home v FMWU* (1985) 65 WAIG 385 test, if all relevant evidence had been set out and considered.

11 Having carefully considered the matter, with great respect to the contrary opinion expressed by Kenner C, and not without hesitation, I prefer the conclusion reached by Wood C, generally for the reasons he has expressed.

12 In my opinion, therefore, the appeal must be dismissed, despite the appellant succeeding in establishing that not all of the evidence which supported its case was adequately considered in the Commissioner's reasons.

13 As this is the view of both Wood C and I, the order of the Full Bench will be that the appeal is dismissed.

COMMISSIONER S J KENNER:

Introduction

14 This is an appeal pursuant to s49 of the *Industrial Relations Act 1979* ("*the Act*") from a decision of a Commissioner published on 21 June 2006. In that decision, the learned Commissioner upheld the respondent's claim that he had been harshly, oppressively and unfairly dismissed from his employment as a sales representative on or about 8 August 2005. The Commission at first instance concluded that an order of reinstatement of the respondent would be inappropriate and instead, made an order of compensation for loss in the sum of $39,567.75.

15 In her reasons for decision, the learned Commissioner determined the claim in the respondent's favour at first instance, on the basis of her assessment of the credibility of the witnesses who testified, and rejected the evidence of the appellant's witnesses and accepted the respondent's evidence almost in toto. In so doing, the learned Commissioner accepted the respondent's evidence that he had been dismissed without any effective prior counselling or warning by the appellant. It would appear that this was the basis for the learned Commission's conclusion that the dismissal was harsh, oppressive and unfair.

16 From that decision the appellant now appeals. The essential complaint of the appellant is that the Commission at first instance failed to adequately set out its findings of fact in relation to its credibility assessment of the witnesses who gave evidence. Furthermore, it is said that the learned Commissioner did not adequately set out her findings upon which she concluded that the respondent's dismissal was harsh, oppressive and unfair. Finally, the appellant complains that the Commission at first instance was in error in awarding six months compensation for loss when the evidence was such that on balance, it could not be concluded that the respondent's employment would have continued for that period of time.

Factual Background

17 The respondent first commenced employment with the appellant in May 1994 as a sales representative. In that capacity, the respondent's duties included calling on retailers to sell the appellant's products. The appellant is a manufacturer of white goods including cookware, washing machines, dryers, dish washers and refrigerators. In the early days of his employment, the appellant had no formal marketing plans however in more recent years, sales representatives were assigned specific territories for which they were responsible and in relation to which they received sales budgets. The respondent testified that he thought he achieved his sales budgets "*at least 50% of the time*": T6. He also said that prior to the most recent State Manager Mr Healey starting, under previous management, no issues with his performance had been raised.

18 The respondent referred to a sales award he received in April 2005 which recognised his sales performance within the appellant's "*top ten*" retail sales representatives for the 2004/2005 financial year and for which he received a $500.00 bonus. This was set out in a letter of the same date tendered as exhibit S2. Up until November 2004, the respondent's evidence was that he felt he was doing as best as he could and had no complaints about his work performance.

19 The new State Manager Mr Healey started in Western Australia in August 2004. The applicant was required to prepare and submit to the State Manager monthly reports of his activity and information obtained from retailers and so on. Additionally, representatives were required to produce a monthly call plan setting out the clients called upon during a particular month. The respondent said that a change occurred in February 2005 where he was required to change his format of call plans to a weekly basis. He was told this by Mr Sundstrum the Sales Manager, somewhat casually according to the respondent, at about this time. The respondent said "*what I do remember is I was sitting at my desk and Olly Sundstrum passed my desk and said -- oh, he'd just asked me what I was doing and I just said, "oh, some paperwork and planning for next week" and he just said, "We're thinking of going into a weekly call plan but I'll let you know more information at a later date.*": T10. The respondent did not recall any meeting on the critical date of 25 February 2005 to discuss call plans or reporting. He said "*No there was no meeting on -- no meeting as I define a meeting, no.*" The respondent affirmed that he had received no criticism whatsoever of his call plans at any stage at about that time or indeed any other time.

20 The respondent took a period of long service leave for October 2004. On his return, the respondent said his perception was that he was being alienated by Mr Healey and Mr Sundstrum. The respondent said that after his return and through the months of January and February he submitted his reports as usual. There was no adverse comment. As to the critical date of 25 February 2005 on the appellant's case, the respondent denied there was any meeting or discussion with him to counsel him about his work performance. A copy of a letter of 25 February 2005 (exhibit S7) was put to the respondent in examination in chief. This letter, which became quite central in the proceedings at first instance, was from Mr Healey and, formal parts omitted, it was in the following terms:-

> "*Dear Ken*
>
> *Recently we have discussed major performance gaps in your role as Sales Representative. In two separate meetings in December 04 and January 05, I identified specific duties within your role that were not up to a satisfactory standard.*
>
> *Duties Identified:*
>
> - *Inability to manage your sales territory*
> - *Failure to complete monthly reports on time*
> - *Failure to make regular visits or contact with accounts within your sales territory.*
>
> *These are fundamental areas of accountability for a sales representative. You are a very experienced rep and you are well aware of the company's expectations. Since these earlier meetings there have been further complaints from our customers, and admission from yourself that you are not making regular visits to your accounts, despite having ample time to do so. This is totally unacceptable.*
>
> *You are in a position of trust and you are expected to manage your time productively. I have serious reservations about your ability to do so. As from today I am requesting you to provide a written report detailing your daily activities. This must be on my desk by 5.00 pm each Monday.*

Ken, the purpose of this letter is to serve you with a final warning and advise that should there be no immediate and obvious improvement in the area stated above, Fisher & Paykel will terminate your employment.

Yours sincerely

Jason Healey

State Manager"

21 The respondent said the first he had seen this was in November 2005 at a conciliation conference before the Commission. Moreover, he said that he had not received any criticism of his work performance or counselling of any kind from either Mr Healey or Mr Sundstrum prior to February 2005. Indeed on the respondent's version of the events, he received no warnings or counselling about his performance at all until his dismissal in August 2005.

22 As to what occurred on 3 August 2005, the respondent was in Mandurah and travelling towards Bunbury. He received a telephone call from Mr Healey inquiring about his monthly report. Mr Healey also asked him whether he could be available for a meeting with him that afternoon at about 4pm. The respondent returned to Perth and met with Mr Healey in the office. Mr Sundstrum also attended the meeting. The first thing Mr Healey said was whether he enjoyed his job. Mr Healey had a manila folder with him with handwritten notes on it and some other papers. Mr Healey told the respondent that he was not happy with his August call plan that he had given to Mr Sundstrum earlier. Mr Healey also told the respondent that he was still favouring some retailers over others and a number of examples were raised. The respondent told Mr Healey that if he was not happy with the call plans he will "*fine tune it*": T21. The respondent said that Mr Healey kept referring to his over servicing of some clients and under servicing others. At a point in the meeting the respondent said Mr Healey told him "*you've been with the company for 10 years," …"you're never going to get promoted, so why bother staying?*": T22. According to the respondent, the meeting kept going around in circles and it appeared to him that Mr Healey had made up his mind that the respondent was going to leave. Towards the end of the meeting the respondent said Mr Healey told him "*I think you and I should part company*". The respondent was asked for his American Express corporate card and his security pass to the building. The respondent then packed up his gear and went home.

23 On the next day, the respondent went into the office and telephoned the Human Resources Manager Mr Puller who is based in Sydney. He explained what had happened and testified that Mr Puller told him to "*sit tight and I'll speak to Jason Healey*": T23. Later that afternoon the respondent received an email from Mr Puller to the effect that he had discussed the respondent's circumstances with Mr Healey and could not change the situation. Mr Puller's email (exhibit S8) referred to the inability of the respondent to change his practice of under servicing and over servicing accounts based on his own preferences rather than the appellant's business priorities and the future direction that the appellant wanted him to take. The respondent was paid one month's salary in lieu of notice and accrued entitlements.

24 In cross-examination the applicant again denied that he had ever been counselled or warned by Mr Healey or Mr Sundstrum about his performance at any time. Whilst he said that there may have been discussions or meetings from time to time with Mr Healey, none were for the purpose of dealing with his performance. The respondent was cross-examined about meetings said to have been held or discussions with Mr Healey on 7 December 2004, 11 January, 7 February and 25 February 2005. The respondent denied ever discussing with Mr Healey his performance on those days. The respondent was shown a copy of exhibit S11 being a photocopy of Mr Healey's manila folder with his handwritten notes on it which Mr Healey said were his notes of his various discussions with the respondent. Again the respondent denied the content of the notes.

25 The respondent also denied in cross-examination that complaints from customers at Harvey Norman Busselton were ever raised by Mr Healey. The respondent could not recall Mr Healey referring to a complaint from Retravision. The respondent also denied in cross-examination that it was Mr Healey who directed him to provide weekly call plans following the appellant's assertion of the meeting on 25 February 2005 and repeated that it was Mr Sundstrum.

26 The respondent repeatedly denied he had been given any direction to change his territory management as asserted by the appellant. Indeed, in relation to the weekly call plans that the respondent was required to submit to Mr Healey, the respondent said there was never any discussion about them: T64.

27 Exhibit S13 was a document prepared by Mr Healey for the purposes of the proceedings at first instance. The information in the exhibit was a summary of weekly reports prepared by the respondent. Those weekly reports were in evidence as exhibit S5. That is, the analysis was prepared from the activity undertaken by the respondent over a period of 16 weeks prior to the termination of his employment. The respondent accepted in cross-examination at T65-69 that exhibit S13 shows in a number of respects that he was over servicing smaller clients and under servicing larger clients with the potential for significant growth of the appellant's business.

28 Mr Burnell owns and runs an electrical retail business and had known the respondent for many years. Mr Burnell said he had been supplied the appellant's products by the respondent and always found him to be professional in his approach and serviced their business adequately. Mr Burnell accepted that his business was a relatively small account for the appellant with a turnover of about $36,000.00 a year: T83. The respondent called upon him about every three or four weeks: T84.

29 Mr Sundstrum has been employed by the appellant for about five years and joined the Western Australian operation in May 2004. Mr Sundstrum said he attended a sales meeting in November 2004 early on at the WA office, where in the presence of himself, Mr Healey and other staff, the respondent was said to have made a comment to the effect that "*he'd been with us physically for the last three years in body, but not in mind*": T86. Mr Sundstrum said that this comment caused him some concern as to whether the respondent was taking his job seriously but the matter was not raised any further at that time.

30 Mr Sundstrum was asked about the critical meeting of 25 February 2005. He said he definitely recalled a meeting between Mr Healey, himself and the respondent in the appellant's boardroom on that day. He said the purpose of the meeting was to issue a "*final warning*" to the respondent and to discuss the matter. Mr Sundstrum referred to an earlier conversation with

Mr Healey who had informed him that he was going to give the respondent a final warning because he had previously discussed his over servicing and under servicing of customers and nothing had changed. Mr Sundstrum testified that he had not been present at any of the previous discussions between Mr Healey and the respondent nor any after for that matter, February 2005. As to his recollection of this meeting the following exchange took place at T87:-

> *"Right. So the first - - the first meeting you attended was the 25th of February?- - -That's right.*
>
> *There's no doubt in your mind that there was such a meeting on that date?---Absolutely.*
>
> *And would it be surprising that Mr Skinner said that that meeting never took place at all?---Most definitely, yes, it would be.*
>
> *Right. Now, I asked Mr Skinner if he had received a written warning - - ?---Right.*
>
> *- - and he denied categorically that he had received any written warning at the meeting on the 25th of February 2005. Can you tell the Commission, in your own words, what you observed Mr Healey give to Mr Skinner?---He gave him a written letter on - - on company letterhead stating the reason for - - you know, the fact that there was a final warning due to the lack of performance.*
>
> *Did you sight the letter before the meeting was had?---No, I did not.*
>
> *Did you sight the document itself during the meeting?---Yes, I did.*
>
> *Did you recognise if it was signed by anybody?---It was signed by Jason Healey."*

31 Mr Sundstrum said that exhibit S7, the letter of 25 February 2005 from Mr Healey to the respondent, was a copy of the document which he saw Mr Healey give the respondent in the meeting: T87. He further said that he briefly saw the content of the letter prior to the meeting with the respondent starting. Mr Sundstrum said that as to its identification, "*it's definitely the same document.*": T88. Mr Sundstrum said that the original however was on company letterhead and it was signed by Mr Healey. Mr Sundstrum was asked in evidence in chief about the respondent's weekly call reports. He said that the respondent was the only representative required to provide weekly call reports and that was at Mr Healey's direction and not his. When Mr Sundstrum was asked whether he had required the respondent to prepare weekly call reports he said "*no, I didn't. definitely not.*": T89.

32 Mr Sundstrum was asked about the meeting on 3 August 2005 at the appellant's offices where the respondent was dismissed. He said that the purpose of the meeting was to terminate the respondent's employment and referred to the decision by Mr Healey that the respondent had not shown any improvement in relation to his territory management and particularly his over servicing and under servicing of customers. Mr Sundstrum referred to the respondent's view in the meeting that he did not consider the appellant's decision to be justified.

33 Mr Sundstrum said he had no involvement in performance managing the respondent. He said that whilst this was formally undertaken by Mr Healey in conversations he was not a party to, from time to time, he casually informed the respondent that he needed to "*lift his game*": T92. Mr Sundstrum also denied that he failed to respond to concerns raised by the respondent about availability of brochures and transit damage that were concerning the respondent. Additionally, Mr Sundstrum denied that there was any exclusion of the respondent from social activities. As to the meeting of 25 February 2005, Mr Sundstrum reiterated that he was in no doubt that the respondent was handed a letter by Mr Healey in a meeting held on that day and also described the respondent's response as being upset at receiving it.

34 Mr Sundstrum was asked about changes to accounts. He said that because of a relationship difficulty between the respondent and a Mr Berryman, who ran a store in Bunbury and managed one at Joondalup, the respondent was given the Bunbury store and Mr Sundstrum took over the Joondalup store. This was communicated to the respondent orally. The respondent acknowledged that the relationship between himself and Mr Berryman was a poor one: T98. Mr Sundstrum said that at the final meeting where the respondent's employment was terminated, he did not suggest any alternatives to Mr Healey.

35 Mr Sundstrum also commented about monthly reports and weekly call plans. He said they are quite different. Whilst he said he had no difficulty with the respondent's monthly reports, it was the call plans that showed the level of servicing of accounts which was the matter of concern for Mr Healey and about which he was not happy: T114-115.

36 Mr Healey has been employed by the appellant for about 9 years the most recent 18 months of which as the State Manager for the appellant in Western Australia. He referred to a meeting on or about 7 December 2004 in the appellant's boardroom at the Welshpool office. That meeting was attended by himself and the respondent. The meeting was prompted by a complaint from a customer Mr Berryman to the effect that the customer had not seen the respondent for about six to eight weeks. The other reason to meet with the respondent being his previous comment at a sales meeting in November that the respondent had been "*here in body for the last three years but not in spirit*". Mr Healey said that having analysed the respondent's monthly call plan it was evident to him that the respondent had only called on about half of his accounts for the month of November: T144. Mr Healey made notes on the inside covers of an A4 manila folder of his discussions with the respondent on that and other occasions. Mr Healey said that he considered it necessary to make some notes about his conversations but never expected they would be produced in an unfair dismissal case: T144. Mr Healey's evidence was he put to the respondent that he needs to set aside a time to visit all of his accounts as the appellant needed to grow its business with every account not just a select few.

37 A further conversation took place between Mr Healey and the respondent in early January 2005. This followed a complaint from a large retailer in Busselton to the effect that he had not seen the respondent since September 2004. Also an issue at that point was the respondent's December report being late. The respondent said he forgot about the report: T146. A further meeting took place on 7 February 2005 according to Mr Healey. The purpose of that discussion with the respondent was to raise a complaint Mr Healey had received from a major customer Retravision to the effect that the respondent's attitude was poor; he called infrequently; and did not show much interest in their business. Mr Healey said he again advised the respondent of the importance of spending time with all his accounts not just a select few: T148.

38 As to the 25 February 2005 meeting, Mr Healey said that this was prompted by a complaint from a retailer in Joondalup that he had received no visits from the respondent. At the meeting were himself, the respondent and Mr Sundstrum. As to the letter of 25 February 2005 (exhibit S7) Mr Healey said that he prepared this letter with the assistance of the appellant's Human Resources Manager Mr Puller. Mr Healey said at T151 "*The letter was prepared with the assistance of Mr Kevin Puller, our HR manager for the company. In fact the whole counselling process and warning process for the – I guess the – the 8 or 9 months that I had to counsel Ken, I was in constant communication with Mr Kevin Puller to make sure procedures were handled correctly.*" Mr Healey was cross-examined on this issue and again referred to Mr Puller having a copy of the letter as he helped Mr Healey to draft it: T191. Mr Healey was also asked in cross-examination whether he received any "*counselling*" on how to terminate an employee's employment in a suitable way and said that he was liaising with Mr Puller the Human Resources Manager: T206. The main issue for Mr Healey with the respondent was the management of his sales territory.

39 As to the period from February to August 2005, Mr Healey said that the content of exhibit S13 (his post dismissal analysis) of his territory management, that was put to the respondent in his cross-examination, was raised with the respondent between four and five times in that period. Mr Healey's concern was that over that period he had not seen any change in that aspect of the respondent's performance. In the final analysis, Mr Healey said that by August 2005 he had come to the view that the respondent was not managing his territory to grow the business and he was not responding to his various requests that he had made over many months and was therefore left with no choice but to terminate his employment: T179.

40 It was put to Mr Healey that the award given to the respondent for the 2004-2005 year to March 2005 was inconsistent with his complaints. Mr Healey said that in relative terms the respondent was less than 100% of his sales budget and the other representative was 155%. The issue for Mr Healey was the respondent not taking opportunities to develop the business in accordance with his directions.

41 In relation to the 25 February 2005 meeting in contention, a copy of an email to Mr Puller from Mr Healey was tendered in evidence as exhibit F and P3. Whilst this document was not initially discovered, and it went in late, Mr Healey said that he was in contact with Mr Puller to get advice from him how to structure the letter of warning to the respondent and Mr Puller gave him some advice on the wording. Mr Healey believed this was the day prior to the letter of warning being given to the respondent: T165. Mr Healey was cross-examined on exhibit F and P3 and said that it was discovered when he had another look through his computer files for any further documents that might be relevant. The case was Mr Healey's first court appearance and whilst he did not understand discovery before, he did now: T206.

Reasons of the Commissioner

42 After setting out the brief background to the matter and the respondent's claim, the learned Commissioner then set out the evidence and submissions adduced by the respondent and appellant. As to the respondent's evidence at first instance the learned Commissioner referred to the following:-

(a) That the respondent commenced employment on 9 May 1994 in accordance with a letter of appointment dated 6 May 1994 appointing him to the position as a Sales Representative in Perth.

(b) That prior to the appointment of a new State Manager for the respondent Mr Healey in August 2004, the respondent had never been counselled by the appellant about his performance and the consequences of not achieving sales targets were not raised with him.

(c) That on or about 5 April 2005 the respondent received an award for sales performance by way of a $500.00 bonus in respect of the 2004/2005 financial year which put the respondent in the top ten retail sales representatives for that year.

(d) The respondent denied that he had ever received a letter of 25 February 2005 which set out alleged deficiencies in his performance regarding territory management; timely monthly reporting and the regularity of visits to his sales accounts. Indeed the respondent denied that he had ever been counselled by the appellant after Mr Healey became the State Manager in any terms at all.

(e) That when on his way to Bunbury on 3 August 2005 he received a telephone call from Mr Healey inquiring of the respondent's availability for a meeting at 4pm that afternoon. The respondent did not proceed to Bunbury but duly attended the meeting also in the presence of Mr Sundstrum the appellant's WA Sales Manager. At the meeting Mr Healey said to the respondent that he was not happy with his August call plan and that the respondent appeared to be favouring certain retailers over others. At the same meeting the respondent was told by Mr Healey that he had been with the appellant for 10 years, was not going to get promoted so why would he bother staying and suggested that the respondent and the appellant "*part company*".

(f) The following day on 4 August 2005 the respondent made contact with the appellant's Human Resources Manager Mr Puller who was located in Sydney to inform him of the events of the previous day. The respondent later received an email from Mr Puller referring to his conversation with Mr Healey and that to the effect that the respondent had not adequately addressed Mr Healey's concerns and that the appellant was not prepared to let the situation continue.

(g) Reference was made to evidence of a Mr Brian Burnell an electrical retailer who had known the respondent for many years and found his approach to be professional and helpful.

43 The learned Commissioner then set out the appellant's evidence and submissions at first instance relevantly as follows:-

(a) Evidence was given by Mr Sundstrum that a meeting did take place between Mr Healey and the respondent at which Mr Sundstrum was present. At that meeting, which was convened for the purposes of issuing a final warning to the respondent, regarding under servicing and over servicing of certain accounts he saw Mr Healey hand to the respondent a letter on company letterhead which set out the reasons for the final warning arising from performance problems. Mr Sundstrum had briefly seen the letter prior to the meeting taking place.

(b) Mr Sundstrum also confirmed that the respondent was required to provide Mr Healey with weekly call reports as to his activities which requirement was not placed on other sales representatives.

(c) Mr Sundstrum was present at the meeting on 3 August 2005 with the respondent. This was described as the meeting at which "*Jason told Ken that he was to be dismissed*".

(d) Warnings were given to the respondent by Mr Healey and Mr Sundstrum was aware that Mr Healey was not happy with the respondent's performance. Although other than the meeting on 25 February 2005, Mr Sundstrum did not attend any other meetings at which Mr Healey spoke to the respondent about work performance.

(e) There was a change to a number of the respondent's accounts in 2005 in particular the Berryman's in Bunbury and the Gaynor's accounts at Balcatta and Morley. The Berryman account was taken away from the respondent because of difficulties in the relationship between the respondent and Mr Berryman. Instead the respondent was given other accounts for Retravision in Armadale and Hills Armadale. The respondent was also responsible for the Joondalup Betta account.

(f) Mr Sundstrum was generally happy with the respondent's monthly reports.

(g) Mr Healey had been employed by the appellant for some nine years and had been at the WA Branch for 18 months at the time of the respondent's dismissal.

(h) There was a meeting on 7 December 2004 between Mr Healey and the respondent at which a complaint from Mr Berryman was discussed. The complaint was that Mr Berryman as a client of the appellant had not seen the respondent for between six to eight weeks. After the meeting Mr Healey made some notes on a manila folder a copy of which were exhibit S11.

(i) Mr Healey spoke to the respondent about his territory management. His concerns were that for the month of November 2004 of his 50 accounts the respondent only called on some 25 of them. Additionally the respondent called on a number of minor accounts three times during the month. The respondent apologised to Mr Healey for these matters said he had recently returned from leave and would rectify his calling on his accounts.

(j) On 11 January 2005 another meeting was held between Mr Healey and the respondent regarding the lateness of the respondent's December report. The respondent said he forgot to submit it on time. Another reason for the meeting was to discuss a complaint from Harvey Norman Busselton which had said they had not received a sales visit since September 2004. Mr Healey said he never received a good explanation or answer for these matters put to him.

(k) There was a further meeting held on 7 February 2005 between Mr Healey and the respondent at which another complaint from an important retailer, Mr Harries of Retravision, was discussed.

44 Thereafter the learned Commissioner set out her consideration of the claim under a heading "*Commission's Analysis and Conclusions*". She said that before considering her findings, she proposed to deal with the matter of credibility. The learned Commissioner observed that it was clear that from the evidence before her, credibility was "very much an issue in these proceedings" (at [44]).

45 The learned Commissioner then said at [45] as follows:-

> "[45] *After considering the testimonies of the witnesses, as well as the evidence in general and after noting the demeanour of the witnesses and the manner in which they gave their evidence, it is the Commission's opinion that where there is a conflict between the testimony of the applicant and Mr Healey it prefers the evidence of the applicant.. The account given by the applicant is to be accepted as reliable and credible. The Commission considers that the manner in which the applicant presented his evidence was honest and straightforward. The applicant was not shaken under cross-examination.*"

46 The learned Commissioner then observed at [46] that aspects of Mr Sundstrum's evidence corroborated the applicant's recollection of the events and referred to his evidence in relation to monthly reports.

47 The Commission at first instance then turned to consider aspects of Mr Healey's testimony which she regarded as not reliable. At [47] the learned Commissioner observed as follows:-

> *"47 Mr Healey then proceeded to conveniently or otherwise fail to recall various events when asked, particularly during cross-examination. The Commission has some reason to doubt that at all times Mr Healy related the truth of events to best of his memory. The Commission noted that on occasions he was vague. At times under cross-examination he retreated from his previous position. The Commission finds that Mr Healey was not only unreliable as a witness to the disputed facts but it is also my view that portions of his testimony were intentionally reconstructed. The Commission's impression was that this was done for the purpose of presenting a more attractive version to support the respondent's contention that the applicant had received a final written warning at a meeting on 25 February 2005. If such had been the case the Commission would have expected that the applicant have remembered the event and certainly recalled having received the correspondence. There is no evidence to support the respondent's evidence and submissions on that point. The Commission therefore, places limited weight on the respondent's account where it significantly differs with the evidence of the applicant."*

48 The Commission, having preferred the evidence of the respondent based on her credibility assessment, then said that the Commission must determine whether the applicant was unfairly, harshly or oppressively dismissed. Immediately thereafter at [48] the learned Commissioner said as follows:-

> "*The Commission has no right to interfere in the decision of the respondent to terminate the employment of the applicant unless the dismissal was carried out in a manner which is either harsh, unfair or oppressive. In this particular case the Commission finds, based on the principles espoused by the Industrial Appeal Court in Undercliffe Nursing Home v. The Federated Miscellaneous Workers' Union of Australia (1985) 65 WAIG 385, that the dismissal of the applicant on 8 August, 2005 was harsh, oppressive and unfair."*

49 Having concluded that the respondent's dismissal was unfair the learned Commissioner then found reinstatement to be inappropriate and in applying *Boganovich v Bayside Western Australia Pty Ltd* (1999) 79 WAIG 8 and *Tranchita v Wavemaster International Pty Ltd* (1999) 79 WAIG 1886 assessed compensation at six months remuneration on the basis of the respondent's total remuneration of $76,358.00 per annum leading to an order of compensation in the sum of $39,567.75.

The Appeal

50 The grounds of appeal as set out in the Notice of Appeal to Full Bench are in the following terms:-

> "*1. The Commission erred in law in that it failed to adequately set out the findings of fact on which it concluded that the Applicant was a more credible witness than the Respondent's witnesses.*
>
> *Particulars*
>
> *1.1 the Commission made no findings of fact relating to the meetings that were evidenced to have taken place between the Applicant and the Respondent's Jason Healey between 7 December 2004 and 7 February 2005.*
>
> *1.2 The Commission made no finding of fact relating to the critical meeting that was evidenced to have taken place between Mr Jason Healey, Mr Olly Sundstrum and the Applicant on 25 February 2005.*
>
> *1.3 The Commission made no findings of fact relating to the evidence of Mr Jason Healey that he had further counselling meetings with the Applicant during the months preceding the dismissal in August 2005.*
>
> *1.4 The Commission gave little or no consideration to the documentary evidence supporting the Respondent's version of events in relation to the matters raised in 1.1-1.3 inclusive.*
>
> *1.5 The Commission made no findings of fact as to the credibility of the Respondent's witness Mr Olly Sundstrum.*
>
> *1.6 The Commission was selective in accepting that part of Mr Sundstrum's evidence that appeared to support the Applicant.*
>
> *1.7 The Commission's conclusion that Mr Jason Healey was an unreliable witness was not supported by the evidence of Mr Olly Sundstrum who, on matters of critical meetings, supported the evidence of the former witness for the Respondent.*

2. The Commission erred in law in that it failed to adequately set out the findings of fact on which it relied to conclude that the dismissal of the Applicant was harsh, oppressive and unfair.

Particulars

2.1 The Commission gave insufficient weight or no weight to the totality of the Respondent's evidence, that it counselled the Applicant about its criticism of the Applicant's failure to manage his sales territory in a manner that satisfied the State Manager (Mr Jason Healey).

2.2 The Commission failed to acknowledge the evidence of Mr Jason Healey, that he had given the Applicant enough chances to correct his work performance and that the dismissal of the Applicant was inevitable.

3. The Commission erred in law in awarding a compensatory amount of six months compensation, when the evidence of the Respondent supported the conclusion that the Applicant's employment would not have lasted beyond the date of the dismissal or, in the alternative, would have been terminated before a period of six months had elapsed.

4. The Appellant requests that the Full Bench:

1. Upholds the appeal and quashes the decision; or

2. Vary the decision in such manner as the Full Bench considers appropriate; or

3. Suspends the operation of the decision and remits the case to the Commission for further hearing and determination."

Relevant Principles

51 As correctly observed by the agent for the appellant, a party on appeal seeking to overturn a decision at first instance which is based on the assessment of credibility of witnesses, faces substantial hurdles. In *Devries v Australian National Railways Commission* (1993) 177 CLR 472 Brennan, Gaudron and McHugh JJ said at 479:

"*More than once in recent years, this Court has pointed out that a finding of fact by a trial judge, based on the credibility of a witness is not to be set aside because an appellate court thinks that the probabilities of the case are against – even strongly against – that finding of fact (76). If the trial judge's finding depends to any substantial degree on the credibility on the witness, the finding must stand unless it can be shown that the trial judge "has failed to use or has palpably misused his advantage" (77) or has acted on evidence which was "inconsistent with facts incontrovertibly established by the evidence" or which was "glaringly improbable" (78).*"

52 The most recent statement by the High Court on this issue appears in *Fox v Percy* (2003) 214 CLR 118 in which the court discussed the limitations imposed on an appeal court when considering an appeal based upon findings of fact. As to these issues, Gleeson CJ, Gummow and Kirby JJ said at 125-126:

"*On the one hand, the appellate court is obliged to 'give the judgement which in its opinion ought to have been given in the first instance' Deerman v. Deerman (1908) 7 CLR 549 at 561…On the other it must, of necessity, observe the 'natural limitations' that exist in the case of any appellate court proceeding wholly or substantially on the record…These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses credibility and of the 'feeling' of a case which an appellate court, reading the transcript, cannot always fully share…*"

53 These and other relevant principles were referred to by the Court of Appeal in *Skinner v Broadbent* [2006] WASCA 2 by Steytler P at [32]-[37]. These matters were summarised by the Full Bench in *Grierson v International Exporters Pty Ltd* (2006) 86 WAIG 2935 where Ritter AP at [50]-[52] said:

"*[50] The process involved for an intermediate appellate court in an appeal of this type was discussed by Steytler P in Skinner v Broadbent [2006] WASCA 2 at [32]-[37]. By reference to the relevant authorities, the President made a number of points which may be summarised as follows:-*

(a) An appellate court has a disadvantage in assessing the credibility of witnesses to that of a trial court. As stated by Lord Sumner in SS Hontestroom v SS Sagaporack [1927] AC 37 at 47, unless it is shown that a trial court has misused its advantage the appeal

court should not reverse conclusions reached, based on their own assessment of the evidence and the probabilities of the case.

(b) Kirby J criticised this approach in State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq) (1999) 73 ALJR 306 at 327 [88].

(c) Despite this, caution must be exercised in overturning findings of fact based on the credibility of witnesses. In resolving a conflict of evidence the "subtle influence of demeanour" cannot be overlooked. (Citing McHugh J in Jones v Hyde (1989) 63 ALJR 349 at 351 and Abalos v Australian Postal Commission (1990) 171 CLR 167 at 179).

(d) Steytler P quoted the reasons of Brennan, Gaudron and McHugh JJ in Devries v Australian National Railways Commission (1993) 177 CLR 472 at 479 where their Honours said a finding of fact based on credibility is not to be set aside because an appellate court thinks the probabilities are against the finding. If the finding is to any substantial degree dependent upon the credibility of a witness, the finding must stand unless the trial judge has failed to use or palpably misused his advantage or acted on evidence inconsistent with facts incontrovertibly established by the evidence or which was glaringly improbable.

(e) Even allowing for the criticism by Kirby J of the words "misused his advantage", this is a strong reminder of the difficulties facing a person seeking to overturn a finding of this kind. As a matter of logic, experience and legal authority, the appellate court must respect the advantage of the primary decision maker. (Quoting Suvaal v Cessnock City Council (2003) 77 ALJR 1449 at 1462 [73] per McHugh and Kirby JJ).

(f) As stated by Gleeson CJ, Gummow and Kirby JJ in Fox v Percy (2003) 214 CLR 118, an appeal court must perform their statutory functions even when a trial judge has reached a conclusion by favouring the witnesses of one party over another. This may lead to the overturning of a finding where incontrovertible facts or uncontested testimony demonstrate the trial judge's conclusions are erroneous or the conclusion reached was glaringly improbable or contrary to compelling inferences.

(g) As stated by their Honours in Fox v Percy, recent research has cast doubt upon the ability of judges to tell truth from falsehood from the appearance of witnesses.

(h) When deciding between competing versions of facts it is necessary for a trial judge to explain why one version has been preferred to another.

(i) It is a trial judge's duty to consider all of the evidence in a case and where important or critical evidence is not referred to an appellate court may infer that it has been overlooked or not considered.

51 Although Steytler P dissented in Skinner v Broadbent, the reasons of the other members of the court (McLure and Pullin JJA) did not differ from the President's analysis of these issues. (See also Lackovic v Insurance Commission (WA) (2006) 31 WAR 460 per Buss JA at [65]-[67]; Steytler P and Pullin JA agreeing). In the authorities referred to by Steytler P in Skinner v Broadbent there is reference to "incontrovertible" evidence and "glaringly improbable" versions of events, which are the words used in the grounds of appeal and submissions made by the appellant in this matter.

52 In paragraph [37] of Skinner v Broadbent, as referred to in (i) above, Steytler P referred to the duty to consider all of the evidence in a case and when important or critical evidence is not referred to, an appellate court may infer that it has been overlooked or that the trial judge failed to give consideration to it. The same principle applies with respect to the reasons of the Commission and the approach of the Full Bench. In paragraph [37], Steytler P referred to the reasons of Samuels JA in Mifsud v Campbell (1991) 21 NSWLR 725 at 728. On that page, Samuels JA said that "a failure to refer to some of the evidence does not necessarily, whenever it occurs, indicate that the judge has failed to discharge the duty

which rests upon him or her". The situation was different if a judge were to "ignore evidence critical to an issue in a case". When that occurred his Honour said this tended to deny the fact and appearance of justice having been done and produced a mistrial."

Consideration

54 The grounds of appeal have been set out above. Whilst particularised as complaints as to the adequacy of the findings of the learned Commissioner at first instance, in essence the appellant complains that the credibility assessment by the learned Commissioner was unsafe because she overlooked important evidence bearing upon that assessment. That proposition was developed orally in the appellant's submissions to the Full Bench.

Ground 1.1

55 The complaints as to this aspect of ground 1 are that the learned Commissioner did not make any findings of fact as to meetings between the applicant and Mr Healey between December 2004 and February 2005. In particular, the appellant at first instance alleged that there were discussions between Mr Healey and the respondent on 7 December 2004, 11 January 2005 and 7 February 2005. The appellant's case was that those meetings were to discuss a range of matters including the respondent's territory management, and various complaints received from the appellant's customers. Reference was made to Mr Healey's written notes in this regard, exhibit S11.

56 The immediate difficulty with this aspect of ground 1, as with some others, is that the Commission at first instance made an assessment of the credibility of the witnesses who gave evidence and set out that assessment at [45]-[47] of her reasons (AB26-27), part of which is set out above. On that assessment, unless it can be demonstrated that important or critical evidence relevant to that assessment was not taken into account, which I consider further below when dealing with other matters, then it is not open to the Full Bench to go behind it in the manner contemplated by the appellant. Whilst the learned Commissioner did not specify in terms of a particular finding that the conversations said to have taken place between Mr Healey and the respondent did not take place and no such meetings occurred, her rejection, of Mr Healey's testimony in toto, to the extent that it was in conflict with that of the respondent, must be taken to be a rejection of the appellant's contentions at first instance that such discussions took place.

57 It is to be noted however, that as to the meeting of 7 December 2004, the respondent's evidence was to the effect that he could not recall meeting Mr Healey on or around that time but did not specifically deny it. He did say however, that neither on that occasion or any occasion, had he been counselled as to his work performance. I note that Mr Healey in cross-examination said as to the 7 December 2004 meeting, that afterwards he spoke to Mr Puller about it: T188-189. I will return to Mr Puller's involvement when dealing with other matters below. Subject to other matters dealt with below, this complaint is not made out.

Ground 1.2

58 The Commission's rejection of Mr Healey's evidence where it differed with that of the respondent as to the meeting of 25 February 2005 again turns on the assessment by the learned Commissioner of the reliability of the appellant's evidence. It is implicit in the Commission's acceptance of the respondent's version of events that she accepted his testimony that if there was any conversation or "*meeting*" between the respondent and Mr Healey and Mr Sundstrum, then it did not concern the respondent's work performance and did not constitute counselling in relation thereto. At [47] of her reasons (AB26) the learned Commissioner preferred the recollection of the respondent as to his account of "*the events and conversation on 25 February 2005, than that of Mr Healey or Mr Sundstrum …*" Whilst it appears that she accepted that some conversation may have taken place between them on or about that day, it must be taken from the resolution of that conflict that the learned Commissioner rejected any allegation that the respondent was counselled as to aspects of his performance including territory management or otherwise. Whilst the learned Commissioner did not refer to other evidence in relation to this event, which I will deal with below, unless and until that credibility assessment is called into question on any other basis, then the implicit finding made must stand.

Ground 1.3

59 The appellant complains as to this matter, that the learned Commissioner made no findings of fact as to further counselling between Mr Healey and the respondent in the months preceding his dismissal in August 2005. In my opinion, the appellant is on stronger ground in relation to this matter. As it can be noted from the summary of the facts set out above, it was part of the appellant's case at first instance that Mr Healey had occasion to speak with the respondent about his territory management and indeed other matters, on a number of occasions between February and August 2005. It was Mr Healey's contention that the content of exhibit S13, an analysis of the respondent's territory management, although not prepared until after the applicant's dismissal, was discussed with the respondent on a number of occasions over that period. Mr Healey maintained his position as to these matters in his evidence in chief, cross-examination and re-examination. The respondent in his evidence simply denied that there had been any occasion over the period between February and August 2005, where his work performance was called into question at all.

60 Mr Sundstrum's evidence was that he was not involved in these matters. Tendered as exhibit S5 as a bundle were the respondent's weekly call plans up until the week ending 29 July 2005. It was Mr Healey's evidence that over this period, he had occasion to repeatedly raise with the respondent his propensity to over service some smaller customers and to under service larger customers with better potential for business growth. Mr Healey also gave evidence that he gave the respondent a specific direction to stop calling on "*Park Appliances*" because they no longer belonged to any buying group and that there was no future in continuing to service that business. Importantly, on exhibit S5, for the week ending Friday 11 March 2005 weekly call plan submitted to him, Mr Healey said that on that plan in the respondent's handwriting was reference to "*Last call*" against the entry for Park Appliances. Despite this, Mr Healey said the respondent continued to call on this business.

Mr Healey was also taken through the weekly call plans at some length in his evidence referring to customers that were receiving excessive visits from the respondent and others, with greater potential for business development, that were being under serviced. Mr Healey said this was contrary to his specific directions given to the respondent.

61 In the weekly call plan for the week ending 24 June 2005, at AB62 there is a handwritten notation made by Mr Healey to the following effect "*Mate, this looks like a very easy day please come and see me*". There was also further reference in Mr Healey's evidence to a weekly call plan dated 6 May 2005 where against Park Appliances the respondent himself wrote "*Don't call*". Mr Healey said that this was again reference to the respondent's continued calling on a customer he had been directed to no longer service. There was also considerable cross-examination of Mr Healey about these matters. As to some of these matters, the respondent says that there were satisfactory explanations given to Mr Healey about them. This submission is at odds with the respondent maintaining he never discussed the weekly call plans at all.

62 In her reasons for decision, summarised above, the learned Commissioner referred to the respondent's denials of any meetings or conversations held between on or about 7 December 2004 and up to and including 25 February 2005, about his work performance. In relation to the appellant's evidence at first instance, the learned Commissioner, as set out above, referred to the evidence of Mr Healey and Mr Sundstrum as to those various dates up to and including 25 February 2005. However, there is no reference to or analysis of the evidence led by all witnesses, and, for example, the content of exhibit S5, as to events which the appellant said occurred after 25 February 2005 leading up to the respondent's dismissal in August 2005. The oral evidence of the appellant, to an extent supported by the documentary evidence, as to these matters, was relevant and important evidence as to its contentions at first instance.

63 The absence of any consideration of this evidence by the learned Commissioner leads one to the conclusion in terms of the ratio of *Broadbent* and also in *Mifsud v Campbell* (1991) 21 NSWLR 725 at 728, that the failure by the Commission at first instance to consider this evidence, may lead to an inference that it has been overlooked or there has been a failure to give any consideration to it. This is particularly important in circumstances where credibility assessments are being made and which were the decisive feature of the proceedings at first instance. From a fair reading of the learned Commissioner's reasons, with due respect, it would appear from them that her consideration of the matters in contention between the appellant and the respondent included events only up to and including 25 February 2005, save for the actual events surrounding the respondent's dismissal on 8 August 2005. In my opinion, the appellant's complaints as to these matters are established.

Ground 1.4

64 The appellant's complaint as to these matters are in essence that the Commission at first instance paid no regard or insufficient regard, to the documentary evidence in support of the case as put by it.

65 As to the documentary evidence, in relation to ground 1.3 dealt with above, I have already referred to exhibit S5 in relation to the respondent's weekly reports, some of which were relevant to the appellant's case as to events between February and August 2005 and to which no reference was made by the learned Commissioner. However, more importantly, was exhibit F and P3. This document, which came in later in the proceedings, and which I have referred to above in summarising the evidence of Mr Healey, was a copy of an email from Mr Healey to Mr Puller regarding the respondent which was sent on 24 February 2005 at 1:50pm. (see AB101). This email communication, formal parts omitted was in the following terms:-

> "*Kevin, the time has come to put a 'final warning' in writing to Ken. I have never prepared a document such as this before, so I would appreciate your feedback in regards to wording. (see below)*
>
> *Dear Ken*
>
> *Recently we have discussed issues regarding your inability to perform duties associated with your role as Sales Representative. In two separate meetings December 04 and January 05, I identified duties within your role that weren't up to a satisfactory standard.*
>
> *Duties Identified:*
>
> - *Inability to manage your sales territory*
> - *Failure to complete monthly reports on time*
> - *Failure to make regular visits or contact with accounts within your sales territory*
>
> *Since these meeting there have been further complaints from our customers, and admission from yourself that you are not making regular visits to your accounts, despite having ample time to do so.*
>
> *Ken, the purpose of this letter is to serve you with a final warning and advise that should there be no improvement in the areas stated above, Fisher & Paykel will have no choice other than to terminate your employment.*
>
> *(Kevin advise on how to wrap it up..)*"

66 It was Mr Healey's evidence that he prepared the counselling letter of 25 February 2005 with the assistance of Mr Puller the Human Resources Manager. His evidence was also that he was in contact with Mr Puller to discuss matters concerning the respondent: T151. Mr Healey said in his evidence the main issue of concern was territory management: T152. Mr Healey was cross-examined about exhibit F and P3 and it was not put to him that it was a fabrication or otherwise. There was criticism, justifiably so, as to its late discovery. No application was made by the respondent for an adjournment to consider this material further. There was the full opportunity for Mr Healey to be cross-examined on the material. Additionally,

Mr Healey was cross-examined about the procedure for the termination of an employee's employment and Mr Healey said that he was liaising with Mr Puller about this matter also.

67 Mr Puller replied to Mr Healey by email the same day at 3:12pm. In it, was an attachment headed "*Skinner warning.doc*" with the message "*I've added some content to your original (which was fine by the way). I think you need to be quite tough with him at this stage and it's not unreasonable to put the pressure on in terms of tighter reporting requirements.*"

68 Given the directly conflicting testimony between the respondent and Mr Healey and Mr Sundstrum as to the meeting of 25 February 2005, in my opinion, this was important if not critical evidence as to the events as they unfolded. Whilst Mr Puller was not called by the appellant to give evidence, and I make no assessment of the credit of Mr Healey as a witness, it was important because the liaison with Mr Puller by email on that day, not challenged, was arguably consistent not just with the content of the letter of 25 February 2005 which the appellant said was given to the respondent, but also the timing of the events which took place on the following day. Mr Sundstrum's evidence was that he was emphatic that he witnessed a letter being handed over.

69 The letter in its penultimate paragraph also refers to the request from Mr Healey to the respondent to provide weekly written reporting to him which was consistent with the facts as found. The reference to "*put the pressure on in terms of tighter reporting requirements*" set out in Mr Puller's email reply to Mr Healey would appear to be consistent with such a weekly reporting regime. It is to be noted that this was not initially suggested in Mr Healey's draft letter set out in his email to Mr Puller in exhibit F and P3. The fact that the final letter produced, did contain such a direction, would seem to be consistent with Mr Puller's suggestion and Mr Healey's evidence that he spoke with Mr Puller directly about these matters. It also would seem to be consistent with Mr Healey's other testimony that he was in contact with Mr Puller about the respondent's situation generally. The Commission, in the penultimate sentence in par 48 as to the meeting of 25 February 2005 said "*There was no evidence to support the respondent's evidence and submissions on that point.*" With due respect, there was.

70 In my respectful opinion, the failure by the learned Commissioner to consider this evidence deprived her of the ability to fully assess the events of 25 February 2005 and also subsequent events as they involved Mr Puller. There is also in my opinion, a logical connection with Mr Puller's involvement as the Human Resources Manager in relation to these matters. The respondent himself communicated with him as to the events surrounding the termination of his employment.

71 It is not open in my opinion, even having regard to the undoubted advantage of the learned Commissioner in seeing and hearing the witnesses give their evidence, to adequately come to the conclusions she did without considering and analysing this evidence.

72 Additionally, there was no reference made by the learned Commissioner to the handwritten notes taken by Mr Healey on the manila folder, which set out his summary of matters raised at various times with the respondent. These notes, as exhibit S13, were not controversial to the extent that the respondent himself said that at the discussion on 3 August 2005 leading to the termination of his employment, Mr Healey had a manila folder with him with handwritten notes on it. It was not suggested to Mr Healey in cross-examination that these notes were an ex post facto fabrication to bolster his case. Whilst there is some reference in the learned Commissioner's reasons at [47] when assessing credibility, to portions of Mr Healey's testimony being "*intentionally reconstructed*" it is not clear whether that is also a suggestion that exhibit S11, being his notes, could be so characterised. It would appear that the reference in the Commission's reasons is to his oral testimony.

73 In terms of both *Broadbent*, and *Mifsud*, these materials, in particular exhibit F and P3, I consider important evidence to which no reference was made or analysis undertaken by the learned Commissioner. When taken in its totality with all of the evidence, this evidence may be said to be consistent with the case put at first instance by the appellant. These matters, taken as a whole, should have been weighed in the balance as to an assessment overall of credit but they were not. With due respect, I consider that the Commission erred in not having any regard to this material.

Grounds 1.5, 1.6 and 1.7

74 Subject to my observations as to grounds 1.3 and 1.4 above, these particulars of ground 1 allege that the Commission at first instance inadequately dealt with the evidence of Mr Sundstrum in making no findings as to his credibility as a witness. As noted above, the learned Commissioner in particular at [47] of her reasons for decision, concluded that the respondent had a clearer recollection of events than either Mr Healey or Mr Sundstrum as to the meeting of 25 February 2005. Whilst no particular reference is made to other aspects of Mr Sundstrum's evidence it seems reasonably clear from the learned Commissioner's reasons as a whole, that she preferred the applicant's recollection of events to his. Whilst it was not expressed as a negative assessment of Mr Sundstrum's credit as in the terms describing Mr Healey's evidence, nonetheless, I consider that the Commission at first instance did deal with Mr Sundstrum's evidence and simply preferred the respondent's, where it was at variance. Taken on its own, I am not persuaded that any further can be made by the appellant as to these matters.

Ground 2

75 Whilst the ground itself refers to an allegation that the learned Commissioner failed to adequately set out findings of fact in concluding the unfairness of the respondent's dismissal, the particulars advanced in support of this ground in essence raise the same or similar issues as in ground 1, concerning the weight to be given to the evidence led by the respondent and the appellant and findings of fact made, which has been dealt with above. However, in her reasons, the learned Commissioner concluded at [48] that based upon the principles dealt with in *Undercliffe Nursing Home v The Federated Miscellaneous Workers Union of Australia* (1985) 65 WAIG 385 the respondent's dismissal was harsh, oppressive and unfair. The basis for the Commission reaching that conclusion is not set out in her reasons for decision. Whilst in the third sentence of [48] the Commission indicated that it had no right to interfere in the appellant's decision to dismiss unless "*the dismissal was carried out in a manner which is either harsh, unfair or oppressive.*", as a whole, in rejecting the appellant's version of events based on the credibility assessment of the witnesses, it must be taken that the Commission concluded that the respondent's dismissal was both substantively and procedurally unfair. However, the reasons for decision do not disclose why that is so.

76 In oral submissions before the Full Bench, the agent for the appellant conceded, in my opinion correctly, that if the respondent's version of the events stood, as found by the Commission, then it was axiomatic that the dismissal would be harsh, oppressive and unfair. Whilst the learned Commissioner with respect should have set out the basis for her conclusion as to the finding of unfairness in her reasons (see: *Ruane v Woodside Offshore Petroleum Pty Ltd* (1990) 71 WAIG 913; RRIA v AMWU (1998) 68 WAIG 990), given my conclusions reached as to ground 1 above, it is unnecessary to deal with this ground any further.

Ground 3

77 In light of my conclusions as to ground 1, it is strictly unnecessary for me to deal with this ground any further either. However, where it is alleged that an award of compensation is excessive based upon the likelihood of employment continuing, then there must be a sound evidentiary basis that such a finding would be open. This matter was dealt with in *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 79 WAIG 8 where the Full Bench determined relevant principles in relation to the assessment of compensation on a finding of harsh, oppressive and unfair dismissal. Whilst *Bogunovich* was decided prior to amendments to s23A of the Act dealing with the powers of the Commission on claims of unfair dismissal made by Amending Act No. 20 of 2002, in my view, given s23A is in substantially the same terms as it was prior to the amendments, then the approach set out in *Bogunovich* ought continue to apply. In that matter, when considering future loss, Sharkey P said at [9]:

> "*(q) As to deciding questions of future loss, assistance can be derived from Malec v J C Hutton Pty Ltd 92 ALR 545 (HC), where Deane, Gaudron and McHugh JJ held that the court must assess the degree of probability that an event would have occurred or might occur, and adjust its award of damages to reflect the degree of probability.*
>
> *Unless the chance is so low as to be regarded as speculative or so high as to be practically certain, the court will take that chance into account in assessing the damages.*
>
> *That is the sort of expression principle that, to some extent, is of assistance in deciding what is the future loss causally connected to an unfair dismissal.*"

78 Additionally, I also commented on the same issue and said at [13] as follows:

> "*As to loss and injury, it is not the case that an applicant who has been found by the Commission to have been unfairly dismissed, and who is to be awarded compensation, is automatically entitled to an award of compensation for loss representing the loss of wages or salary from the date of dismissal to the date of the hearing. That may be the ultimate outcome after findings are made and an assessment by the Commission, as to the quantum of compensation having regard to s 26 of the Act and factors such as the employee's duty to mitigate his or her loss. All the circumstances of the case need to be considered. For example, it well may be that despite the Commission's finding that the dismissal was harsh, oppressive and unfair, it was characterised as such by reason of the manner or process leading to the dismissal rather than the substantive reasons for the dismissal itself, in the sense in which that principle is referred to in Shire of Esperance v Mouritz (1991) 71 WAIG 891. In such a case, it may be open to find as a fact on the evidence, that the unfairly dismissed employee could have been fairly dismissed by the employer shortly after the actual dismissal in any event. In a case such as this, it would be open for the Commission to find that the unfairly dismissed employee's loss is limited to that period between the date of the employee's actual dismissal, and when he or she could have been fairly dismissed in any event.*
>
> *In the same context, the circumstances of the case may be such that it is open for the Commission to find, that based upon the evidence before it, it was more likely than not that but for the unfair dismissal, the employee may have left the employment of the respondent voluntarily at some future time. Alternatively, it may well be that in accordance with an unfairly dismissed employee's duty to mitigate his or her loss, that the employee obtains other employment immediately or a short time after the dismissal. In such a case, there may be no loss or indeed only minimal loss caused by the unfair dismissal, and the Commission could find accordingly.*"

79 In this case there was no evidence that the respondent was looking elsewhere for employment. There was also no evidence that for some other good reason, the respondent's position as a sales person was going to cease being required to be done by anyone. For there to be consideration of the on going employment of the respondent in this matter, beyond the actual dismissal, there would need to be evidence capable of characterisation as more than mere speculation and that there was a real prospect of the employment being terminated fairly at some point thereafter in any event.

A Final Matter

80 In light of the conclusions above as to the errors identified in the decision of the learned Commissioner, a final question arises as to whether if the appellant's evidence were accepted in its entirety in preference to that of the respondent, whether the

dismissal of the respondent would none the less be harsh, oppressive and unfair in any event. If that were so, then the appeal should not be upheld as the ultimate outcome would be the same.

81 I cannot conclusively come to that decision on the balance of probabilities based on all of the material before the Commission at first instance. Against the appellant, is the fact that in April 2005 the respondent received a sales award for his sales performance over the 2004-2005 financial year. Furthermore, is the fact that the final warning was given to the respondent in late February 2005 but it was not until some months later that he was dismissed. It might be said that on one view the appellant had by the passage of time, eroded the significance of the February 2005 counselling and combined with the bonus in April 2005, any criticisms of the respondent's performance had been negatived. As against this, is the position of Mr Healey that he continued to raise the issue of territory management with the respondent as a senior sales representative with many years experience who did not address his concerns and failed to follow his specific directions.

82 The resolution of this matter is not without some difficulty. However in considering all of the factors, including the fact that the respondent was a senior and experienced sales representative, I cannot conclude on balance that the outcome would be no different had all of the appellant's evidence been accepted at first instance.

Conclusion

83 I would therefore order that the appeal be upheld. It would be inappropriate for the Full Bench to exercise its power to vary the decision at first instance given it has not had the benefit of seeing and hearing the witnesses give their evidence. It seems to me that in these circumstances the only appropriate order is that the decision be quashed.

COMMISSIONER S WOOD:

84 I have had the benefit of reading the draft reasons for decision of Kenner C. I agree, with due respect, that the learned Commissioner, at first instance, erred in that she failed to adequately take into account certain evidence which could have had a material bearing on the issue of credibility. Exhibit F&P3 could lead to a conclusion that a letter of final warning was issued to Mr Skinner on 25 February 2005. I join in the reasons of Kenner C on that issue. The only reference in the learned Commissioner's decision at first instance, which displays that this exhibit may have been considered, is the mention in paragraph [47] that:-

> "*The Commission finds that Mr Healey was not only unreliable as a witness to the disputed facts but it is also my view that portions of his testimony were intentionally reconstructed. The Commission's impression was that this was done for the purpose of presenting a more attractive version to support the respondent's contention that the applicant had received a final written warning at a meeting on 25 February 2005*."

85 It is not clear from this passage that the Commissioner had specific regard for this exhibit, and if so, what weight it was given. The passage may be a general reference to a consideration of Exhibit F&P3, and Mr Healey's associated evidence, but it is not sufficiently clear.

86 Kenner C raised also the question as to whether, if the appellant's evidence were accepted in its entirety, would the dismissal of Mr Skinner be harsh, oppressive or unfair. I respectfully reach a different conclusion.

87 This issue was put to Mr Jones, agent for the appellant, at the appeal hearing. Therefore, if one considers the appellant's case at its highest, can one reach the conclusion that the dismissal was harsh, unfair or oppressive? The appellant's case is that Mr Skinner refused to improve his territory management, his management of clients, in the face of a final warning and regular counselling. It is said that Mr Skinner refused to follow the direction by Mr Healey to spend less time on customers he was comfortable with and to service more profitable customers. Mr Jones submitted, in respect to evidence of Mr Skinner being rewarded for his performance, that if Mr Skinner had responded to Mr Healey's directions he would have improved his performance from 93% of budget to closer to that of his colleague, Mr McIntosh, namely 155.9% of budget.

88 Mr Sundstrum and Mr Healey gave evidence for the company at first hearing. It is Mr Sundstrum's clear evidence that Mr Healey, and not he, was responsible for reviewing and managing the performance of Mr Skinner, including the weekly reports. Mr Sundstrum did attend meetings with Mr Skinner and Mr Healey when a final warning was issued and when Mr Skinner was dismissed. With one exception Mr Sundstrum's evidence was largely supportive of Mr Healey's evidence. Mr Sundstrum does say that Mr Skinner was taken aback by his dismissal, whereas Mr Healey says he was not surprised. Mr Sundstrum says:-

> "*I just couldn't believe it because he'd been given every opportunity to improve his call plan, his - - his calling on accounts over the - - over the - - you know, over a fairly decent period and when it was again given to him, he was - - you know, "I can't work this out", which I found bizarre.*"

89 Nevertheless, it is really the evidence of Mr Healey, about Mr Skinner's performance, which needs to be assessed.

90 Mr Healey commenced in his position of State Manager for Western Australia in August 2004. Under cross-examination Mr Healey says that the previous State Manager had commented to him that Mr Skinner was "*a bit of a plodder*". Mr Skinner was on leave for the month of October 2004. Mr Healey says that Mr Skinner made a comment in a sales meeting in early November 2004, that he had been "*here*", meaning in the employment of the respondent, for the last three years in body but not in spirit. Mr Healey did not take Mr Skinner to task at that time; he says he let the comment go and just digested it.

91 Mr Healey gave evidence that he has a perfect memory of his meetings with Mr Skinner. He says that he would speak to Mr Skinner on a daily basis as a sales representative. He first met with Mr Skinner to discuss his performance on 7 December 2004. Mr Healey wanted to discuss a complaint from Mr Clive Berryman that he had not spoken to Mr Skinner for 6 to

8 weeks. Mr Berryman was a customer with "*potentially quite a large account*". He also wanted to take Mr Skinner to task on the comment he made at the sales meeting in November.

92 Mr Healey's evidence is that he made notes on a manila folder of meetings he had with Mr Skinner on 7 December 2004, and in January and February 2005 [Exhibit S11]. The notes made on the manila folder are as follows:-

"

Meeting with Ken

7th December 04 — *Spoke to Ken about territory management no call to Bunbury in November, called on 25/50 A/C's for the month. Calling on minor stores twice. Lied to me stating he had spoken to Clive Berryman, when he hadn't. Ken from his own admissions said he had taken 'a while' to get motivated after returning from holidays."*

Amex

Front Door Card

Computer

Phone

Price book

Car? — *Long Service*

5/10 – 29/10

11/1/05 — *No December report /*

Busselton no call since Sep → Jan ↗ another verbal warning

5/1 - 25/2 Next

7/2 — *Bill Harries*

- *Calls inconsistent 6 – 8 weeks apart*
- *No training despite requests*
- *Speaks poorly of F&P*
- *Shows no interest in building sales despite being given 'green light'.*

13/2 — *Complaints from Clive Berryman that Ken hasn't called at Joondalup Betta for at least 6 months (Re email)*

25/2 — *Discussions with Ken (Olly present)*

1.45 pm — *Re: Clive Berryman's complaint, Ken has admitted that he hasn't been calling. Handed letter of final warning, which Ken understood areas identified as unacceptable. Ken now will report weekly calls and activities to me on a weekly basis*."

93 At the meeting on 7 December 2004 Mr Healey also spoke to Mr Skinner about territory management, in that Mr Skinner had visited only half his accounts in the previous month. He had visited minor accounts three times during the month, as opposed to potentially more valuable accounts, and had not visited Bunbury. Mr Healey says that Mr Skinner lied to him about speaking to Mr Berryman. He says that Mr Skinner apologised for doing so and said that it had taken him a little while to get back into the job after he had returned from leave. Mr Healey says that Mr Skinner agreed that he needed to call on all his accounts and rectify this straight away.

94 Mr Skinner handed in his December report a week late. Mr Healey says that he had to put in his monthly report to the Melbourne office without Mr Skinner's information. Mr Healey described Mr Skinner's late monthly report as being "*good*". Mr Skinner said that he had forgotten and had got caught up in the season's festivities. Mr Healey says he felt as if Mr Skinner was testing him. Mr Healey spoke to Mr Skinner again on 11 January 2005 about the late report and about a complaint from Harvey Norman in Busselton that the store had not received a visit since September 2004.

95 Mr Healey says that he next met with Mr Skinner on 7 February 2005. Mr Healey had received a complaint from Mr Harries, the national chairman of Retravision. Mr Harries complained that he was disappointed with Mr Skinner's attitude to his account and his job. Mr Skinner had spoken poorly about the respondent's management, showed no desire to grow Mr Harries' business and called infrequently. Mr Healey says that Mr Skinner's response was that he had never seen eye to eye with Mr Harries. Mr Healey says that he counselled Mr Skinner about needing to spend time with all his accounts.

96 Mr Healey next met with Mr Skinner on 25 February 2005 to discuss an email [Exhibit S10] from Mr Berryman about the lack of servicing to his Joondalup store. Mr Skinner's reply was, "*Yes, that would be right*". Mr Sundstrum was at the meeting as Mr Healey wanted to hand Mr Skinner a signed letter of final warning [Exhibit S7]. Mr Healey says that the letter was prepared with the assistance of Mr Puller, the respondent's human resources manager. Mr Skinner argued the points in the letter. Mr Skinner eventually agreed that he was over-servicing mainly Fridge and Washer City stores and not giving attention

to other stores in his territory. Mr Skinner was told that there would be no further problems if he would change his territory management.

97 Mr Healey in evidence says that the notes on his manila folder were made after his meetings with Mr Skinner (T144). These notes include reference to 13 February 2005, mention Mr Berryman's complaint and refer to an email. Exhibit S10 is an email from Mr Berryman to Mr Healey dated 23 February referencing a telephone conversation "*the other day*" about the lack of service to the Joondalup store.

98 Following the final warning Mr Skinner, and only he, then had to report on his calling patterns weekly. Mr Healey says that Mr Skinner complied with this instruction. Mr Skinner's reporting was generally good. The weekly reporting was so that Mr Healey could evaluate whether Mr Skinner had taken on board the instruction to change his ways. Mr Healey says that it was clear from the weekly reports that Mr Skinner did not change his ways. Mr Healey says he definitely spoke to Mr Skinner three times between 25 February and 3 August 2005, maybe four times, about his call patterns. Mr Healey spoke to Mr Skinner in April, but he cannot be certain. He told him not to visit Park Appliances because his time was better spent on major accounts. Mr Healey denies that he ever gave Mr Skinner permission to visit Park Appliances. Mr Healey says that Mr Skinner was stuck in a habit of calling on stores he got on well with. His accounts were actually going backwards. Mr Healey referred to a summary of Mr Skinner's call patterns as a clear indication that Mr Skinner had over-serviced less important accounts. Mr Healey complains that Mr Skinner did not change his call patterns notwithstanding their discussions.

99 I note that there are no notes in Mr Healey's manila folder that cover any date post 25 February 2005. Mr Healey says that he had meetings with Mr Skinner on at least three occasions in the period between the final warning and termination. There are some other notations which appear somewhat out of sequence. They refer to Amex, front door card, computer etc and appear under the entry of 7 December 04. These notations would seem to relate to Mr Skinner's termination.

100 Mr Healey says also that Exhibit S13 is his summary of Mr Healey's weekly reports and it, "*reinforced what I was counselling him about over the 8 or 9 month period*". In the section marked other observations, Mr Skinner says, "*Analysis of Ken's weekly reports …… This behaviour was unable to be changed despite verbal warnings and counselling in April and June 04*".

101 I note also that there is a degree of inconsistency between Mr Healey's evidence concerning his discussions with Mr Skinner and the respondent's Reply to Applicant's Claim [AB13-14]. The reply reads as follows:-

> "*1. The Respondent admits paragraph 1-19 inclusive of the Applicant's Particulars of Claim ("the claim").*
>
> *2. The Respondent does not admit paragraph 20 of the claim.*
>
> *Particulars*
>
> *2.1 The Applicant had been employed in the role of a Sales Representative since 9 May 1994.*
>
> *2.2 The Western Australian State Manager (Jason Healey) had cause to counsel the Applicant on 7 December 2004, 11 January 2005 and 7 February 2005 arising out of customer complaints about his under-servicing of important clients and failure to submit his regular monthly activity reports for December 2004*
>
> *2.3 These consultations resulted in the Applicant being issued with a final warning dated 25 February 2005.*
>
> *2.4 That written warning amongst other matters raised for his attention required the Applicant to submit a detailed weekly activity report each Monday.*
>
> *2.5 His weekly reporting indicated a lack of planning and effective time management. It became a source of criticism between Jason Healey and the Applicant. It ultimately resulted in Jason Healey directing the Applicant not to call on a particular account.*
>
> *2.6 Despite this instruction the Applicant continued to call on the account because the owner was his friend.*
>
> *2.7 The Respondent did not notice any improvement in the Applicant's performance of his duties after the written warning in February 2005.*
>
> *2.8 Consequently, on 8 August 2005, Jason Healey and the Sales Manager met with the Applicant and terminated his employment on the ground that he had continued to discharge his duties in contradiction of the express direction of Jason Healey and had demonstrated no improvement since the written warning given to the Applicant in February 2005.*

> *2.9 The Respondent rejects the Applicant's contention that the termination was unfair because he had not been given any notice of inadequate performance of his duties.*
>
> *3. The Respondent notes paragraphs 21-24 inclusive and objects to the remedies being pursued pursuant to s.23A of the Act.*"

Nothing was made in cross examination of this inconsistency at first instance and hence I take that matter no further.

102 In April 2005 Mr Skinner received a bonus of $500. He was later listed in the top ten sales people for the respondent in Australia. Mr Healey says of Exhibit S2, dated 5 April 2005, that Mr Skinner was in the top ten sales people in Australia for that financial year. The top ten sales list ran from 1 April 2004 to 31 March 2005. Mr Healey says Mr Skinner had a very good month in the last month of the financial year. Mr Healey says of Exhibit S3 that Mr Skinner was at 93% of budget and Mr McIntosh, another sale representative in Western Australia for the respondent, was at 155% of budget. He says that this was a period where Western Australia was the best performing state and that, "*Mr Skinner should be doing a little bit better than what he was*". He says that Mr Skinner, similar to Mr McIntosh, should have been overachieving on his budget. He was not achieving as he should because he was not managing his territory properly.

103 Exhibits S4 and S5 were Mr Skinner's monthly and weekly reports respectively. The monthly reports were completed by all sales representatives. The only time that Mr Healey made any criticism of Mr Skinner's monthly report was when he did not hand in his December 2004 report on time. The monthly report covers the sales activity over the previous month. There is also a call plan for the month which displays the expected call pattern for the forthcoming month. The weekly report was only completed by Mr Skinner. These weekly reports were completed in arrears. Mr Healey requested these weekly reports because he says, "*I had problems with the way he was managing his territory and I wanted to see on a more regular basis where he was going and what he was doing with his time.*" Mr Healey says that the instruction to complete weekly reports was given in the final warning letter of 25 February 2005. The weekly call plans operated from 28 February to 29 July 2005. Mr Healey says that Mr Skinner did not change his ways. He continued to over-service favoured accounts and under-service other accounts of equal or more importance. He continued to call on Park Appliances even though he was instructed not to do so. The latter point is displayed on the weekly call sheet of 8 March 2005 in Mr Skinner's writing with the words "*Last call*" against Park Appliances. He says that he did not give Mr Skinner permission to call on that store to have a cup of coffee. Then on the sheet of 6 May 2005 Mr Healey has written "*Don't call*" against Park Appliances. In Exhibit S13, which was compiled after Mr Skinner's dismissal, Mr Healey says of Park Appliances, "*Ken was verbally warned a 2nd time to stop calling, only to disobey my orders and call again on 29/7*".

104 Mr Healey says of the weekly reports that between 25 February and 3 August 2005 he expressed dissatisfaction to Mr Skinner about his calling pattern. He says that they discussed Park Appliances and he reminded Mr Skinner that he had requested that the store not be visited. He says also that there were accounts which Mr Skinner was visiting more than others. He says that he recalls that Mr Skinner visited Fridge and Washer City, O'Connor, three times in three weeks. He says that he spoke to Mr Skinner four or five times in that period about his call plans. He did not witness any change in Mr Skinner's behaviour whatsoever.

105 There was a salary review in July 2005 and Mr Skinner's salary was increased. Mr Healey says that it was more of a goodwill gesture and that Mr Skinner received a 2% increase, whereas the balance of the staff in Western Australia received a 5% increase.

106 Mr Healey says that by August 2005 he had had enough. He says that he was at his wit's end and that Mr Skinner was not responding to his requests. He called Mr Skinner to a meeting on 3 August 2005 at 4pm. Mr Sundstrum was present and Mr Healey says that he went over Mr Skinner's performance with him, the previous warning and the lack of change. He told Mr Skinner that he was terminating his employment. Mr Skinner argued the point and did not want to leave the company. Mr Healey says that he could not have given Mr Skinner any more chances as he was holding back the company. Mr Skinner remained until the Friday to clear up matters and was paid 4 weeks' notice. Mr Skinner requested and was given permission to use the company car until the Monday following his termination. Mr Skinner spoke to Mr Puller to try and change the decision, but to no effect.

107 Mr Healey says that he formed the view that he may have to dismiss Mr Healey in late July. (T187). Mr Healey says he made the decision the night before to dismiss Mr Skinner. He went through the notes he had tendered and the weekly call reports in making the decision. Mr Skinner offered to conduct a call plan to specific directions but Mr Healey says that it was too late. He says that Mr Skinner was in denial. He says that Mr Skinner was not surprised.

108 The above describes adequately the appellant's evidence at its highest. To summarise the appellant's case then Mr Skinner was an employee of some 11 years. The complaint of the appellant is that Mr Skinner did not manage his territory properly, to the disadvantage of the appellant's business. He did not change his practices notwithstanding a final warning and several subsequent incidents of verbal counselling (somewhere between 3 and 5 times). Mr Healey after almost a year had reached his "*wit's end*", was tired of Mr Skinner failing to follow direction and hence terminated his employment. There appears also to be a situation whereby Mr Skinner had lost his focus at the company and was there in body but not in spirit. Put in this context the dismissal of Mr Skinner is not one which justifies the intervention of the Commission.

109 However, I do not consider this to be a fair assessment of the respondent's evidence. Mr Skinner had been a good employee for the bulk of his employment. On the evidence, there is no actual complaint about his services until December 2004 other than Mr Healey says he was told that Mr Skinner was a "*plodder*". The December discussion between Mr Healey and Mr Skinner arises from a comment Mr Skinner made at a sales meeting, a complaint from Mr Berryman about the lack of service and an accusation that Mr Skinner had lied to Mr Healey about speaking to Mr Berryman when in fact he had not. Mr Skinner

then handed in late his December report. Mr Healey complains that Mr Skinner was testing him. This suggests some tension existed in the relationship, and that Mr Skinner was not seeking to comply with directions. Mr Healey received also a complaint from Harvey Norman in Busselton about a lack of service. Mr Healey again spoke to Mr Skinner. There are other negative comments listed in Exhibit S11 which were made by Mr Healey.

110 Mr Healey had occasion to speak to Mr Skinner again on 7 February 2005. Mr Skinner is said to have received another verbal warning. Mr Healey had received another complaint this time from Mr Harries, the national chairman of Retravision. Mr Harries was disappointed about Mr Skinner's attitude to his job and to his account. The notes and evidence say that Mr Skinner spoke poorly about his employer. Mr Skinner was counselled that he needed to spend time with all his accounts. Mr Healey then received an email from Mr Berryman about the lack of service provided by Mr Skinner to his store in Joondalup. That prompted a strong response, namely Mr Healey issued Mr Skinner with a final warning.

111 What is of particular importance is what happened thereafter. This is the point of submissions made by Mr Lynn for the respondent to the Full Bench. In the space of some three months (December 2004 to February 2005) Mr Healey had responded quickly and largely to complaints. He counselled Mr Skinner several times and then issued a final warning. He made notes of these meetings and, at least after the December meeting, discussed his notes with Mr Puller, the human resources manager. Following this Mr Skinner was the only salesperson placed on weekly reports. Mr Healey did this to more closely supervise Mr Skinner, in particular, to supervise the stores which he visited and the frequency of these visits. That is the information provided in the call plans and that is the prime complaint of the respondent. Mr Jones in his submissions to the Full Bench emphasised that point.

112 In March 2005, directly after the final warning, Mr Skinner had a particularly good month in sales. This evidence is provided by Mr Sundstrum and Mr Healey to downplay the fact that Mr Skinner made the top ten list on the national chart of salespersons for the year. The year ended in March. They say he only reached that position for the sales year because of his March sales. A proper reading of the appellant's evidence is that the appellant's witnesses give Mr Skinner little credit for improving his sales in the month; i.e. directly after he had received a final warning. A more commonsensical way to look at the behaviour is that Mr Skinner responded positively in his sales directly after receiving a final warning. Mr Skinner received the reward of a $500 bonus in April for his efforts.

113 Mr Lynn submitted correctly that in four months of weekly reports, there are only two obvious complaints registered by Mr Healey. One is that Mr Skinner continued to visit Park Appliances, though he was instructed not to do so; and on one occasion he had an easy day of visits (see T193-194). Mr Healey did not answer directly under cross-examination whether there were legitimate reasons for that day. There is no record of a complaint from a customer about Mr Skinner during this period.

114 Mr Healey says that during this four month period he continued to counsel Mr Skinner about his territory management. He says he did so somewhere between 3 to 5 times. There is little detail to those discussions. There were no notes made as were apparent in December, January and February. Mr Healey says that he made the notes originally as he might have had to refer to them later. There were no such notes made of any discussion in the period March to August 2005. There are simply a lot of ticks and an occasional comment made on the weekly reports. Mr Healey had ample opportunity in giving his evidence to elaborate on his discussions during this period. He simply referred to Park Appliances, summarised the period as Mr Skinner failed to change his ways notwithstanding the discussions he had with him. This is adequately shown in Mr Healey's re examination and questioning by the Commission:-

> "*MR JONES: - - your analysis. And it was put to you in a hypothetical sense that if Mr Skinner was made aware of these things prior to the actual dismissal he may have changed his - - his call patterns to suit. Did you ever discuss with him the substance of your analysis during the time between February and August when you dismissed him?---It was discussed - - on observation of his weekly reports it was quite clear that he was still revisiting the same accounts over and over on a more regular basis than other accounts so that was discussed verbally and he was counselled verbally.*
>
> *How many times do you recall these verbal discussions?---Four times.*
>
> *In the months of when?---Would have been months of April, May, June and July. (T210)*
>
> *MAYMAN C: When you raised and discussed the issue in relation to this counselling in May, can you tell the Commission what you said?---I think in May there was - - the Parks Appliance issue came up again, that I noticed that Ken had called there after being told on two previous occasions not to and if my memory serves me right it was also just something that I noticed on his weekly call plans or - - yeah, his weekly call plans, that he was still visiting the same retailers too often and not visiting others.*
>
> *And what did you say in June?---June was once again just, that was about his weekly call plans.*"

115 As at 10 July 2005 Mr Skinner was number 6 on the national sales team list and had performed at 93% of his sales budget [Exhibit S3]. Mr Healey's evidence is that he should have done better as Western Australia was the best performing state and Mr Skinner's colleague, Mr McIntosh, was at 155.9% of his budget. Shortly after this Mr Skinner received a pay rise. Mr Healey says that was simply a goodwill gesture and Mr Skinner only received a 2% rise, whilst others typically received a 5% rise. Shortly after that Mr Skinner was dismissed. In fact Mr Healey says he thought about dismissing Mr Skinner in late

July. Mr Healey says simply that he reviewed his notes and the weekly call plans and decided to terminate Mr Skinner's employment.

116 The weekly call plans must take on some prominence. They were the tool devised by Mr Healey for supervising Mr Skinner's performance. Mr Healey was clearly able to and did give Mr Skinner specific directions. He told Mr Skinner not to visit Park Appliances and complains that Mr Skinner continued to do so. There is no other evidence of any specific direction. However, Mr Healey constructed a chart [Exhibit S13] which he says proves that Mr Skinner's pattern of visits meant that he attended lower value customers more frequently than higher value customers. This exercise was completed after the dismissal and was completed in light of Mr Skinner's application to the Commission. There is no evidence that these points were discussed in detail with Mr Skinner. It strikes me as more than odd that Mr Healey was actively engaged in managing Mr Skinner's visits to customers over four months via weekly reports on those visits, and yet the only evidence is general evidence that he spoke to Mr Skinner and Mr Skinner continued to do as he wanted. During the same period Mr Skinner increased his sales in March, received a $500 bonus in April (described by the company as a "*prestigious position*"), was number 6 on the national sales list in July, received a pay increase and then was shortly thereafter dismissed. The final warning letter in February 2005 advised Mr Skinner that, "*should there be no immediate and obvious improvement in the areas stated, Fisher and Paykel will terminate your employment*". It would appear that there was obvious and immediate improvement by Mr Skinner; shown at the very least by his better March sales. Mr Skinner obviously received two prominent accolades in that period from the national office, yet he was dismissed. It is not adequate in my view for Mr Healey to say that Mr Skinner was a senior, experienced salesperson and so should have known what to do, particularly given the manner of supervision chosen by the respondent.

117 I can only conclude that in terms of a fair go all round, the treatment of Mr Skinner has fallen so short of this as to make his dismissal harsh and unfair. In my considered view there is sufficient evidence, on the respondent's case alone, to come to that conclusion.

2006 WAIRC 05838

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	FISHER & PAYKEL AUSTRALIA PTY LTD
	APPELLANT
	-and-
	KENNETH JAMES SKINNER
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	COMMISSIONER S J KENNER
	COMMISSIONER S WOOD
DATE	WEDNESDAY, 13 DECEMBER 2006
FILE NO	FBA 24 OF 2006
CITATION NO.	2006 WAIRC 05838

Decision	Appeal dismissed
Appearances	
Appellant	Mr D Jones, as agent
Respondent	Mr A Lynn (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on 9 November 2006, and having heard Mr D Jones, as agent, on behalf of the appellant, and Mr A Lynn (of Counsel), by leave, on behalf of the respondent, and reasons for decision having been delivered on 13 December 2006, it is this day, 13 December 2006, ordered that appeal No FBA 24 of 2006 is dismissed.

By the Full Bench

[L.S.]

(Sgd.) M T RITTER,
Acting President.

FULL BENCH—Appeals against decision of Industrial Magistrate—

2006 WAIRC 05811

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WAYNE HANCOCK
	APPELLANT
	-and-
	NU-TECH ENGINEERING PTY LTD
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	COMMISSIONER S J KENNER
	COMMISSIONER J L HARRISON
HEARD	MONDAY, 30 OCTOBER 2006
DELIVERED	THURSDAY, 7 DECEMBER 2006
FILE NO.	FBA 22 OF 2006
CITATION NO.	2006 WAIRC 05811

Catchwords	Industrial Law (WA) - Appeal against decision of Industrial Magistrate's Court - Alleged non-compliance by respondent with *Metal Trades (General) Award 1966* or in alternative *Minimum Conditions of Employment Act 1993* (WA) - Alleged failure to pay appellant accrued annual leave entitlements on termination of employment and paid sick leave and public holidays without loss of pay - Effect of appellant's Workplace Agreement and Australian Workplace Agreement on awards and legislation - Whether appellant was paid in advance for accrued annual leave - Paid leave entitlements under the *Minimum Conditions of Employment Act* - Whether there was underpayment for sick leave and public holiday leave - Defence of "*set off*" - Appeal upheld - *Industrial Relations Act 1979* (WA) (as amended), s83, s83A, s84, s114(1) - *Industrial Relations Commission Regulations 2005*, reg 102(2) - *Minimum Conditions of Employment Act 1993* (WA), s3, s5(1), (2), (3), (5), s7, s18, s19, s23, s24, s29, s30, s31 - *Metal Trades (General) Award 1966*, cl 23(1), (6), cl 24(1)
Decision	Appeal upheld, matter remitted to the Industrial Magistrate's Court for further hearing and determination according to law
Appearances	
Appellant	Mr G McCorry, as agent
Respondent	Mr B R Jackson (of Counsel), by leave

Reasons for Decision

THE FULL BENCH:

The Appeal

1 This is an appeal instituted against a decision of the Industrial Magistrate's Court under s84 of the *Industrial Relations Act 1979* (WA) (*the Act*). The decision of the Industrial Magistrate's Court made on 30 June 2006 was to dismiss the application before the Court. That application was filed on 25 October 2005. It was an application made pursuant to s83 of *the Act* or in the alternative s7 of the *Minimum Conditions of Employment Act 1993* (WA) (*the MCE Act*).

The Application and the Decision of the Industrial Magistrate's Court

2 The application alleged the respondent had failed to comply with clauses 23(1), 24(1) and 23(6) of the *Metal Trades (General) Award 1966* (*the award*) and in the alternative ss24, 19 and 30 of *the MCE Act*. As particularised in a schedule entitled "*Particulars of Claim*" attached to the application, it was alleged the respondent had failed to pay the appellant for accrued annual leave entitlements on termination of employment and failed to grant the appellant paid sick leave and public holidays without loss of pay. The "*Particulars of Claim*" set out in a summary way the basis and quantification of the appellant's claim. The total of monies said to be payable by the respondent to the appellant was $11,910.64. This was comprised by unpaid accrued annual leave entitlements of $10,430.64 and unpaid sick leave and public holiday entitlements of $1,480. The appellant claimed this sum, the payment of "*pre-judgement interest*" and a penalty for three breaches of *the award*.

3 There was no dispute that the appellant was employed by the respondent as a welder, primarily repairing earthmoving equipment, from 1 July 2002 to 7 or 8 April 2005. (The appellant's "*Particulars of Claim*" referred to 8 April 2005, but there was in evidence before the Industrial Magistrate a letter from the appellant saying his last day would be 7 April 2005. He also gave evidence that 7 April 2005 was his last day at T28. The difference is not material to the disposition of the appeal). It was

also not in dispute that the appellant's employment, throughout this period, was covered by *the award*. The respondent disputed however that there had been any breach of *the award* or *the MCE Act*.

4 The application was heard on 21 June 2006. On that date the appellant gave evidence. He was the only witness called in support of the application. Mr Paul Rakich, a part owner of the respondent, gave evidence for the respondent. Mr Rakich was the only witness who gave evidence for the respondent. At the conclusion of the evidence, the appellant's agent and the respondent's counsel made closing submissions and his Honour then reserved his decision.

5 On 30 June 2006 his Honour published his reasons for decision. On the same date, as stated earlier, the order dismissing the claim was published by the Court.

The Facts

6 The facts relevant to the decision made by the Industrial Magistrate were largely not in dispute and are as follows.

7 The appellant was first engaged by Nu-Tech Engineering (Aust) Pty Ltd as a welder through a labour hire agency around the beginning of 1998. The appellant was engaged as a sub-contractor. He was paid a flat hourly rate of $20 per hour and received approximately $1,000 per week. Towards the end of 1999, Mr Rakich spoke with the appellant and other sub-contractors and advised them that they would need to become employees and paid a wage rather than be engaged as sub-contractors. The parties held discussions about what would be included within the appellant's employment package. On 1 January 2000 the appellant and Nu-Tech Engineering (Aust) Pty Ltd signed a document entitled "*Workplace Agreement*". The Workplace Agreement was not registered under the now repealed *Workplace Agreements Act 1993* (WA).

8 Relevant to the application before the Industrial Magistrate's Court, the Workplace Agreement contained the following clauses:-

> "*3. Rate & Hours of Work*
>
> *The ordinary hours shall be the first 8 hours worked per day Monday to Friday*
>
> *Ordinary rate of pay will incorporate three items*
>
> *Base Rate $15.00 p/h*
>
> *Holiday Rate $1.25p/h*
>
> *Performance Bonus $1.75 p/h*
>
> *Rate of pay for ordinary hours shall be paid at the rate of $18 per hour*
>
> *Hours worked in excess of the ordinary hours above shall be paid at the rate of $26 per hour.*
>
> *These hourly rates maybe changed at any time during the course of the agreement but only by mutual consent. Because of economic factors the rates may be altered up or down by at no time may they be lowered below the award hourly rate. Changes made to these rates shall in no way change the meaning or intention of the remainder of the agreement.*
>
> *4. Annual Leave*
>
> *A total of 160 hours at award rate has been added to the annual earnings based on a 40 hour week times 48 weeks. Then divide the total by 1920 hours (40 hours x 48 weeks) to arrive at the flat rate for ordinary hours payment.*
>
> *This means the employee is being paid holiday pay while working and therefore no other claim can be made against Nu-Tech for failure to cover the above entitlement.*
>
> *5. Public Holidays*
>
> *Ten (10) public holidays will be paid @ 8 hours per day at the rate of $15/hours.*
>
> *6. Sick Leave*
>
> *Ten (10) sick leave days per year (80 hours total) will be paid at the rate of $15/hour. If sick days are not claimed during the year then they will be paid as an annual December bonus to employees still working with the company. No payment shall be made to persons leaving the company or being dismissed because of misconduct or lack of work.*
>
> *Doctors certificate would be required for the second consecutive day off or a sick day either side of a public holiday.*"

9 After the signing of the Workplace Agreement, the appellant was paid by Nu-Tech Engineering (Aust) Pty Ltd in accordance with its terms.

10 The entity running the business of Nu-Tech Engineering (Aust) Pty Ltd changed from that company to the respondent in the first part of 2002. The appellant, from 1 July 2002, became employed by the respondent and continued to do the same work as he had done for Nu-Tech Engineering (Aust) Pty Ltd. The appellant continued to be paid in accordance with the Workplace Agreement.

11 The rates of pay of the appellant increased as follows:-

(a) On 9 August 2002 the appellant's all in rate was increased to $18.50 per hour and overtime rate was increased to $27 per hour.

(b) On 7 February 2003 the appellant's all in rate was increased to $19.50 per hour and overtime rate to $28 per hour.

12 On 2 September 2004 the appellant signed what was called an "*Australian Workplace Agreement*" (*the AWA*) with the respondent. *The AWA* was not approved under the provisions of the *Workplace Relations Act 1996* (Cth). Clause 4 of *the AWA* stated that it was to operate to the exclusion of any and all other agreements or awards. It was accepted by the respondent that as *the AWA* was not approved under the *Workplace Relations Act*, it did not operate to the exclusion of *the award*. Clauses 11 and 12 of *the AWA* were as follows:-

"*11 Remuneration Structure and Wages*

Remuneration for this position will be structured as follows:

(a) The Employee will be paid $22.00 per hour for each ordinary hour worked.

(b) This rate has been loaded to include all entitlements to annual leave, and annual leave loading.

(c) Whilst the parties acknowledge that no extra claims will be made during the term of this agreement, annual wage reviews shall take place on the Employee completing an initial 12 months of continuous employment with the Company under this agreement. Consequently, the Employees rate of pay <u>may</u> be increased, on the Employer taking into consideration such factors as the Employees performance, the performance of the business, general economic factors and the Employees demonstrated ability and overall value to the business.

(d) The wage less tax and other authorised deductions will be paid weekly by electronic funds transfer (EFT) into an account as determined by the Employee.

12 Bonus Loadings

(a) In addition to the ordinary hourly rate of pay, if the employee works in excess of 40 hours in a given week they will be paid a bonus loading of $10.00 per hour for such hours worked.

(b) All hours worked on a public holiday by the Employee will be paid a bonus loading of $10.00 per hour in addition to the ordinary hourly rate of pay."

13 Clauses 18 to 21 of *the AWA* were also relevant to the application. They were as follows:-

"*18 Annual Leave*

(a) Within the terms of this AWA the Employee agrees to contract out of their annual leave and annual leave loading entitlement and agrees to the equivalent of such entitlements being included into their ordinary hourly rate of pay on an ongoing basis.

(b) Any such time off work shall be considered a period of unpaid leave.

19 Unpaid Leave

(a) Notwithstanding that the Employee has agreed to contract annual leave and annual leave entitlements into the ordinary hourly rate of pay, unpaid leave will be granted by the employer in accord with this clause.

(b) Wherever possible such leave shall be taken at a mutually convenient time as agreed to by the parties. The reason for taking unpaid leave shall be at the discretion of the employee.

(c) Unless in accord with Clause 20 Sick Leave, or as otherwise authorised by the Employer, the Employee will provide a minimum of 7 days notice by application in writing of their wish to take unpaid leave.

20 Sick Leave

(a) An Employee is entitled for each year of service to 10 days sick leave if the Employee is unable to attend work due to

personal ill health or injury. Such leave will accrue pro rata on a weekly basis.

(b) The unused portion of sick leave in any year shall be paid out prior to June 30th.

(c) The Employee shall wherever practicable, give the employer notice of the intention to take sick leave prior to the absence, the reasons for taking such leave, and the estimated length of absence.

(d) The Employee agrees to notify the Employer by telephone of such absence within one (1) hour of their intended starting time on the day of absence unless the illness is of such a nature that it is not reasonable to do so.

(e) If it is not practicable/reasonable for the Employee to give prior notice of absence, the employee shall ensure that the Employer is notified by telephone of such absence at the first opportunity on the day of absence.

(f) On return to work the Employee may be required to produce a medical certificate for sick leave absences that extend to two or more consecutive working days.

21 Public Holidays

(a) The following days are public holidays for the purpose of this Agreement: New Years Day, Australia Day, Labour Day, Queen's Birthday, Foundation Day, Anzac Day, Good Friday, Easter Monday, Christmas Day and Boxing Day.

(b) The Employee may be rostered to work on any of the above days if they have indicated their preference in Schedule A to do so and will be paid in accord with Clause 12 Bonus Loadings and Clause 16 Additional Hours."

14 Schedule B to *the AWA* set out what was described as a minimum ordinary hourly rate of pay which was said to be inclusive of annual leave, annual leave loading, sick leave, public holidays and redundancy pay.

15 Following the signing of *the AWA* the appellant was paid in accordance with its terms. Accordingly, he was then paid at the all in rate of $22 per hour and overtime payment of $32 per hour. This was an increase in the rates which had been paid since 7 February 2003 referred to above. On 11 March 2005 the appellant's overtime rate was increased to $33 per hour.

16 As stated above, the appellant resigned his employment with the respondent with effect from 7 or 8 April 2005.

17 Subject to the appellant's argument about illegality, which will be referred to later, it was accepted by the appellant and the respondent on the appeal that the Workplace Agreement and *the AWA* constituted the appellant's terms and conditions of employment except insofar as they were in conflict with *the award* or *the MCE Act*. This was consistent with a finding made by the Industrial Magistrate in his reasons that the Workplace Agreement and *the AWA* set out the terms of the employment contract between the appellant and the respondent from the date they were signed.

18 Before the Industrial Magistrate, it was agreed between the parties that the appellant had not taken 420.92 hours of annual leave at the time he ceased his employment with the respondent. It was also agreed that as set out in the "*Particulars of Claim*" the appellant had been absent from his employment with the respondent on sick leave or public holidays for 160 hours during the period 1 July 2002 to 30 June 2003 and 192 hours from 1 July 2003 to 8 April 2005. (T13/14).

19 In essence, the appellant claimed he had not been paid what he was entitled to under *the award* or *the MCE Act* for his accrued annual leave or absences from work on sick leave or public holidays. The respondent's position was that because the appellant had been paid the amounts set out in the Workplace Agreement and *the AWA*, as varied from time to time, he had been paid, in advance, amounts in excess of his entitlements under *the award* or *the MCE Act* for accrued annual leave and absences on sick leave or public holidays. The respondent's position was that as the appellant had already been paid his entitlements, the application was an attempt to "*double dip*".

The Non Tender of the Appropriate Version of the Award

20 At the hearing at first instance there was not tendered as an exhibit or provided to the Industrial Magistrate a copy of *the award* covering the period of the appellant's employment with the respondent. This should have occurred so that there was a clear record before the Industrial Magistrate's Court of *the award* which the appellant contended had been breached. Instead, the appellant's agent tendered a consolidation of *the award* as at 6 January 1997. The appellant's agent said in effect that this form of *the award* was appropriate to tender as although the rates of pay contained in *the award* had changed since then, the material provisions of *the award* which the appellant relied on, had not. The appellant also contended that the amounts he was entitled to be paid pursuant to *the award* for accrued annual leave, sick leave and public holidays were because of the terms of *the award*, or *the MCE Act*, based upon the actual amounts he was being paid at the time the payment for these entitlements became due, rather than any lesser rates set out and prescribed in *the award*. It was accordingly unnecessary to tender *the award* in the form that existed during the period of the appellant's employment. The respondent did not object to the 6 January 1997 consolidation of *the award* being received as an exhibit by the Court. In our opinion despite all of this *the award* in the form it existed during the employment period, should have been tendered.

21 Neither party sought to put before the Full Bench the version of *the award* which covered this period. The 6 January 1997 consolidation of *the award* as received as an exhibit by the Industrial Magistrate was included in the appeal book. For the purposes of determining the appeal, it will be assumed that the relevant provisions of *the award* as contained in the 6 January 1997 consolidation remained in force during the appellant's employment with the respondent.

22 The respondent did not submit on the appeal that the Full Bench was not entitled to take this approach.

The Terms of the Award

23 The clauses of *the award* relied on by the appellant will be set out below. The appellant relied on the entitlement to be paid for accrued leave in clause 23(6)(a), in accordance with clauses 23(3)(b) and (c); the entitlement to paid public holidays in clause 23(1) and the entitlement to paid sick leave in clause 24:-

> *"23. - HOLIDAYS AND ANNUAL LEAVE*
>
> *(1) (a) The following days or the days observed in lieu shall, subject to this subclause and to paragraph (c) of subclause (1) of Clause 14. - Overtime of this award, be allowed as holidays without deduction of pay, namely –*
>
> *New Year's Day, Australia Day, Good Friday, Easter Monday, Anzac Day, Labour Day, Foundation Day, Sovereign's Birthday, Christmas Day and Boxing Day.*
>
> *Provided that another day may be taken as a holiday by arrangement between the parties in lieu of any of the days named in this subclause.*
>
> *Provided further that for an employee employed north of the 26th parallel of south latitude or within the area previously covered by Award No. 26 of 1950, Australia Day, Easter Monday, Foundation Day, Sovereign's Birthday and Boxing Day shall not be holidays but in lieu thereof there shall be added one week to the annual leave to which the employee is entitled under this clause.*
>
> *(b) When any of the days mentioned in paragraph (a) hereof falls on a Saturday or a Sunday the holiday shall be observed on the next succeeding Monday and when Boxing Day falls on a Sunday or on a Monday the holiday shall be observed on the next succeeding Tuesday. In each case the substituted day shall be a holiday without deduction of pay and the day for which it is substituted shall not be a holiday.*
>
> *(2) On any public holiday not prescribed as a holiday under this award, the employer's establishment or place of business may be closed, in which case an employee need not present for duty and payment may be deducted, but if work be done, ordinary rates of pay shall apply.*
>
> *(3) (a) Except as hereinafter provided a period of four consecutive weeks leave with payment as prescribed in paragraph (b) hereof shall be allowed annually to an employee by the employer after a period of twelve months continuous service with that employer.*
>
> *(b) (i) An employee before going on leave shall be paid the wages the employee would have received in respect of the ordinary time the employee would have worked had the employee not been on leave during the relevant period.*
>
> *(ii) Subject to paragraph (c) hereof an employee shall, where applicable, have the amount of wages to be received for annual leave calculated by including the following where applicable.*
>
> *(aa) The rate applicable to the employee as prescribed in Clause 31. - Wages and Supplementary Payments of Part I - General or Clause 10. - Wages of Part II - Construction Work of this award and the rates prescribed by subclauses (11), (12) and (13) of Clause 18. - Special Rates and Provisions and Clause 22. - Location Allowances of this award and;*

(bb) Subject to paragraph (c) (ii) hereof the rate prescribed for work in ordinary time by Clause 15. - Shift Work of the award according to the employee's roster or projected roster including Saturday and Sunday shifts;

(cc) The rate payable pursuant to Clause 7. - Higher Duties calculated on a daily basis, which the employee would have received for ordinary time during the relevant period whether on a shift roster or otherwise;

(dd) Any other rate to which the employee is entitled in accordance with the contract of employment for ordinary hours of work; provided that this provision shall not operate so as to include any payment which is of a similar nature to or is paid for the same reasons as or is paid in lieu of those payments prescribed by Clause 14. - Overtime, Clause 18. - Special Rates and Provisions (Clause 5. - Special Rates and Provisions in PART II CONSTRUCTION WORK), Clause 19. - Car Allowance, Clause 20. - Fares and Travelling Time (Clause 6. - Allowance for Travelling and Employment in Construction Work in PART II - CONSTRUCTION WORK) or Clause 21. - Distant Work (Clause 7. - Distant Work in PART II - CONSTRUCTION WORK) of this award, nor any payment which might have become payable to the employee as reimbursement for expenses incurred.

(c) In addition to the payment prescribed in paragraph (b) hereof, an employee shall receive a loading calculated on the rate of wage prescribed by that paragraph. This loading shall be as follows -

(i) Day Employees - An employee who would have worked on day work had the employee not been on leave - a loading on 17½%.

(ii) Shift Employees - An employee who would have worked on shift work had the employee not been on leave a loading of 17½%. Provided that where the employee would have received shift loadings prescribed by Clause 15. - Shift Work and, if applicable, payment for work on a regularly rostered sixth shift in not more than one week in any four weeks had the employee not been on leave during the relevant period and such loadings would have entitled the employee to a greater amount than the loading of 17½%, then the shift loadings and, if applicable, the payment for the said regularly rostered sixth shift shall be added to the rate of wage prescribed by paragraph (b) (ii) (aa) hereof in lieu of the 17½% loading.

Provided further, that if the shift loadings and, if applicable, the payment for the said regularly rostered sixth shift would have entitled the employee to a lesser amount than the loading of 17½%, then such loading of 17½% shall be added to the rate of wage prescribed by paragraph (b) but not including paragraph (b)(ii)(bb) hereof in lieu of the shift loadings and the said payment.

(iii) Where annual leave is taken in accordance with paragraph (b) of subclause (10) of this clause, the loading referred to in this subclause shall be paid regardless of length of service.

Except as prescribed in subclause (6) of this clause and Clause 8. - Annual Leave Loading of Part II - Construction Work of this Award, the loading prescribed by this paragraph shall not apply to proportionate leave on termination.

...

(6) (a) An employee whose employment terminates after the employee has completed a twelve monthly qualifying period and who has not been allowed the leave prescribed under this clause in respect of that qualifying period shall be given payment as prescribed in paragraphs (b) and (c) of subclause (3) of this clause in lieu of that leave or, in a case to which subclauses (9), (10) or (11) of this clause applies, in lieu of so much of that leave as has not been allowed unless -

(i) the employee has been justifiably dismissed for misconduct; and

(ii) the misconduct for which the employee has been dismissed occurred prior to the completion of that qualifying period.

...

24. - ABSENCE THROUGH SICKNESS

(1) (a) An employee who is unable to attend or remain at his place of employment during the ordinary hours of work by reason of personal ill health or injury shall be entitled to payment during such absence in accordance with the provisions of this clause.

(i) Employee who actually works 38 ordinary hours each week

An employee whose ordinary hours of work are arranged in accordance with sub-paragraph (i) or (ii) of paragraph (a) of subclause (3) of Clause 13. - Hours so that the employee actually works an average of 38 ordinary hours each week during a particular work cycle shall be entitled to pay shall be entitled to payment during such absence for the actual ordinary hours absent.

(ii) Employee who works an average of 38 ordinary hours each week

An employee whose ordinary hours of work are arranged in accordance with sub-paragraph (iii) or (iv) of paragraph (a) of subclause (3) of Clause 13. - Hours so that the employee works an average of 38 ordinary hours each week during a particular work cycle shall be entitled to pay during such absence calculated as follows:

$$\frac{\text{duration of absence}}{\text{ordinary hours normally worked that day}} \times \frac{\text{appropriate weekly rate}}{5}$$

An employee shall not be entitled to claim payment for personal ill health or injury nor will the employee's sick leave entitlement be reduced if such ill health or injury occurs on the week day the employee is to take off duty in accordance with sub-paragraph (iii) or (iv) of paragraph (a) of subclause (3) of Clause 13. - Hours of this award."

The Minimum Conditions of Employment Act

24 As stated the appellant's alternative claim was made under *the MCE Act*. *The MCE Act* was amended by the *Labour Relations Legislation Amendment Act 2006*. These amendments do not affect the present appeal because the appellant's employment with the respondent concluded on 7 or 8 April 2005. Apart from some minor amendments, *the MCE Act*, as reprinted on 4 October 2002 was the applicable version of *the Act*. The references to *the MCE Act* in these reasons will be to it as applicable to the appellant's period of employment with the respondent.

25 *The MCE Act*, as stated in its preamble, provides for minimum conditions of employment for employees in Western Australia. The expression "*minimum condition of employment*" is defined in s3 of *the MCE Act*. It is defined to mean:-

> "*(a) a rate of pay prescribed by this Act;*
>
> *(b) a requirement as to pay, other than a rate of pay, prescribed by this Act;*
>
> *(c) a condition for leave prescribed by this Act;*
>
> *(d) the use, in manner prescribed by this Act, of a condition for leave prescribed by this Act; or*
>
> *(e) a condition prescribed by Part 5.*"

26 Section 5(1) of *the MCE Act* provides that the minimum conditions of employment extend to and bind all employees and employers and are taken to be implied in any workplace agreement, employer-employee agreement, award or contract of employment not governed by a workplace agreement, employer-agreement or award. The expression "*workplace agreement*" is defined in s3 of *the MCE Act* to mean a workplace agreement that is in force under the *Workplace Agreements Act 1993*. The Workplace Agreement relevant to the present appeal, as an agreement not registered under that Act, is therefore not a Workplace Agreement for purposes of *the MCE Act*. Relevant to the present appeal, the minimum conditions of employment are by s5(1) of *the MCE Act* taken to be implied into *the award* which covered the employment of the appellant with the respondent.

27 Section 5(2) of *the MCE Act* provides that, amongst other things, a provision or condition of an award or contract of employment that is less favourable to the employee than a minimum condition of employment has no effect. Section 5(3) provides that a provision or condition of an agreement or arrangement that purports to exclude the operation of *the MCE Act* has no effect, but without prejudice to other provisions or conditions of the agreement or arrangement. Section 5(5) of *the MCE Act* provides that the section has effect subject to sections 8 and 9(1) of *the MCE Act*. These sections are of no relevance to the present appeal however.

28 Part 4 of *the MCE Act* is headed "*Minimum leave conditions*". Division 1 of Part 4 is headed "*Preliminary*" and is comprised by s18. Section 18(1) is relevant to the present appeal and is as follows:-

> "*18. Paid leave, how pay calculated*
>
> *(1) Where leave is paid leave, payment is to be made at the rate the employee would have received as his or her payment at the time the leave is taken under the workplace agreement, employer-employee agreement, award or contract of employment.*"

29 Section 18(2) is a machinery provision enabling calculation of the number of hours of paid leave. Section 18(3) of *the MCE Act* provides that payment for overtime, penalty rates or any kind of allowance is not required to be taken into account in determining any rate of payment for the purposes of the section. Section 18(4) provides that matters in relation to payment for leave under Part 4 or Part 5 may be prescribed by the regulations. No relevant regulations were prescribed.

30 Division 2 of Part 4 is entitled "*Leave for illness or injury*". Section 19 is as follows:-

> "*19. Paid sick leave, entitlement to*
>
> *(1) Subject to sections 20 and 22, an employee, other than a casual employee, who is unable to work as a result of the employee's illness or injury, is entitled to paid leave each year for periods of absence from work resulting from the illness or injury for the number of hours the employee is required ordinarily to work in a 2 week period during that year, up to 76 hours.*
>
> *(2) An entitlement under subsection (1) accrues pro rata on a weekly basis.*
>
> *(3) In subsection (1),* ***"year"*** *does not include any period of unpaid leave.*"

31 Sections 20 and 22 which are mentioned in s19(1) are not relevant to the present appeal.

32 Division 3 of Part 4 of *the MCE Act* is headed "*Annual leave*". Section 23 provides for an entitlement to paid annual leave for an employee other than a casual employee. The amount of paid annual leave is "*for the number of hours the employee is required ordinarily to work in a 4 week period during that year, up to 152 hours*". Section 23(2) provides that an entitlement under subsection (1) accrues pro-rata on a weekly basis. Section 23(3) of *the MCE Act* provides that in subsection (1), "*year*" does not include any period of unpaid leave. Section 23(4) provides that subsection (1) does not apply to an employee of a class prescribed by the regulations. Again there are no relevant regulations for the purposes of this appeal.

33 Section 24 provides for when annual leave payments are to be made. The section is in the following terms:-

> "*24. Annual leave payments, when to be made*
>
> *(1) An employee is to be paid for a period of annual leave at the time payment is made in the normal course of the employment, unless the employee requests in writing that he or she be paid*

before the period of leave commences in which case the employee is to be so paid.

(2) If —

(a) an employee lawfully leaves his or her employment; or

(b) an employee's employment is terminated by the employer through no fault of the employee,

before the employee has taken annual leave to which he or she is entitled, the employee is to be paid for all of that annual leave.

(3) If —

(a) an employee leaves his or her employment; or

(b) that employment is terminated by the employer,

in circumstances other than those referred to in subsection (2) before the employee has taken annual leave to which he or she is entitled, the employee is to be paid for any untaken leave that relates to a completed year of service, except that if the employee is dismissed for misconduct, the employee is not entitled to be paid for any untaken leave that relates to a year of service that was completed after the misconduct occurred.

(4) In this section —

*"**year**" does not include any period of unpaid leave."*

34 Section 24(2) was relevant to the appellant. This is because, as both parties accepted, the appellant lawfully left his employment with the respondent before he had taken annual leave to which he was entitled. Accordingly, under s24(2) the appellant was "*to be paid for all of that annual leave*". Additionally, the payment of the annual leave, as "*paid leave*", was required to be made in accordance with s18(1) of *the MCE Act*.

35 In our opinion s24(1) of *the MCE Act* did not apply to the appellant at the time when his employment with the respondent ceased. This is because s24(1) of *the MCE Act* contemplates a period of annual leave actually being taken. This is because it refers to the payment "*before the period of leave commences*". The appellant was not commencing a period of leave when his employment ceased.

36 Instead in the application to the Industrial Magistrate's Court, the appellant was seeking to enforce an entitlement to be paid for untaken annual leave at the cessation of his employment. Section 24(1) and (2) of *the MCE Act* legislate about different situations. Section 24(1), as stated, is directed to the situation where a period of annual leave is actually taken. Section 24(2), in contrast, focuses upon the situation where leave is not being taken, but the employment ceases at a time when the employee has an entitlement to annual leave which has not been taken. It provides for a payment in lieu of that entitlement. Ordinarily, s24(1) of *the MCE Act* embraces the situation where there is existing employment, a period of annual leave taken and afterwards a continuation of the employment.

37 Division 5 of Part 4 of *the MCE Act* is headed "*Public holidays*". Section 30 of *the MCE Act* provides that an employee, other than a casual employee, who in any area of the State is not required to work on a day solely because that day is a public holiday in that area, is entitled to be paid as if he or she were required to work on that day. Section 29 of *the MCE Act* provides that "*public holiday*" in respect of an area in the State, means a day mentioned in Schedule 1 to *the MCE Act*, that is a public holiday in that area. Section 31 of *the MCE Act* provides that s30 is not to be read as requiring an employer to pay a penalty rate in respect of work done on a public holiday.

The Reasons of the Industrial Magistrate

38 The reasons of the Industrial Magistrate commenced with a description of the claim and the parties. The reasons then set out relevant clauses of the Workplace Agreement and *the AWA*. The Industrial Magistrate then referred to a suggestion in the appellant's evidence and submissions that these agreements had been signed under duress. The Industrial Magistrate did not accept that to be the case and there has been no challenge to that finding on appeal.

39 The Industrial Magistrate then said that both agreements could be used as evidence as to the terms of the contract of employment between the parties. The Industrial Magistrate did not accept that because the agreements were not registered or certified they were null and void and could not be relied on. There is also no challenge to this aspect of the Industrial Magistrate's reasoning.

40 The Industrial Magistrate then said it was common in employer-employee relationships for there to be contracts of employment even when they are bound by an award. His Honour said that where there is inconsistency in the contract and an award provision, the award provision applies. His Honour then gave an example of this, being clause 6 of *the award*, about notice, compared with the notice requirement in clause 2 of the Workplace Agreement. His Honour then said that there was nothing in *the award* which prevented an employer and employee from agreeing to over award payments. His Honour said that *the award* provides for the minimum amount an employee must be paid in relation to ordinary hours, overtime and the other monetary entitlements depending on the employee's classification.

41 His Honour then made the finding, referred to earlier that the Workplace Agreement and *the AWA* set out the terms of the employment contract. His Honour also made a finding that the terms of employment continued notwithstanding the change in entity of the employer in 2002. His Honour then referred to the agreement between the parties about the number of hours of untaken annual leave and hours of absence on sick leave and public holidays. When doing so however his Honour misstated the claim about sick leave and public holidays. His Honour referred to 160 hours of sick/public holiday leave taken "*during the period of the claim*". As set out in the "*Particulars of Claim*" however, and agreed to by the respondent at the hearing at T13 and T14, 160 hours was the time for 1 July 2002 to 30 June 2003. There was also however the claimed time of 192 hours of absence on sick/public holiday leave from 1 July 2003 to 8 April 2005.

42 His Honour then referred to the argument of the respondent that by agreement with the appellant "*he was paid in advance for his annual leave by an increased and quantified amount in his hourly rate*". His Honour then cited and quoted from a passage of the reasons of Anderson J in *James Turner Roofing Pty Ltd v Peters* (2003) 83 WAIG 427; (2003) 132 IR 122; [2003] WASCA 28. This passage was about the enforcement of an award being dependent upon the amounts prescribed in the award.

43 His Honour then referred to the provisions in *the award* in relation to annual leave and referred to and quoted from clause 23 of *the award*. His Honour also referred to clause 13 of *the award* which provided that ordinary hours should be an average of 38 hours with a work cycle not exceeding 7 consecutive days. His Honour then referred to the entitlement to a payment for untaken annual leave provided in clause 23(6)(a) of *the award*.

44 His Honour then referred to the entitlement to paid annual leave in *the MCE Act*. His Honour said that it provided for "*paid annual leave consistent with that provided for in the award*".

45 The Industrial Magistrate then said that "*the parties entered into an agreement which provided for an hourly rate which included a component to cover annual leave*". His Honour said the arrangement was accepted by the appellant who was not paid "*when he took leave during his employment with the respondent*". In context, this sentence must mean that he was not paid at the time when he took the leave, on the basis that he had been paid in advance a component of his hourly rate to cover the entitlement to paid annual leave. The reasons did not at that point or subsequently however address the position of the appellant's entitlement to be paid for untaken annual leave at the cessation of his employment under *the award* and *the MCE Act*.

46 The Industrial Magistrate then said:-

> "*I have not heard evidence as to the rates payable under the Award beyond the rates shown in the consolidated Award dated 6 January 1997. Using those rates and the formula set out in the State workplace agreement, it was demonstrated that the amount paid to the [appellant] for annual leave was well in excess of the amount payable under the Award as was the ordinary hour's rate and the overtime rate.*"

47 This paragraph refers to the consolidation of *the award* dated 6 January 1997 which had been tendered as an exhibit. The Industrial Magistrate referred to the rates contained in that consolidation of *the award*. Unless the rates set out in the 6 January 1997 consolidation of *the award* remained unchanged until the commencement of the appellant's employment with the respondent, they were not relevant to the application which was before the Industrial Magistrate. We make this point, not in criticism of the Industrial Magistrate but to again highlight that the appropriate version of *the award* should have been tendered at the trial. There is a difficulty however with his Honour's statement that the amount paid to the appellant for annual leave was well in excess of the amount payable under *the award*. This bare statement contains no analysis of what the entitlements were under *the award*. Further, there is no analysis of this elsewhere in the Industrial Magistrate's reasons. Without an analysis of precisely what the appellant was entitled to with respect to the payment of annual leave, under *the award*, it is difficult to see how the Industrial Magistrate came to the conclusion he did in this paragraph.

48 In the following paragraph, his Honour referred to *James Turner Roofing* and said that in a claim alleging a breach of an award, the calculation required to determine any underpayment must be done using the award rates and not the over award rate set out in any agreement. His Honour said that this is what the appellant had done in his "*Particulars of Claim*". Whilst this was so, the Industrial Magistrate overlooked the appellant's argument that the terms of *the award* itself, (or *the MCE Act*) required payments for annual leave to be based upon the actual amounts which an employee was being paid by his employer, and not just the minimum rates prescribed in *the award*. The Industrial Magistrate did not consider this aspect of the appellant's argument in any other part of his reasons.

49 The Industrial Magistrate then said:-

> "*In any event on the evidence before me I find that the [appellant] was paid for the accrued annual leave and he was paid for the sick leave and public holidays at a rate which is prima facie above the award rate.*"

50 The Industrial Magistrate then concluded that the claim would be dismissed.

51 There are problems with the paragraph of the Industrial Magistrate's reasons just quoted. Firstly, the Industrial Magistrate did not explain on what basis he had determined that the appellant had been paid for his accrued annual leave. Again, to reach such a conclusion would involve an analysis of the entitlement to payment of accrued annual leave under *the award* and *the MCE Act* as well as an analysis of what had in fact been paid. No such analysis is contained in the reasons. Secondly, the paragraph simply did not mention the entitlements of the appellant to payment for accrued annual leave under *the MCE Act*. Thirdly, the reference to payment for sick leave and public holidays at a rate "*prima facie above the award rate*", again suffered from a lack of analysis of what the entitlement to payments for sick leave and public holidays were under *the award* (or *the MCE Act*) and what amounts had been paid in excess of those entitlements. Fourthly, the appellant's alternative claim

for non payment of sick leave/public holiday leave entitlements under *the MCE Act* was not on the face of the reasons as a whole properly considered by the Industrial Magistrate.

The Notice of Appeal

52 A notice of appeal to the Full Bench must in accordance with regulation 102(2) of the *Industrial Relations Commission Regulations 2005* "*clearly and concisely set out the grounds of appeal*". Unfortunately the notice of appeal as filed did not comply with this requirement. Although no complaint was made about this by the respondent, the schedule to the notice of appeal does not set out clear and concise grounds. The schedule commences with an assertion that the Industrial Magistrate erred in fact and in law in finding that the respondent had not failed to comply with *the award* or *the MCE Act*. The schedule then says "*in that*". Following this is a dash and eight numbered paragraphs. These paragraphs are mostly not grounds of appeal as such but assertions about what the respondent did, and the effect of *the award*, *the MCE Act* and *the Act*. The paragraph numbered 7 contained an assertion of what the appellant said the Industrial Magistrate should have found "*on a proper construction of the legislation and its proper application to the facts*". The paragraph numbered 8 asserted in effect that the Industrial Magistrate had wrongly applied the principles set out by Anderson J in *James Turner Roofing* to the facts of the application.

53 The appellant's written and oral submissions did not specifically address the eight numbered paragraphs in the schedule to the notice of appeal. Instead the appellant made submissions directed to the conclusion that the Industrial Magistrate had erred in his dismissal of the claim for unpaid accrued annual leave and unpaid sick and public holiday leave, under *the award* or *the MCE Act*. Again the respondent made no objection to this and provided written and oral submissions directed towards the Full Bench accepting that the conclusions reached by the Industrial Magistrate were correct.

54 Given the state of the notice of appeal and the way in which submissions were made by the appellant, it is appropriate in determining the appeal to focus upon the arguments presented by the appellant in support of the appeal. It is appropriate to mention as a matter of record however that the appellant did not present argument in support of paragraph 7(b) of the schedule to the notice of appeal. This was that the terms of the purported Workplace Agreement did not survive a change of employer in July 2002. Accordingly, we have taken this argument to be abandoned. In any event, there would seem to be no basis upon which to challenge the finding of the Industrial Magistrate that the same conditions of employment applied to the continuation of the employment relationship between the appellant and the respondent.

The Illegality/Nullity Argument

55 The appellant argued that the Workplace Agreement and *the AWA* were in effect nullities because, contrary to *the award* and *the MCE Act* they endeavoured to contract out of the entitlement to paid annual leave. In making this submission the appellant relied on s5 of *the MCE Act* and s114(1) of *the Act*.

56 Relevantly s114(1) of *the Act* provides that every contract, insofar as it purports to annul or vary an award of the Commission, shall to that extent be null and void without prejudice to the other provisions of the contract, which shall be deemed to be severable from any provisions hereby annulled. Section 114(1) therefore does not provide for an infringing contract to be null and void as a whole but only to the extent that it purports to annul or vary an award. A similar effect is provided for by s5 of *the MCE Act*.

57 Accordingly, even if the Workplace Agreement or *the AWA* purported to provide for no paid annual leave it would be only that term of the Workplace Agreement/*AWA* which would be of no effect. The balance of the Workplace Agreement/*AWA*, not in conflict with *the MCE Act* or *the award* would continue to apply to the employment relationship of the appellant and the respondent.

58 In any event, in our opinion, properly construed neither the Workplace Agreement nor *the AWA* purport to contract out of the entitlement to annual leave.

59 In considering this issue, it is relevant that both under *the award* and *the MCE Act*, the entitlement to annual leave is a composite entitlement. It is an entitlement to leave and to payment whilst on leave.

60 The Workplace Agreement does not purport to exclude paid annual leave. Its effect is to provide for the payment for annual leave in an advance of the taking of the leave. The rate of pay set out in clause 3 of the Workplace Agreement includes an hourly rate of $1.25 to be attributed to the "*holiday rate*". Clause 4 of the Workplace Agreement is headed "*Annual leave*". This clause does not purport to say that there is no entitlement to the taking of annual leave. It refers instead to the method of payment of what is described as "*holiday pay while working*". The reference in this clause to no other claim being made against "*Nu-Tech for failure to cover the above entitlement*", is referable only to the entitlement to payment whilst on leave as opposed to the taking of annual leave. This clause would be of no effect if it resulted in payments being made to the appellant for annual leave which were less than the entitlements of the appellant under *the award* or *the MCE Act*. The clauses do not however in our opinion evince an intention to not permit the appellant to have paid annual leave, contrary to *the award* or *the MCE Act*.

61 In our opinion the effect of *the AWA* is similar. We refer in this regard in particular to clauses 11, 18 and 19. Again in our opinion the effect of these clauses is not that the appellant is not entitled to annual leave. It simply changes the nomenclature or description of the leave from annual leave to unpaid leave. The leave is said to be unpaid in *the AWA* because the payment for the leave has been made in advance of the taking of the leave. The clauses and the agreement as a whole do not purport to say that there can be no entitlement to leave, in the sense of an absence from work. Indeed, this is allowed for, by clause 19. Accordingly, *the AWA* does not purport to deny the appellant the entitlement to either of the components of annual leave. The leave component is to be allowed albeit it is called unpaid leave. The payment component of annual leave has been made in advance of the taking of the leave.

62 In coming to these conclusions we have taken into account that clause 18(a) of *the AWA*, says the employee "*agrees to contract out of their annual leave and annual leave loading entitlement*", "*within the terms of this AWA*". The latter expression requires the former to be considered within the context of *the AWA* as a whole. As a whole *the AWA* does not purport to exclude payment for annual leave. This is because clause 18(a) goes on to say that the entitlements have been included in the ordinary hourly rate of pay on an ongoing basis. Clause 19 then makes it clear that "*unpaid leave will be granted by the employer in accord with this clause*". The clause does not purport to limit unpaid leave to a period less than that contained in *the award* or *the MCE Act*.

63 For these reasons we do not accept the appellant's argument that the Workplace Agreement and *the AWA* attempted to deny an entitlement to paid annual leave, contrary to *the award* or *the MCE Act*, and therefore the Workplace Agreement and *the AWA* were illegal or of no effect.

64 We also note that at the trial there was no dispute that the appellant had taken periods of recreational leave when employed by the respondent. (See for example the evidence of the appellant at T20, 24 and 28/9 and Mr Rakich at T34 and 38/9).

Annual Leave and the MCE Act

65 We will next consider the argument of the appellant that the Industrial Magistrate erred in failing to decide that he had not been paid for his accrued annual leave, at the cessation of his employment, contrary to *the MCE Act* and *the award*. As we have set out, the Industrial Magistrate found, on the basis of the agreement between the parties, that the appellant had not taken 420.92 hours of annual leave at the time of his cessation of employment. As set out earlier, under *the MCE Act* and *the award* the appellant was entitled to be paid for this untaken leave. Section 24(2) of *the MCE Act* provided for this entitlement. It provided that "*the employee is to be paid for all of that annual leave*". Furthermore, as stated earlier s18(1) applied to this payment. Section 18(1) refers to payment "*at the rate the employee would have received as his or her payment at the time the leave is taken under the workplace agreement, employer-employee agreement, award or contract of employment*". In combination with s24(2) the reference to "*the time the leave is taken*" in s18(1), must be read as meaning the time immediately prior to the employee leaving his employment.

66 In our opinion the effect of s18(1) of *the MCE Act* is that an employee is entitled to be paid at the same rate, for paid leave, as he or she would have been paid if they were working ordinary hours and not taking leave. This opinion is supported by reference to s18(3), which excludes payments for overtime, penalty rates and allowances for the purpose of determining the rate of payment. Also, in the second reading speech of the then Minister for Labour Relations about the *Minimum Conditions of Employment Bill*, to the Legislative Assembly on 8 July 1993 (Hansard page 1456), the Minister said at page 1457:-

> "*An employee will be entitled to receive the same rate of remuneration during any period of leave provided for in this Bill as he or she would be entitled to receive normally under an award, agreement or contract of employment.*"

67 The Minister then referred to the s18(3) exceptions. In making the comment he did the Minister was clearly referring to s18(1) of *the MCE Act*. This subsection has been unamended from the commencement of *the MCE Act*, apart from the inclusion of employer-employee agreements into and deletion of workplace agreements from, s18(1). Accordingly the Minister's comments remain relevant.

68 Section 18(1) of *the MCE Act*, relevant to the present appeal, refers to payments under an "*award or contract of employment*". We note that in s18(1) unlike s5(1)(c) of *the MCE Act*, the reference is to a "*contract of employment*" without the addition of the words "*not governed by*" the industrial instruments listed in s5(1)(c). We think the effect of s18(1) of *the MCE Act* is that if a contract of employment provides for an above award rate of pay for ordinary hours worked, it is that rate which is applicable to be paid leave, not the lower award rate.

69 In the present case, at the time the appellant left the employment of the respondent, he was being paid at the rate of $22 per hour. The appellant's entitlement to a payment for accrued annual leave under s24(2) of *the MCE Act* was therefore, prima facie, a payment of $22 for each of the 420.92 hours of accrued leave, totalling $9,260.24. The appellant did not receive this amount, at least not in the form of a payment made at the cessation of his employment.

70 The effect of ss5 and 7 of *the MCE Act* is that the appellant's entitlements to paid accrued annual leave as a minimum condition of employment, is implied in to *the award* and may be enforced under Part III of *the Act***.**

71 Part III of *the Act* includes s83 which provides, amongst other things, for an application to the Industrial Magistrate's Court for the enforcement of the provision of an award where there has been a contravention of such a provision. Section 83A(1) provides for the Industrial Magistrate's Court to make an order for an employer to pay to an employee the amount by which the employee has been underpaid their entitlements under, relevant to this appeal, *the award*.

72 The scheme of *the MCE Act* and *the Act*, with respect to the enforcement of minimum conditions of employment, is therefore that, in the case of an employee like the appellant whose employment is covered by an award, the enforcement is necessarily dependent upon a finding that the implied provision of *the award* has not been complied with.

73 Where the implied provision into *the award* under *the MCE Act* is the non-payment of an entitlement, this may bring into question the principles discussed by Anderson J in *James Turner Roofing*. The respondent's case was that these principles applied in the present case because the amounts which had been paid to the appellant during the course of his employment, were above award pay rates and were in excess of the entitlement to the payment for accrued leave at the cessation of his employment.

74 The principles discussed by Anderson J in *James Turner Roofing* were about what is sometimes called a "*set off*". As stated by Anderson J at paragraph [18], to refer to a set off in the present context is strictly a misuse of the term. His Honour referred to a set off at common law being a "*right to plead a debt due from the claimant as a defence to his claim and in partial satisfaction or extinction of it*" ([18]). As stated by Anderson J that right arises at common law only where there are mutual debts between claimant and defendant. In the present area of the law, as explained by Anderson J there is no question of

mutual debts. As stated by his Honour the term set off is conveniently used to "*denote a defence by the employer to the effect that the payments which he actually made to the employee were sufficient to discharge all of his obligations*" ([18]).

75 The issue is relevant in the present case because the respondent contends the amount paid to the appellant in advance, for annual leave (and also sick leave and public holidays) exceeded the amount which he was obliged to pay to the respondent under *the MCE Act* or *the award*.

76 Anderson J in *James Turner Roofing* discussed "*the manner in which amounts which had been paid*", "*should be credited to*" an employer's obligations under an award. In the course of his reasons, Anderson J discussed a number of cases. At paragraph [21] however his Honour conveniently set out the principles which he extracted from the cases as follows:-

> "*1. If no more appears than that (a) work was done; (b) the work was covered by an award; (c) a wage was paid for that work; then the whole of the amount paid can be credited against the award entitlement for the work whether it arises as ordinary time, overtime, weekend penalty rates or any other monetary entitlement under the award.*
>
> *2. However, if the whole or any part of the payment is appropriated by the employer to a particular incident of employment the employer cannot later claim to have that payment applied in satisfaction of his obligation arising under some other incident of the employment. So a payment made specifically for ordinary time worked cannot be applied in satisfaction of an obligation to make a payment in respect to some other incident of employment such as overtime, holiday pay, clothing or the like even if the payment made for ordinary time was more than the amount due under the award in respect of that ordinary time.*
>
> *3. Appropriation of a money payment to a particular incident of employment may be express or implied and may be by unilateral act of the employer debtor or by agreement express or implied.*
>
> *4. A periodic sum paid to an employee as wages is prima facie an appropriation by the employer to all of the wages due for the period whether for ordinary time, overtime, weekend penalty rates or any other monetary entitlement in respect of the time worked. The sum is not deemed to be referable only to ordinary time worked unless specifically allocated to other obligations arising within the employer/employee relationship.*
>
> *5. Each case depends on its own facts and is to be resolved according to general principles relating to contracts and to debtors and creditors.*"

77 In the present appeal, the hourly payments made to the appellant by the respondent both under the Workplace Agreement and *the AWA* were explicitly made with reference to payments to cover annual leave. However they did so differently. Under the Workplace Agreement, the amount of $1.25 of the ordinary rate of pay was a "*holiday rate*". Under *the AWA*, an unspecified amount of the ordinary hourly rate of $22 included "*entitlements to annual leave*" (clause 11(b)). Both types of payments made however fit within what is implicit in principle 2 of those set out by Anderson J. This is that a payment made specifically for annual leave can be applied in satisfaction of the obligation to pay for annual leave under *the award*. (This would also include a minimum condition of employment implied into *the award*). This includes the obligation to make a payment for accrued annual leave.

78 To determine whether the respondent contravened *the award* the following exercise is necessary. The purpose of the exercise is to see whether the respondent paid to the appellant, in advance, the amount of $9260.24 for accrued annual leave, which the appellant was prima facie entitled to when the employment ended. Firstly, the period covered by the Workplace Agreement needs to be considered. In this period, for each hour worked, $1.25 was paid for annual leave. These amounts need to be totalled for the period. If a period of leave was taken, then the total needs to be reduced to cover payment for the hours of leave then taken and not otherwise paid for. For example if the appellant worked for 200 hours, the amount of $250 (200 x $1.25) would be credited to annual leave payments. If the appellant then took 8 hours of annual leave at a time when his ordinary rate of pay was $18.00, the credit of $250 would need to be reduced by $144 (8 x $18.00). The credited amount would then be $106 ($250 - $144). At the end of the period covered by the Workplace Agreement, the respondent would, depending on the hours worked, leave taken and increases in the ordinary rate of pay (being the applicable amount under s18(1) of *the MCE Act*) either be in credit or debit for the amounts to be paid for annual leave.

79 Next, the period covered by *the AWA* needs to be considered. In this period the ordinary rate of pay contained an unspecified amount for annual leave. In our opinion it is necessary therefore to see whether the total amounts paid to the appellant during this period for ordinary pay and including payments for annual leave, equalled or exceeded the amounts which the respondent was obliged to pay to the appellant under *the award* (or *the MCE Act*) for ordinary time worked. Again periods of annual leave taken, not otherwise paid for, must be taken into account. At the end of the period covered by *the AWA*, any excess may, in accordance with *James Turner Roofing*, be applied to payments required to be made for annual leave.

80 The amount of the respondent's credit or debit for the period covered by the Workplace Agreement must be added to the amount of any excess for the period covered by *the AWA*. If this combined amount equals or exceeds $9260.24, then the

respondent has not breached the obligation to pay this amount to the appellant for accrued annual leave, under *the MCE Act* and implied into *the award*. This is because the payment will have been made in advance.

81 During the period covered by *the AWA* it is appropriate in our opinion, as stated, to take into account the obligations under *the award* to make payments for ordinary time worked. This is because the hourly payments made were for the purpose of covering ordinary work and also annual leave pay entitlements. Therefore both of these obligations under *the award* should be taken into account in determining whether there has been any contravention.

82 We have also considered whether the principles set out by Anderson J in *James Turner Roofing* were applicable to a situation where, as here, the hourly payment made was partly to satisfy a future obligation; being that of payment whilst taking annual leave, or for accrued annual leave upon termination. In our opinion, however there is no reason why this cannot be done. There is nothing in *James Turner Roofing* which suggests this cannot occur. Additionally, Anderson J in *James Turner Roofing* referred with approval to *Poletti v Ecob* (No 2) (1989) 31 IR 321, a decision of the Full Court of the Federal Court of Australia. That case involved in part an allegation of underpayment of annual leave entitlements. There, the agreement between the parties was to the effect that payments made to the employee would cover ordinary time plus annual leave. The Court held that because the total payment exceeded the award entitlements for ordinary time and annual leave there was no underpayment in respect of those entitlements.

83 At page 325 of *Poletti* there is reference to a finding that the employee had not taken annual leave except for two or three days in 1986. It was said the employee was paid extra in lieu of that leave at his own request. At page 335 of *Poletti* the Court referred to the payments which had been made and appropriated as payments for annual leave. The amount of these payments was compared to the entitlement to annual leave payments under *the award*. The result was that the employee had not been underpaid for annual leave.

84 In our opinion therefore based upon *James Turner Roofing* and *Poletti*, the payments made by the respondent to the appellant during the period covered by *the AWA*, in satisfaction of the obligation to make payments for ordinary time and annual leave can be taken into account when assessing whether there has been a breach by the respondent of the obligation to make the accrued annual leave payment.

85 As stated, to determine whether there has been an underpayment, in breach of *the MCE Act*, and as implied into *the award*, for failure to make the accrued annual leave payment, an accounting exercise needs to be engaged in, as described above.

86 The Industrial Magistrate did not perform this exercise. This should have occurred. In our opinion the appeal must be upheld and the matter remitted to the Industrial Magistrate for further hearing and determination on this issue.

87 We recognise that there are difficulties in the Industrial Magistrate now carrying out this exercise on the evidence which was before him at trial. In particular, given that only the 6 January 1997 consolidation of *the award* was tendered, the Industrial Magistrate does not at present have any way of calculating *the award* rate entitlements for ordinary hours worked. It will be a matter for the Industrial Magistrate as to whether he is prepared to receive into evidence the relevant version of *the award*.

88 Additionally, to calculate the amounts the respondent was required to pay to the appellant for ordinary time worked under *the award*, it is necessary to classify the appellant as an employee under *the award*. We note that at the hearing before the Industrial Magistrate, the respondent's counsel submitted that the appropriate classification level for the appellant under *the award* was C12. (T67). However, the appellant's agent in reply submitted that there was "*no evidence given in relation to what class of welder*" the appellant was. (T71). Again it will be for the Industrial Magistrate to further consider this issue including any application to lead additional evidence.

The Accrued Annual Leave Payment Entitlement under the Award

89 Earlier, we set out the requirement for a payment for accrued annual leave under *the MCE Act*. In our opinion under the terms of *the award*, the same obligation and entitlement existed. This is from the terms of clause 23(6)(a) of *the award*. In our opinion the effect of this clause is to entitle an employee such as the appellant to a payment for accrued annual leave in accordance with clause 23(3)(b) and (c) of *the award*. The entitlement under clause 23(3)(b)(i) is for a payment of "*the wages the employee would have received in respect of the ordinary time the employee would have worked had the employee not been on leave during the relevant period*". It is noted that this does not refer to rates applicable to the ordinary hours of employment worked as prescribed in *the award*. Instead it refers to "*the wages the employee would have received*". In the present case that amount was $22 per hour at the time the appellant ceased his employment with the respondent. He was therefore entitled to a payment for accrued annual leave in accordance with clause 23(6) of *the award* at the rate of $22 per hour.

90 This conclusion is supported by the decision of the Full Bench in *AFMEPKIU v Centurion Industries Ltd* (1997) 77 WAIG 319. *Centurion* was about the construction of the same award as in the present appeal. The employee had ordinarily been paid at the rate of $15.30 per hour. Sharkey P, in his reasons, referred to clauses 23(3)(b)(i) and (ii) and (dd) of *the award*. Sharkey P then referred to the submission that the effect of *the award* was that "*he should be paid not what the award, minimum rates award, prescribed, but what [the employee] was actually paid*". Sharkey P said that the "*plain meaning of the clause provides for payment at the rate which the employer would have received etc. That is the rate of $15.30 per hour. Thus, what was due to be paid for annual leave was required to be calculated on that basis*". Coleman CC and Parks C agreed with the reasons of Sharkey P.

91 *The award*, with respect to the payments for annual leave entitlements, is therefore an example of what Anderson J referred to at [50] of *James Turner Roofing*. That is, a situation where an award itself may provide for entitlements to be calculated by "*reference to such over award arrangement as may have been entered into*".

92 The outcome is in our opinion that the entitlement to a payment for accrued annual leave at the end of the appellant's employment was the same amount under *the award* and *the MCE Act*. As stated however the resolution of this aspect of the application needs to be remitted to the Industrial Magistrate for further consideration.

Underpayment of Sick Leave and Public Holidays

93 We will next consider the issues relevant to the claims for underpayment for sick leave and public holidays.

94 One issue is whether the claim for non-payment or underpayment of sick and public holiday leave, are entitlements which may be the subject of an order for payment under s83A of *the Act*. In our opinion they are. Both *the award* itself, and *the MCE Act* as implied into *the award*, contain entitlements to paid sick and public holiday leave. There is, in both instances, the composite entitlement to the leave and payment for the leave. If the leave is allowed, but the payment not made to an employee, either at all or in the amount of the entitlement, the employee, in the terms of s83A, "*has not been paid ... the amount which the employee was entitled to be paid under*" *the award*. Accordingly an order for payment may be made under s83A of *the Act*. The claim to payments for sick and public holiday leave is not therefore of the character of entitlements which Anderson J referred to at [16] of *James Turner Roofing* as not supporting an order under s83A of *the Act*. We also note that the respondent did not submit that they were.

95 The basis of payment for sick leave and public holiday leave differed under the Workplace Agreement and *the AWA*. Both situations must be considered to see if the respondent acted contrary to *the MCE Act* or *the award*.

96 Under the Workplace Agreement, sick leave and public holidays were to be paid at the rate of $15 per hour. This was less than the ordinary rate of pay of $18 per hour which as set out earlier included the base rate of $15, holiday rate of $1.25 and performance bonus of $1.75.

97 The first issue to consider is whether the payment of a lesser hourly rate for public holidays and sick leave was contrary to *the MCE Act*. Section 19(1) provides for the entitlement to paid sick leave. The payment of this leave is to be in accordance with s18(1) of *the MCE Act*. Relevantly, this provides that payment is to be made "*at the rate the employee would have received as his or her payment at the time the leave is taken under the workplace agreement, employer-employee agreement, award or contract or employment*". As discussed earlier, in our opinion, this directs attention to the amount which the employee would have received as their payment for ordinary hours worked had they not been on leave. Whilst being paid under the Workplace Agreement, this amount was $18 per hour. Accordingly, being paid at the rate of $15 per hour whilst on sick leave was not in accordance with s18 and s19 of *the MCE Act*. The underpayment was therefore entitled to be enforced in the manner set out earlier. Given that the matter is to be remitted to the Industrial Magistrate, it is appropriate for his Honour to also consider and determine the quantification of this amount and any consequential orders.

98 Section 30 of *the MCE Act* was also not complied with during the period of time the appellant's employment was covered by the Workplace Agreement. The entitlement under s30 is to "*be paid as if he or she was required to work on that day*". This section was not complied with because the appellant was being paid at a lesser rate of ordinary pay when on public holidays than if being required to work. Again, upon remittal the Industrial Magistrate should further consider and determine the amount of the underpayment and orders to be made.

99 Under *the award* the entitlement to paid sick leave is determined according to the formula set out in clause 24. It is unnecessary for the purposes of the disposition of this appeal to consider its application to the appellant. This is because this would not involve a payment being made to the appellant for sick leave in excess of the $18 per hour for ordinary time worked, which he would have been entitled to under the Workplace Agreement in combination with *the MCE Act*. The same may be said about clause 23(1)(a) of *the award* with respect to public holidays, as against s30 of *the MCE Act*.

100 With respect to the period during which the appellant was paid in accordance with *the AWA*, the position is more complicated. *The AWA* in clauses 20 and 21 provided for the entitlement to sick leave and public holidays. These clauses did not however in their terms refer to the payment for sick leave and public holidays. The hourly rate of pay referred to in clause 11 of *the AWA* was said in clause 11(b) to be loaded to include all entitlements to annual leave and annual leave loading. No mention is there made of payment for sick leave and public holidays. It is noted however that in Schedule B to *the AWA* there is set out the minimum ordinary hourly rates of pay which is said to be inclusive of annual leave, annual leave loading, sick leave, public holidays and redundancy pay. A payroll advice with respect to the appellant for the period 1 October 2004 to 7 October 2004, which was an exhibit before the Industrial Magistrate seems to indicate that the appellant had been paid for public holidays and sick leave at the rate of $22 per hour. If this was so, there would have been no breach of *the MCE Act* or *the award*.

101 If the appellant took a day of sick leave or public holiday leave and was not paid for that day on the basis that his entitlement to payment had been paid in advance through the ordinary hourly rate, then whether *the MCE Act* condition for payment of sick or public holiday leave, as implied into *the award*, had been contravened would depend upon an accounting exercise of the type we have earlier described with respect to the payments for annual leave. As the matter is to be remitted to the Industrial Magistrate, the issue of underpayment of sick leave and public holidays during the period covered by *the AWA* should be further addressed by the parties and considered and determined by the Industrial Magistrate.

Conclusion

102 It follows from what we have said earlier that in our opinion the appeal must be allowed. It must be allowed because the Industrial Magistrate did not analyse the issues of underpayment in the manner which should have occurred. The reasons of the Industrial Magistrate were deficient in the way in which we have earlier described. The matter must be remitted to the Industrial Magistrate for further hearing, consideration and determination, according to law.

103 A minute of proposed order should issue in terms that:-

1. The appeal is upheld.
2. The decision of the Industrial Magistrate's Court is set aside.
3. The matter is remitted to the Industrial Magistrate's Court for further hearing and determination according to law.

2006 WAIRC 05828

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WAYNE HANCOCK
	APPELLANT
	-and-
	NU-TECH ENGINEERING PTY LTD
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	COMMISSIONER S J KENNER
	COMMISSIONER J L HARRISON
DATE	TUESDAY, 12 DECEMBER 2006
FILE NO	FBA 22 OF 2006
CITATION NO.	2006 WAIRC 05828

Decision	Appeal upheld, matter remitted to the Industrial Magistrate's Court for further hearing and detemination according to law
Appearances	
Appellant	Mr G McCorry, as agent
Respondent	Mr B R Jackson (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on 30 October 2006, and having heard Mr G McCorry, as agent, on behalf of the appellant, and Mr B R Jackson (of Counsel), by leave, on behalf of the respondent, and reasons for decision having been delivered on 7 December 2006, it is this day, 12 December 2006, ordered that:-

1. The appeal is upheld.
2. The decision of the Industrial Magistrate's Court is set aside.
3. The matter is remitted to the Industrial Magistrate's Court for further hearing and determination according to law.

By the Full Bench

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

FULL BENCH—Procedural Directions and Orders—

2006 WAIRC 05853

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WAYNE SHORTLAND
	APPELLANT
	-and-
	LOMBARDI NOMINEES PTY LTD T/A HOWARD PORTER
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER J L HARRISON
DATE	TUESDAY, 19 DECEMBER 2006
FILE NO/S	FBA 28 OF 2006
CITATION NO.	2006 WAIRC 05853

Decision	Appeal adjourned

Order

This matter having been listed for hearing before the Full Bench on 20 December 2006 and having received letters dated 18 December 2006 from Mr R Bower (of Counsel) and 19 December 2006 signed by both Workclaims Australia on behalf of the appellant and Mr R Gifford on behalf of the respondent, it is this day, 19 December 2006, ordered, by consent, that the hearing of appeal No FBA 28 of 2006 be adjourned to a date to be fixed.

By the Full Bench

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

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2006 WAIRC 05846

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ELLEN ELIZABETH CROFT
	APPLICANT
	-v-
	DONNYBROOK DISTRICT TRANSPORT
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
HEARD	TUESDAY, 28 NOVEMBER 2006
DELIVERED	FRIDAY, 15 DECEMBER 2006
FILE NO.	B 61 OF 2006
CITATION NO.	2006 WAIRC 05846

Catchwords	Contractual benefits claim -- Entitlements claimed under contract of employment - Principles applied - Application upheld in part - Industrial Relations Act 1979 (WA) s 29(1)(b)(ii)
Result	Upheld and Order Issued
Representation	
Applicant	Ms E Croft on her own behalf
Respondent	No appearance

Reasons for Decision

(Given extemporaneously at the conclusion of the proceedings

as edited by the Commissioner)

1 This is an application by Ellen Elizabeth Croft ("the applicant"), whose previous name was Fowler, pursuant to s29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act") lodged on 24 January 2006 seeking benefits which she claims are due to her under her contract of employment with Donnybrook District 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 Mr Graham Fowler in his capacity as the Manager/Director of the respondent to the address provided at the previous conference being 28 Thomson Street, Donnybrook, and this notice was not returned to the Commission. I also understand that the notice of hearing was emailed to Mr Fowler and there was no indication that the email was not received by him. I also note for the record that Mr Fowler did not attend the previous conference and the Commission went to some lengths to ensure that this matter was listed when he was available but for whatever reason he did not attend the hearing. As I am satisfied that the respondent has been advised of the hearing, and given the Commission's powers under s27(1)(d) of the Act, it is my view that it was appropriate in the circumstances to proceed with the hearing in the absence of the respondent.

The Claim

3 The applicant is claiming three benefits which she maintains are due to her under her contract of employment with the respondent, which are not benefits due to her under any award or order of the Commission. The applicant is claiming unpaid wages for the period 1 July 2000 through to 27 June 2001 in the amount of $3982.50 gross. The applicant claims that this amount arises from hours worked by her but not paid by the respondent during this period (265.5 hours at an hourly rate of $15 per hour = $3982.50). The applicant is claiming $5880 in annual leave entitlements which accrued between January 2000 and June 2002 when the applicant went onto a period of workers' compensation. This claim is made up of 80 hours for the period January 2000 through to June 2000, 160 hours for the period July 2000 through to June 2001 and 160 hours for the period July 2001 to June 2002, minus 106 hours in annual leave that the applicant took during her last accrual period (294 hours at $20 per hour = $5880 gross). The applicant is claiming $1029 for an annual leave loading of 17½ per cent for the outstanding annual leave entitlements due to her. The total that the applicant is seeking is $10,891.50 gross.

4 The applicant maintains that she is owed benefits prior to January 2000 from the respondent but declined to continue with this part of her application given the six year time limit on applications of this nature. I note for the record that this application was lodged on 24 January 2006.

Applicant's evidence

5 The applicant gave evidence that she was employed by the respondent as a full-time administrative officer from 8 December 1997 until the end of June 2002 when she went onto workers' compensation payments. The applicant did not return to her employment with the respondent subsequent to this date.

6 The applicant gave evidence that under her contract of employment with the respondent, which was a verbal agreement between herself and Mr Fowler, she was paid an hourly rate of $15 per hour for each hour worked and this increased to $20 per hour in September 2001. The applicant gave evidence that under her agreement with Mr Fowler she was also entitled to four weeks' annual leave per year, as well as annual leave loading. The applicant gave evidence that she took some annual leave during the relevant period that she is claiming and the applicant gave evidence that any annual leave that she took was annual leave which accrued prior to January 2000 except for 106 hours of annual leave taken in the period July 2001 to June 2002.

7 The applicant submitted a summary of the amounts paid to her whilst employed by the respondent, as well as time sheets for the hours she worked and hours she was paid for from 30 September 1998 through to the 2 May 2001 (Exhibit A2), a summary of the wages she was paid for the period 11 July 2001 through to the 26 June 2002 (Exhibit A3) and a summary of the wages paid to her in the period ending 19 September 2001 which confirms when the applicant's hourly rate increased to $20 per hour (Exhibit A4).

8 The applicant gave evidence that the monies that she is claiming were not paid to her. The applicant also stated that she had an arrangement with Mr Fowler that when the respondent's cash flow improved the payment of the hours owing to her would be paid and she stated that this happened from time to time. Notwithstanding this arrangement the applicant gave evidence that when she ceased working with the respondent she was still owed the outstanding wages and annual leave entitlements that she is claiming.

Findings and conclusions

Credibility

9 I accept the evidence given by the applicant in these proceedings. It is my view that her evidence was given honestly and to the best of her recollection and the evidence given by the applicant was corroborated by substantial documentation tendered at the hearing.

10 The claim before the Commission is one for an alleged denial of a contractual benefit. The law as to these matters is well settled. For an applicant to be successful in such a claim a number of elements must be established. The claim must relate to an industrial matter pursuant to s7 of the Act and the claimant must be an employee; the claimed benefit must be a contractual benefit that being a benefit to which there is an entitlement under the applicant's contract of service; the relevant contract must be a contract of service; the benefit claimed must not arise under an award or order of this Commission; and the benefit must have been denied by the employer: *Hotcopper Australia Ltd v David Saab* (2001) 81 WAIG 2704; *Ahern v Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (WA Branch Inc)* (1999) 79 WAIG 1867. The meaning of "benefit" has been interpreted widely in this jurisdiction: *Balfour v Travel Strength Ltd* (1980) 60 WAIG 1015; *Perth Finishing College Pty Ltd v Watts* (1989) 69 WAIG 2307.

11 I find that the applicant was an employee of the respondent and was employed under a contract of service. I find that her claims are industrial matters for the purposes of s7 of the Act as they relate to payments the applicant claims are due to her which arise out of the applicant's employment with the respondent and I also accept that the benefits that the applicant is claiming do not arise under an award or order of this Commission. The issue to be determined therefore is what were the terms of the applicant's contract of employment with the respondent and whether it was a term of the contract of employment that the applicant is entitled to the payments she is seeking.

12 As I accept the applicant's evidence and I accept the summary prepared by the applicant of the unpaid wages, annual leave and annual leave loading due to the applicant I find that the applicant's contract of employment with the respondent included the rates of pay claimed by the applicant for hours worked and the annual leave and annual leave loading that she is claiming. I find that the applicant was not paid for the wages, annual leave and annual leave loading that she is seeking for the period January 2000 through to June 2002 and I accept that the applicant's hourly rate increased from $15 to $20 per hour in September 2001.

13 In the circumstances I find that the applicant is entitled to be paid the unpaid wages that the applicant is claiming are owed to her for the period 1 July 2000 through to the 27 June 2001 in the form of $3982.50 gross. I find that the applicant is owed for the period January 2000 through to June 2002 a total of 400 hours in annual leave entitlements minus 106 hours in annual leave entitlements taken, paid at $20 per hour which equates to an amount of $5880 gross and I find that the applicant is entitled to annual leave loading on those 294 hours at 17½ per cent being $1029 gross. I am also satisfied that any leave that the applicant has taken was annual leave which accrued in the period worked by the applicant prior to January 2000 except for 106 hours of annual leave taken in the period July 2001 to June 2002. I find that the applicant is therefore owed a total of $10,891.50 gross which is to be paid by the respondent.

14 A minute of proposed order will now issue that the respondent pay the applicant the amounts due to her.

2006 WAIRC 05852

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ELLEN ELIZABETH CROFT
	APPLICANT
	-v-
	DONNYBROOK DISTRICT TRANSPORT
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 19 DECEMBER 2006
FILE NO/S	B 61 OF 2006
CITATION NO.	2006 WAIRC 05852

Result Upheld in Part and Order Issued

Order

HAVING HEARD Ms E Croft on her own behalf and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby:

1 DECLARES that the respondent denied the applicant benefits under her contract of employment.

2 ORDERS that the respondent pay Ellen Elizabeth Croft $10,891.50 gross.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

2006 WAIRC 05875

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALAN RAY MACGREGOR
	APPLICANT
	-v-
	GEOGRAPHE BAY REAL ESTATE INVESTMENTS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
HEARD	16 AND 17 AUGUST 2006 & 26 SEPTEMBER 2006
DELIVERED	WEDNESDAY, 27 DECEMBER 2006
FILE NO.	U 41 OF 2006, B 41 OF 2006
CITATION NO.	2006 WAIRC 05875

Catchwords	Industrial Law (WA) - Termination of employment - Harsh, oppressive and unfair dismissal - Acceptance of referral out of time - Application referred outside of 28 day time limit - Relevant principles to be applied - Commission satisfied applying principles that discretion should be exercised - Acceptance of referral out of time granted - Whether dismissal or constructive dismissal – Intent of parties considered – No dismissal at the initiative of the employer – Commission lacks jurisdiction – Application dismissed - Contractual benefits claim — Entitlements under contract of employment - Applicant advised he is not pursing claim - Application made at short notice to pursue new benefits claim - Disadvantage considered - Application to amend claim refused - Application dismissed - Industrial Relations Act 1979 (WA) s 29(1)(b)(i) and (ii), s 29(2) and (3)
Result	Dismissed
Representation	
Applicant	Mr I Morison (of counsel)
Respondent	Ms L Gibbs (of counsel)

Reasons for Decision

1 On 13 January 2006 Alan Ray MacGregor ("the applicant") lodged applications pursuant to s29(1)(b)(i) and s29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act") alleging that he was unfairly terminated from his position as a sales representative with Geographe Bay Real Estate Investments Pty Ltd ("the respondent") on 16 December 2005 and that he is owed benefits under his contract of employment with the respondent. The respondent denies that the applicant was unfairly terminated and argues that the applicant was not terminated as he left the respondent of his own accord.

2 Even though the applicant claimed that he was owed annual leave entitlements under his contract of employment with the respondent just prior to the hearing the applicant's representative wrote to the respondent indicating that the applicant would not be pursuing this claim. Notwithstanding this advice at the commencement of the hearing the applicant wanted to pursue a claim for a payment in lieu of notice under his application for a denied contractual benefit.

3 The correspondence sent to the respondent indicating that the applicant was no longer pursuing his claim for a denied contractual benefit was then tabled by the respondent. This correspondence is as follows (formal parts omitted):

> **"MacGREGOR (sic) v GEOGRAPHE BAY REAL ESTATE INVESTMENTS PTY LTD WAIRC APPLICATION U41 AND B41 OF 2006**
>
> We refer to the above, and to the matters raised in the Commission on Friday 11 August 2006. With regard to the particulars sought in your client's application, we advise as follows:
>
> (i) Oral.
>
> (ii) (1) Mr Robert McMillan.
>
> (2) The Goose Restaurant, Busselton.
>
> (3) 14 December 2005.
>
> (4) That the Applicant was being dismissed because the purchasers of the Respondent did not like his attitude.
>
> (iii) Not applicable
>
> Copies of the requested discovered documents are enclosed, together with a copy of our client's email of 16 December 2005, provided by way of further and better discovery.
>
> We are further instructed that the Applicant will not be maintaining a claim for unpaid contractual benefits at the hearing.
>
> We look forward to receiving your client's further and better discovery."

4 The applicant's representative at the hearing, who was recently instructed by the solicitors acting on behalf of the applicant, stated that he was unaware that the applicant had withdrawn his contractual benefits claim and stated that even though the applicant had indicated to the respondent that he was not pursuing his claim for annual leave entitlements he now wished to pursue a claim for a payment in lieu of notice. The applicant argued that the claim for notice largely arises from his summary termination and that the respondent has been on notice since these applications were lodged that his termination was without notice and there would therefore be no detriment to the respondent if the applicant is allowed to pursue this claim. The respondent opposed the applicant resurrecting a denied contractual benefit claim at this late stage and the respondent argued that it was disadvantaged if the applicant's claim for a payment in lieu of notice was allowed to proceed because it was unaware prior to the commencement of the hearing that this was a claim that the applicant was seeking, no particulars of the claim have been provided to the respondent and the respondent has not been able to prepare for hearing in relation to this claim.

5 When taking into account the authority of *Steven James O'Brien v Perth Metalwork Co Pty Ltd* (2002) 82 WAIG 3209 and after considering the submissions of the parties I advised the parties at the hearing that I would not allow the applicant to reinstate his claim for a denied contractual benefit and that this application would be dismissed. I made this decision on the basis that it was my view that the respondent would be at a disadvantage if this claim was pursued at this late stage and I advised the parties that additional reasons for reaching this view would issue later. Following are my additional reasons for reaching the view that this application should be dismissed. In my opinion the applicant's claim for a payment in lieu of notice should not proceed given that the applicant notified the respondent as late as 14 August 2006 that he was not pursuing any

claim for a benefit due to him under his contract of employment, the applicant had many months to detail his claim for a payment in lieu of notice and provide relevant particulars and he did not do so until the day of the hearing and even though no documentation existed in relation to this claim the respondent had no opportunity to obtain instructions about this claim prior to the hearing. I therefore formed the view the respondent would be at a substantial disadvantage if the applicant was allowed to pursue this claim.

Background

6 There are a number of relevant facts that are not in dispute. The applicant commenced employment with the respondent as a sales representative in May 1996 and when the applicant ceased employment with the respondent Mr Robert McMillan and Ms Catherine McMillan were the respondent's directors. The respondent's current directors are Mr Neil Honey, Mr Alan Pascall and Mr Kevin Trott ("the new directors" "new owners") and they were appointed to this position on 30 December 2005 (see Exhibit A2). Documents confirming Mr McMillan's intention to sell the respondent's business to the new directors were signed on 10 December 2005 and the settlement date for the sale of the respondent's business was 31 December 2005. The applicant did not have a written contract of employment with the respondent.

Leave to amend the application

7 At the outset of the proceedings the applicant sought leave to amend this application to change his date of termination from 16 December 2005 to 14 December 2005 which was in accord with information contained in the further and better particulars that the applicant provided to the respondent just prior to the hearing and the respondent did not oppose this application. It was my view that there was no reason why this application should not be granted and the applicant was therefore granted leave to amend his application. As a result of this amendment however, this application has been filed outside of the required 28 day time limit for filing applications of this nature. Given the late stage of the amendment to this application the applicant requested that all matters, including the requirement on the Commission to determine whether or not it would be unfair not to accept this application out of time, be dealt with in the two days set aside for the hearing and the respondent did not object to this course of action. In the circumstances I formed the view that it was appropriate for all issues in dispute, including a determination as to whether it would be unfair not to accept this application be dealt with during the days set aside for the hearing.

8 I am therefore required to determine in the first instance whether or not it would be unfair not to accept this application and if this application is accepted I am required to determine whether or not the applicant was terminated in order to attract the Commission's jurisdiction to deal with this application.

Applicant's evidence

9 The applicant stated that towards the end of his employment with the respondent he undertook additional duties to his normal work as a sales representative such as signing cheques when the respondent's director and licensee Mr McMillan was on leave and the applicant stated that he also assisted the respondent's property management section during these periods.

10 The applicant gave evidence that approximately six to eight weeks before he ceased employment with the respondent he found out that he was going to be terminated from an agent working with a different real estate agency when the agent rang the applicant to ask if he wanted to work with him as he had heard that the applicant was being terminated. The applicant stated that when he approached Mr McMillan about this he responded by saying that everything was for sale. The applicant later told Mr McMillan that he had heard that if the respondent's business was going to be sold that he would be sacked and in response to this statement Mr McMillan told him that he had not sold the business.

11 The applicant stated that in the week prior to 12 December 2005 he attended a council training course in Perth and he also attended a course on customer and email management systems conducted by the Roy Weston South Perth office.

12 The applicant stated that when he rang Mr McMillan on Saturday 10 December 2005, as confirmed by his telephone records (see Exhibit A3), he discussed whether or not he would have a job with the respondent after the respondent's business was sold. The applicant stated that Mr McMillan told him that he would discuss the issue with his wife and would contact him on Monday.

13 The applicant stated that he went to work as usual on Monday 12 December 2005 and as he did not hear from Mr McMillan he telephoned him around 8.00pm that evening. The applicant gave evidence that he asked Mr McMillan again during this call whether he still had a job and Mr McMillan told him to get a separation certificate. The applicant stated that Mr McMillan then told him that he wanted to meet with him face to face on Wednesday morning and they agreed to meet at the Goose Restaurant at 8.00am. The applicant stated that he previously discussed obtaining a separation certificate with Mr McMillan in a joking manner and he stated that when he was told by Mr McMillan during this conversation to get a separation certificate he understood that he was going to be terminated.

14 The applicant stated that on Tuesday 13 December 2005 he went to the respondent's office at approximately 6.00am and removed his microwave oven and a filing cabinet containing his own files. The applicant stated that he went in early as he was embarrassed because he had been sacked after working with the respondent for nine and a half years and he did not want to talk to other staff about it or see the new directors who were already working in the respondent's office. The applicant stated that he did not return to the respondent's office that day.

15 The applicant gave evidence that he met Mr McMillan at the Goose Restaurant on Wednesday 14 December 2005 for approximately ten to fifteen minutes. The applicant stated that Mr McMillan was embarrassed and he apologised to him and told him that there was no position for the applicant with the respondent and Mr McMillan told him that it was because the new directors did not like the applicant's attitude. The applicant stated that they discussed the applicant's listings, Mr McMillan told him that he would be looked after and that commissions due to him would be given to him until the hand over to the new directors. The applicant stated that at the end of the meeting he gave Mr McMillan his office key. The applicant stated that

later that day he telephoned a number of other representatives and told them that he had been terminated and he stated that he then picked up a separation certificate from Centrelink and dropped it into the respondent's office for Mr McMillan to sign.

16 The applicant gave evidence that he had filled out the 'Employee details' section on this separation certificate and the rest was filled out by Mr McMillan and the applicant stated that he was given the completed separation certificate by Mr McMillan on 16 December 2005 (see Exhibit A4). The applicant stated that even though there is reference on this certificate to him being terminated because of a shortage of work or a redundancy situation he did not have a discussion with Mr McMillan about this issue and he stated that he laughed at this reason being put forward by Mr McMillan for his termination as there was no shortage of work in the real estate industry. The applicant stated that on 16 December 2005 he sent an email to Ms Kathy Atkinson who was one of the other sales representatives employed by the respondent about his termination (Exhibit A5). The applicant stated that the reference to the new job in this email was about a job he had already organised with a Mr Geoff Sweeney from Roy Weston South Perth and he stated that Mr Sweeney had told him that if he was terminated he could start working with him straight away. The applicant stated that on the evening of Monday 12 December 2005 during a conversation with Mr Sweeney he told him that he was ceasing work with the respondent on Wednesday 14 December 2005. The applicant stated that he also spoke to Mr Sweeney on the evening of Tuesday 13 December 2005 and on Wednesday 14 December 2005 after speaking to Mr McMillan (see Exhibit A3).

17 The applicant gave evidence that just prior to 14 December 2005 he spoke to Mr McMillan about his leave which was to commence on Friday 16 December 2005 and the applicant stated that he raised his ongoing employment with Mr McMillan at the time as he wanted to know if he had a job before he commenced his leave.

18 The applicant stated that after he was terminated he switched his clients' details into the Roy Weston South Perth office email management system. The applicant stated that on 2 January 2006 he and his family went to Walpole for a holiday for approximately 10 days which had been booked six months in advance. The applicant stated that on his return he met with lawyers about his termination.

19 The applicant stated that he did not lodge his application straight away for a number of reasons. The applicant stated that he was shocked about his termination, he stated that he was at a loss about what to do, it was the Christmas period and lawyers were on leave during this time, he was going on holidays and the applicant stated that he also spent time building up his client data base.

20 A number of documents were tendered detailing the applicant's earnings during the period 1 July 2003 to 28 July 2006 (see Exhibit A6). The applicant stated that under his current employment arrangements he is paid a retainer of $2100 gross per month. The applicant stated that he had lost income due to his dismissal as a number of houses that he had listed were not sold before he was terminated and he claimed that they were sold after he was terminated (see Exhibit A7).

21 Under cross-examination the applicant stated that he had discussions with Ms Atkinson in late November early December 2005 about her buying the respondent's business. The applicant stated that he encouraged her to buy the respondent's business because he believed she would be a better employer than the new directors and he confirmed that he had advised Mr McMillan that Ms Atkinson was interested in buying the business. The applicant stated that he was aware that the sale of the respondent's business to the new directors was finalised around 10 December 2005.

22 The applicant agreed that he told other representatives employed by the respondent that the respondent's business was going to be sold and he also told them that a number of employees were to be terminated, including himself, when the respondent's business was sold and the applicant agreed that he told his colleagues Mr Kevin Driscoll and Ms Ann Sandford that they would be terminated if the new directors bought the respondent's business. When it was put to the applicant that he was causing trouble making these comments the applicant stated that the industry runs on rumour and that when he made these comments the respondent's business had not been sold.

23 The applicant conceded that in the last six months of his employment with the respondent his sales figures were lower than his previous results and the applicant stated that his listings fell after the end of November 2005 because Mr Honey was working in his area. The applicant agreed that Mr Honey had more listings than him before Mr Honey came to work for the respondent but he was unaware if he had made more sales in his area than the applicant.

24 The applicant denied that his role as a local council representative impacted on his sales and he stated that he was regularly in the office and undertook his roster as usual.

25 The applicant agreed that he considered working with another agency owned by Mr Derek White. The applicant stated that he was aware that the new directors were terminated by The Professionals Busselton ("the Professionals") before commencing work with the respondent and that they commenced working with the respondent from approximately 22 November 2005.

26 The applicant stated that because he was close to reaching his entitlement to long service leave he did not want to cease working with the respondent and he stated that even though he did not want to work for the new directors given the opportunity he would have worked with the new directors at least until his long service leave was due. The applicant then agreed that he was 'waiting for a better offer to come along'.

27 The applicant agreed that he was out of the office more after the new directors commenced working with the respondent he stated however that he was still undertaking his normal duties.

28 The applicant denied that he kept pushing Mr McMillan about what was to happen with his employment and that Mr McMillan told him to "do whatever you want". The applicant reiterated that Mr McMillan told him to get a separation certificate.

29 The applicant stated that when he went into the respondent's office on Tuesday 13 December 2005 he packed up belongings in his office, he took his filing cabinet and removed his photo from the window. The applicant stated that he only removed those files which he had made up about past vendors and present clients and he stated that he did not take any other information. The applicant denied that he left a separation certificate on Mr McMillan's desk on the morning of Tuesday 13 December 2005 and the applicant stated that he could not have done so as he had only been advised late the previous evening to obtain the

separation certificate and he was in the respondent's office the following day at 6.00am. The applicant agreed that none of the new directors spoke to him about being terminated. The applicant agreed that Mr Driscoll and Ms Sandford remain employed by the respondent.

30 The applicant stated that at the meeting he had with Mr McMillan on14 December 2005 he told him that he would reinstate his email access and that he would be paid outstanding commission due to him until the business was handed over to the new directors and the applicant stated that he received commissions for these properties after he ceased employment with the respondent.

31 The applicant stated that he initially obtained advice about lodging an unfair dismissal claim prior to going on his holiday to Walpole and he stated that he obtained a second opinion once he returned from Walpole. The applicant stated that he thought he had sufficient time within which to file this application.

32 Under re-examination the applicant stated that Mr McMillan did not raise any issue with him about his performance.

33 The applicant stated that Mr White told him that he was going to be sacked at the time he offered the applicant a job and he also told the applicant that Mr Driscoll and Ms Sandford were going to be terminated.

34 The applicant stated that when he sought advice about his termination after he ceased employment with the respondent he was not advised that there was a time limit within which to file an application but the applicant conceded that after he ceased employment with the respondent he accessed the Commission's website and became aware that there was a timeframe of 28 days for lodging and unfair dismissal application. The applicant stated that he understood this timeframe to be 28 business days.

35 Mr Ivan Nash owns the building where the Professionals operate. Mr Nash stated that during a discussion he had with Mr Honey in September 2005 Mr Honey told him that the new directors were going to set up their own business or negotiate to buy the respondent's business. Mr Nash said that he then had a discussion with Mr Honey about the financial impact of taking over the respondent's business and Mr Nash stated that Mr Honey told him that the new directors intended to get rid of the applicant, Mr Driscoll and other office staff and he was told that they would keep one of the management staff on for a while. Mr Nash stated that at the time he did not know the applicant or Mr Driscoll and Mr Nash stated that he was told that the new directors would take a number of current office staff with them to their new business.

36 Under cross-examination Mr Nash stated that he was aware that Mr White was buying out Mr Jeff Trott's share of the Professionals.

37 Mr White is a director of the Professionals and he has been involved in real estate for approximately eleven years. Mr White knows the applicant. Mr White confirmed that he approached the applicant about employing him and he stated that he told the applicant that he may no longer have a job if the new directors took over the respondent's business. The applicant responded by telling him that he did not wish to move as he enjoyed working where he was.

38 Under cross-examination Mr White confirmed that he terminated Mr Honey in mid November 2005. Mr White stated that he offered the applicant employment around this time because he understood that the applicant and Mr Driscoll may not have a job when the new directors took over the respondent's business. Mr White claimed that the new directors were not his top sales representatives when they worked for the Professionals and Mr White stated that he terminated them because they were setting up in competition with him. Mr White maintained that the Professionals' listings were similar in number to those of the respondent. Mr White conceded that even though it was hearsay that the applicant was going to be terminated he told the applicant that both he and Mr Driscoll would be terminated. Mr White stated that he was happy to employ the applicant because he was a good sales representative.

Respondent's evidence

39 Mr McMillan became a director of the respondent in July 2003 and he ceased in this role on 31 December 2005. Mr McMillan stated that he considered selling the respondent's business throughout the period he owned the respondent's business and in particular after May 2005 when he was approached by another agent who was interested in buying his rent roll. Mr McMillan stated that in August 2005 Mr Honey also approached him about selling the respondent's business and he told Mr Honey to make him an offer. Mr McMillan stated that in September 2005 the applicant asked him if the respondent's business was to be sold and he told him at the time that it was not for sale. Mr McMillan stated that the applicant then approached him in early December 2005 about Ms Atkinson buying the respondent's business and he stated that he gave her financial details about the business for her to consider. Mr McMillan stated that apart from an approach from Mr White he had no other approaches to sell the business and he stated that he was not advertising that the business was for sale. Mr McMillan stated that it was only when the new directors became employees on 22 November 2005 that negotiations started with them about the sale of the respondent's business. Mr McMillan stated that he was aware that the new directors had been terminated by the Professionals.

40 Mr McMillan stated that he and the new directors signed the intention of sale documents on 10 December 2005 and Mr McMillan stated that as part of his arrangement with the new directors no employee was to be terminated prior to the settlement date except for the respondent's receptionist who was terminated after the sale document was signed. Mr McMillan gave evidence that the respondent's new directors told him that all remaining staff would be evaluated after they took over the respondent's operations. Mr McMillan confirmed that the settlement date for the sale of the respondent's operations was 31 December 2005.

41 Mr McMillan stated that after signing the sale documents he went to Perth to have the sale documents signed by his wife, who was also a director, and he stated that he also had to visit his bank. Mr McMillan stated that he intended to tell existing staff about the sale of the business when he returned to Busselton on Wednesday 14 December 2005.

42 Mr McMillan stated that he recalled having a conversation with the applicant on 10 December 2005. Mr McMillan stated that during this discussion the applicant asked him if he had a job with the respondent as he understood the respondent's business had been sold. Mr McMillan stated that he was surprised at the applicant's comment that the business had been sold and he

told the applicant he "would leave it until I got back". Mr McMillan stated that when the applicant contacted him again on Monday 12 December 2005 he was annoyed with the applicant and told him to "Do whatever you want to do, Alan, but leave it until I get back" (transcript page 110). Mr McMillan stated that he had no discussions with the applicant at the time about him obtaining a separation certificate. Mr McMillan stated that during a phone conversation the following day with Mr Honey he was told that the applicant had left the respondent's office as he had removed his belongings from the office and he had also taken his photo out of the window. Mr McMillan stated that he felt let down by the applicant as he was selling the respondent's business along with its assets and Mr McMillan stated that he also had no chance to talk to the applicant about his options.

43 Mr McMillan stated that in the six to eight week period prior to mid December 2005 the applicant had approached him and told him that he expected to be terminated by the new directors. Mr McMillan stated that he treated this issue as a joke as there had been no offer to buy the respondent's business at that stage and he reminded the applicant that he was his employer and not the new directors.

44 Mr McMillan stated that on Tuesday 13 December 2005 he rang the applicant and they arranged to meet at the Goose Restaurant the following day. Mr McMillan stated that the applicant told him during this conversation that he did not want to work with the new directors. Mr McMillan stated that he visited the respondent's office briefly on 14 December 2005 prior to meeting the applicant at the restaurant and he stated that he saw a separation certificate on his desk. Mr McMillan stated that the applicant had completed the employee details on this certificate and the rest of the form was blank. Mr McMillan stated that at the meeting held on 14 December 2005 at the Goose Restaurant the applicant handed over his key, he engaged in small talk with the applicant, he told the applicant that commissions due to him up to the time of the sale of the business would be honoured by him and he told the applicant that he was sorry that the situation had ended up the way it had. Mr McMillan stated that they left after having a cup of coffee. Mr McMillan stated that he did not tell the applicant that the new directors did not like the applicant's attitude and Mr McMillan gave evidence that at the time of this meeting the applicant had already had a position in place with Roy Weston South Perth. Mr McMillan could not recall anything else being discussed at the meeting and he stated that the meeting was amicable.

45 Mr McMillan stated that when he signed the applicant's separation certificate he indicated that the applicant had been terminated due to a redundancy situation to assist the applicant to obtain Centrelink payments. Mr McMillan stated that when he filled out his form he did not see the section where he could indicate that the applicant had left voluntarily.

46 Mr McMillan stated that he made notes about his interactions with the applicant in the Outlook programme on his computer around this time (Exhibit R1). Mr McMillan stated that the dates on these entries were incorrect and he maintained that the entry dated 12 December 2005 should read 13 December 2005 and he stated that the second entry should read 14 December 2005.

47 Mr McMillan stated that after the applicant became a shire councillor his performance deteriorated and he claimed that his work ethic and attendance at the office also declined during this period. Mr McMillan stated that during this time the real estate market remained steady however the applicant's sales decreased.

48 Under cross-examination Mr McMillan stated that Mr Honey approached him in August 2005 about the sale of the respondent's business and Mr McMillan stated that two to three days later he had a meeting with Mr Honey about his intentions. Mr McMillan stated that at the time he advised Mr Honey that the respondent's business was for sale at a price and they discussed the respondent's rent roll and the availability of the respondent's business. Mr McMillan stated that nothing more happened about Mr Honey buying the respondent's business until October 2005 when Mr Honey contacted Mr McMillan to see if the business was still available. Mr McMillan stated that in the interim Mr White had contacted him on a number of occasions asking whether or not the respondent's business was for sale. Mr McMillan stated that further discussions were held with Mr Honey about the sale of the respondent's business after he was dismissed by the Professionals in November 2005. When Mr McMillan was asked about his discussions with Mr Honey prior to 22 November 2005 he stated that Mr Honey rang him and asked him if there was a job available if things "got sticky at the Professionals" and Mr McMillan stated that he responded in the affirmative.

49 Mr McMillan stated that discussions with the applicant about his future with the respondent became a joke between them because of the rumours being circulated by Mr White but he maintained that during these discussions there was no mention about the applicant obtaining a separation certificate.

50 Mr McMillan stated that rumours about the respondent's business being sold were being spread by Mr White.

51 Mr McMillan claimed that negotiations with Mr Honey about the sale of the respondent's operations did not start until November 2005.

52 Mr McMillan stated that when he spoke to the applicant on Saturday 10 December 2005 the applicant asked him if he had a job and he told the applicant that he would get back to him on the following Wednesday.

53 Mr McMillan stated that two to three days prior to the sale documents being signed on 10 December 2005 lawyers acting for both parties exchanged drafts of the sale documents.

54 Mr McMillan stated that he gave a sale price of the respondent's business to Mr Honey in September or October 2005 and he told them what he would accept and he stated that they went away to consider this amount and he stated that nothing more eventuated until the new directors started working with the respondent.

55 Mr McMillan stated that he understood that the applicant's long service leave would have shown as a contingent liability on the balance sheet for the respondent's business prior to the sale and he stated that this issue was not discussed with the new directors. Mr McMillan confirmed that the sale documents of the respondent's business indicated that the respondent's employees had been paid their entitlements and that he had to pay all contingent liabilities prior to the settlement date.

56 Mr McMillan could not recall whether the applicant contacted him on the evening of 11 December 2005 or the morning of Monday 12 December 2005 however he recalled having a conversation with the applicant some time after their conversation on Saturday 10 December 2005. Mr McMillan stated that during this conversation the applicant asked him again if he had a job with the respondent as he was commencing leave that Friday. Mr McMillan stated that he told the applicant that he would talk to him when he returned to Busselton on Wednesday but he did not set a time for a meeting. Mr McMillan again stated that he did not tell the applicant at the time to organise a separation certificate.

57 Mr McMillan stated that he contacted the applicant on the evening of Tuesday 13 November 2005 to organise a time to meet him the following day and Mr McMillan stated that at this meeting at the Goose Restaurant he told the applicant that he was sorry about the way things had worked out and he stated that the applicant then handed over his key.

58 Mr McMillan believed that when the applicant took his files and equipment from the respondent's office and removed his photo from the office window the applicant no longer wanted to be part of the respondent's business and he understood from these actions that the applicant had resigned however, Mr McMillan conceded that the applicant never told him that he was resigning.

59 Mr McMillan stated that he wanted all of his employees to continue working with the respondent's business because he was selling an operating concern and he also did not want the applicant to leave in case the sale did not go through.

60 Mr McMillan reiterated that the new directors did not tell him that the applicant was going to be terminated and he believed that the applicant heard this from elsewhere and not from the new directors. Mr McMillan then stated that he told the applicant that his job was safe. Mr McMillan stated that he did not tell the applicant that the respondent's business was being sold because he wanted the sale documents finalised before telling anyone and Mr McMillan gave evidence that he told the applicant that he would still be employed when the sale went through and he stated that he told this to all employees except the respondent's receptionist. Mr McMillan maintained that the applicant had listened to rumours about his ongoing employment and not the advice of Mr McMillan. Mr McMillan stated that the new directors were aware that the applicant was claiming that he would be terminated by them and Mr McMillan stated that the new directors told him that all employees would remain employed by the respondent and would be assessed after the sale was finalised.

61 Mr McMillan stated that even though his notes about his interactions with the applicant in the week commencing 12 December 2005 had incorrect dates he had a clear recollection of the events of that weekend and that week.

62 Mr McMillan maintained that the applicant's separation certificate was on his desk in the respondent's office on the morning of Wednesday 14 December 2005 and he insisted that he saw it before meeting the applicant at the Goose Restaurant that morning. Mr McMillan stated that he saw no reason to take it to the meeting he had with the applicant at the restaurant.

63 Mr McMillan stated that even though the applicant was not an exemplary employee he did not tell the applicant that he had concerns about his performance. Mr McMillan then stated that he had counselled the applicant about the amount of time that he was spending on council business and he claimed that in the second half of 2005 his sales figures were down. Mr McMillan agreed that the listings in Busselton had declined in recent years.

64 Under re-examination Mr McMillan stated that during his telephone discussion with the applicant on or about Monday 12 December 2005 he believed that the applicant was trying to push him to do something and as a result he told the applicant to "Do whatever you want to do" and Mr McMillan stated that notwithstanding this comment he wanted to meet face to face with the applicant to discuss his options. It was Mr McMillan's view that the applicant had no reason to be concerned about his ongoing employment when the new directors took over the respondent's business.

65 Mr Honey has worked as a real estate sales representative for three and a half years and prior to that was a small business owner and police officer. Mr Honey worked for two and a half years with the Professionals before commencing work for the respondent. Mr Honey stated that he was terminated by the Professionals in November 2005.

66 Mr Honey stated that in early September 2005 he was considering setting up his own real estate business and he stated that he had a discussion with Mr Nash in late September 2005 about this issue when Mr Nash visited the Professionals' office. Mr Honey stated that during their discussion they talked about the directors of the Professionals not complying with the lease on the building and Mr Nash then told him that he had enough and that he had another tenant for the office and Mr Nash told Mr Honey that he understood Mr K Trott would go with Mr Honey when he left. Mr Honey stated that he told Mr Nash that he and some other representatives were thinking of leaving the Professionals and were currently looking for their own premises. Mr Honey stated that he did not have any discussions with Mr Nash about purchasing the respondent's business. Mr Honey understood that Mr Nash then spoke to Mr White about Mr Honey leaving the Professionals.

67 Mr Honey stated that by September 2005 he had had one conversation with Mr McMillan about purchasing the respondent's business.

68 Mr Honey stated that after he was terminated on 9 November 2005 he rang Mr McMillan about taking up a position with the respondent and he stated that he commenced employment with the respondent the following day. Mr Honey stated that up to that point in time he had had only one conversation with Mr McMillan about buying the business. Mr Honey stated that prior to 10 December 2005 he did not have any discussions with Mr McMillan or with his partners, Mr K Trott and Mr Pascall, about staff working for the respondent nor did he have any discussions with Mr McMillan, Mr K Trott and Mr Pascall before or after this date about the applicant's ongoing employment with the respondent. Mr Honey stated that he wanted to start the business with all staff remaining employed except for the respondent's receptionist and he stated that after the business was 'bedded down' he would then look at the future.

69 Mr Honey stated that he was advised by Mr Pascall on 13 December 2005 that the applicant had removed his belongings from the respondent's office and had taken his photo out of the window. Mr Honey stated that he was surprised by these actions as he had not had any discussions with the applicant about his future. Mr Honey stated that he had some idea that the applicant

was seeking work with Roy Weston South Perth and this was confirmed when he received the email that the applicant sent to Ms Atkinson on 16 December 2005.

70 Mr Honey stated that the respondent's business is going well and they currently have nine staff, including Mr Driscoll who he claims is a good sales person and he stated that he intends to keep employing him. Mr Honey stated that Ms Sandford is an excellent property manager and remains as an employee of the respondent.

71 Mr Honey stated that he had no discussions with Mr McMillan about the applicant's long service leave credits.

72 Under cross-examination Mr Honey stated that when he had an initial discussion with Mr McMillan about the respondent's business they discussed the value of the respondent's rent roll and Mr Honey stated that Mr McMillan later gave him a figure for the business.

73 Mr Honey stated that when he spoke to Mr Nash in September 2005 he was considering purchasing the respondent's operations. Mr Honey denied that he told Mr Nash during this conversation that he wanted to terminate Mr Driscoll and the applicant if he took over the respondent's business and he denied telling Mr Nash that he was considering buying the respondent's operations even though this was a possible option.

74 Mr Honey stated that he had no problems with the applicant's attitude and he stated that he could not recall telling Mr McMillan that the applicant had a bad attitude. Mr Honey stated that even though he did not tell Mr McMillan that he would be retaining all existing staff he intended to do this and he stated that staff would be reviewed once the respondent's operations were owned by the new directors. Mr Honey stated that a number of new staff have been put on by the respondent after the new directors purchased the business, including new sales representatives. Mr Honey believed that there were sufficient areas for the applicant to work in even though the applicant worked in the same area as Mr Honey.

75 Mr Honey stated that once he realised in late September 2005 that he could not find premises to set up his own business he negotiated with Mr McMillan from 10 November 2005 onwards to buy the respondent's operations. Mr Honey stated that in late October 2005 lawyers acting on behalf of the new directors drew up a draft sale agreement and he stated that discussions to finalise documentation for the sale of the respondent's business took approximately one month.

76 Mr Pascall has worked for five years in real estate and he commenced employment with the respondent on Monday 14 November 2005. Mr Pascall previously worked with the Professionals. Mr Pascall stated that he had no problems working with the applicant after he commenced employment with the respondent and Mr Pascall stated that he had no discussions with Mr Honey, Mr K Trott, Mr McMillan or the applicant about the applicant's ongoing employment with the respondent.

77 Under cross-examination Mr Pascall stated that it was only after he was terminated by the Professionals that he became involved in negotiations to buy the respondent's business and he stated that prior to this date he was not in a financial position to be part of the business. Mr Pascall stated that Mr Honey was the main negotiator for the purchase of the respondent's business and Mr Pascall stated that he was aware that Mr Honey had discussions with Mr McMillan prior to his dismissal from the Professionals about purchasing the respondent's business and Mr Pascall stated that he was unaware of the timeframe of those discussions.

Applicant's submissions

Out of time

78 The applicant claims that the reason why his application was lodged two days out of the required timeframe was because he was confused and upset when he ceased employment with the respondent given the manner of his termination and that in the period after he was terminated he went on a holiday with his family away from Busselton. Additionally, the applicant needed to establish himself in a new position and it was the Christmas close-down period. Even though the applicant was aware that this application had to be lodged within 28 days of his termination he assumed that this was 28 business days and that the Christmas and New Year breaks would not count. Once the applicant saw a second legal firm after returning from his holidays this application was then expeditiously lodged. The applicant argues that accepting this application causes no prejudice to the respondent, there is a compelling case that if he was dismissed that it was unfair and the applicant claims that it would be unjust for this application to be defeated by a delay of only two days (see *Colin Leslie Beaumont v Coogee Chemicals Pty Ltd* [2005] 85 WAIG 728).

The substantive application

79 The applicant submits that he was told that he was dismissed during his discussion with Mr McMillan on 12 December 2005. The applicant argues that when he asked Mr McMillan whether he would be retaining his job when the respondent's business was sold he was told that he should get a termination certificate. Because of this conversation the applicant went to the respondent's office the following morning and cleared out his office prior to his colleagues commencing work. The applicant maintains that Mr MacMillan confirmed that he was terminated on 14 December 2005 when they met at the Goose Restaurant.

80 The applicant relies on the following in support of his claim that he was terminated. The applicant argues that he did not tell Mr McMillan that he was resigning and claims that if he had resigned he would have written a letter to that effect or he would have told somebody of his intentions. The applicant argues that his behaviour was not impulsive and that he did not take any action prior to 12 December 2005 to leave the respondent's business even though he was aware for some time that the respondent's business was for sale. Additionally, the applicant had organised leave to commence on 16 December 2005. There was no record on the applicant's separation certificate that he had resigned and as Mr McMillan was aware that the applicant had another job to go to when he filled out this separation certificate there was therefore no issue about the applicant accessing Centrelink payments. The applicant's conduct in clearing out his office on 13 December 2005 is consistent with being told the previous evening that he was terminated, it was improbable that the applicant left the separation certificate on Mr McMillan's desk for him to pick up on Wednesday morning as Mr McMillan gave evidence that he had never before seen a separation certificate and it is likely that Mr McMillan would have taken it along to the meeting that day with the applicant to discuss how to fill it out. The applicant argues that Mr McMillan's conduct at the meeting with the applicant on Wednesday

14 December 2005 was consistent with the applicant having been terminated and argues that Mr McMillan confirmed that the applicant had been terminated at this meeting and made arrangements flowing from this. The applicant argues that Mr McMillan had to terminate the applicant as there was no provision for the payment of the applicant's long service leave in the contractual arrangements for the sale of the respondent's business and the applicant was therefore a contingent liability for Mr McMillan. The applicant argues that it is highly probable that Mr Honey did not believe that there was room for both himself and the applicant subsequent to the respondent being sold and that he communicated this to Mr McMillan.

81 The applicant maintains that the applicant's evidence about his conversation with Mr McMillan on the evening of 12 December 2005 should be preferred to the evidence given by Mr McMillan as Mr McMillan's version of events of this conversation was difficult to accept and his evidence lacked credibility. The applicant maintains that Mr McMillan's claim that he did not tell the applicant that he was terminated on 12 December 2005 is unlikely to have taken place because the applicant wanted to continue working with the respondent at least until his long service leave accrued and the applicant maintains that he would not have resigned from a job he wanted to keep. The applicant maintains that after waiting for some time for a response from Mr McMillan about whether or not the respondent's business was being sold and whether or not he would continue being employed by the respondent it was improbable that the applicant would have removed his belongings from the respondent's office on Tuesday if he was not told on Monday evening that he was to be terminated.

82 The applicant claims that Mr McMillan's evidence in general lacked credibility and the applicant argues that Mr McMillan's evidence should be treated with caution as Mr McMillan misled the Commission about the details of the negotiations for the sale of the respondent's business and the applicant argues that Mr McMillan's character and credibility was brought into question as he was telling the applicant that he should have no concerns about the business being sold whilst actively negotiating to sell the respondent's business. The applicant argues that during cross-examination Mr McMillan invented evidence, for example, Mr McMillan claimed for the first time towards the end of his cross-examination that the new owners told him that they would be keeping all staff which contradicted his evidence in chief and the evidence given by Mr Honey and Mr Pascall and during Mr McMillan's evidence in chief he gave no evidence about warnings he gave to the applicant yet in cross-examination Mr McMillan claimed that he had counselled the applicant. The applicant claims that Mr McMillan's evidence about the events of the week commencing Saturday 10 December 2005 was confusing and the applicant claims that Mr McMillan made false statements in the computer record about his dealings with the applicant. The applicant argues that Mr McMillan's claim that he called the applicant after hearing that he had cleaned out his office was false and Mr McMillan could have verified this telephone conversation with the applicant but did not do so. The applicant maintains that Mr McMillan was uncomfortable whilst giving his evidence and in cross-examination he was evasive and aggressive. Mr McMillan agreed that if this application succeeds then he will have to pay any compensation ordered by the Commission and Mr McMillan made false statements in the separation certificate.

83 The applicant argues in the alternative that if the Commission finds that he was not terminated he claims that he was constructively dismissed. The applicant argues that the respondent's actions constituted or ultimately led to the termination of his employment and the applicant claims that the actions of the respondent was the principal contributing factor leading to the applicant's cessation of employment with the respondent (see *Attorney-General v WA Prison Officers' Union of Workers* [1995] 75 WAIG 3166 [IAC] and *Mohazab v Dick Smith Electronics Pty Ltd* [No 2] [1995] 62 IR 200 at 205). The applicant argues that Mr McMillan's evidence that he told the applicant to 'do what you want' was a calculated act to bring the employment relationship to an end and Mr McMillan's conduct in concealing the negotiations for the sale of the business, failing to give the applicant any assurance about his job, allowing the proposed new owners to work in the respondent's business when they wanted the applicant to leave and failing to openly acknowledge the sale of the respondent's business when it occurred on 10 December 2005 was conduct which made it unbearable for the applicant to remain with the respondent.

84 The applicant also argues that Mr McMillan intended to terminate the applicant even though Mr Honey suggested that the new owners had not made a decision about the applicant's employment.

85 The applicant maintains that there were no grounds for him to be terminated and argues that a range of issues raised by the respondent at the hearing such as the decline in the applicant's income and listings and spending too much time out of the office were not made out. The applicant claims that he made a good income in previous years whilst working with the respondent and argues that his income at the time of his dismissal was similar to Mr Honey's income for that same period. The applicant argues that in any event the period from July through to December is a slow time in real estate in Busselton and the applicant argues that he was dismissed when the busiest period in real estate in Busselton was about to commence. The applicant claims that he made up time when he attended shire council meetings, he did not take any files belonging to the respondent when he left and the applicant argues that even if these criticisms were made out it would not form the basis for summary termination. There was no evidence that the applicant had been given warnings by Mr McMillan other than a suggestion that the applicant had been counselled. As the applicant was now working as an agent in the Perth metropolitan area he was deprived of listings and could not replicate his normal earnings and the applicant was not given reasonable notice of his termination after nearly 10 years of service at a senior level. The applicant is seeking compensation of six months' remuneration which is $28,661 being one half of his income in the financial year ended June 2005.

Respondent's submissions

Out of time

86 The respondent maintains that it would be unfair to the respondent and against the public interest for the Commission to accept this application. The respondent also argues that this application should be rejected as the applicant had the opportunity to lodge this claim within 28 days after his termination and did not do so and the applicant did not take reasonable steps to ensure that these timeframes were met (see *Raymond Turner v Air Liquide WA* [2003] 83 WAIG 1059).

87 The respondent argues that prima facie, the time limit should be complied with, and claims that the reasons provided by the applicant for the delay in filing this application have been many and varied and inconsistent and the respondent argues that little weight should be given to the applicant's claim that he believed that it was 28 business days within which to file this

application. The respondent argues that the applicant's claim that he was confused as to the date of his termination was not supported by the evidence, the reasons for the delay in lodging this application were insufficient and there was no evidence that the applicant took any steps to contest his alleged termination prior to lodging this application and the respondent claims that the first that the respondent knew that the applicant was contesting his alleged termination was when this application was served on the respondent.

88 The respondent maintains that there is little merit to the applicant's claim and argues that the applicant abandoned his employment or resigned. The respondent argues in the alternative that if the applicant was terminated then it was not unfair to do so in the circumstances. The respondent argues that it would be unfair to the respondent for the Commission to accept the application and not unfair to the applicant, and the respondent claims that it has suffered prejudice by the acts of the applicant as it has had to deal with an application in its entirety that is not properly before the Commission. The respondent maintains that it will be prejudiced if this application is accepted out of time and if the Commission was to find that there was no prejudice to the respondent then the absence of prejudice is an insufficient basis for the granting of an extension of time (see *Malik v Paul Albert, Director General Department of Education Western Australia* [2004] 84 WAIG 683).

The substantive application

89 The respondent submits that the applicant has not shown on the balance of probabilities that he was terminated at the initiative of the employer and the respondent argues that this application should therefore be dismissed as it is without jurisdiction. In the alternative the respondent submits that if the Commission finds that there was a termination that in all the circumstances and based on the applicant's behaviour that his termination was not harsh, oppressive or unfair.

90 The respondent claims that the applicant ceased employment with the respondent of his own accord. The respondent argues that the applicant did not wish to work for the new directors and the applicant relied on unsubstantiated rumours to form the view that he was not wanted by the respondent and that these rumours were circulated by one of the respondent's competitors who wanted to secure the applicant's services. The respondent also maintains that the applicant ignored the reassurances of Mr McMillan that his employment status was unchanged.

91 The respondent maintains that at no stage did it intend to terminate the applicant. The respondent claims that the applicant constantly raised the respondent's business being sold and his dismissal with Mr McMillan and the applicant conceded that Mr McMillan told him that the respondent's business had not been sold. The applicant admitted that he was spreading the rumour that the respondent's business was to be sold to the new directors and that he and other employees would be sacked when no agreement was in place for the business to be sold and the information that the applicant was acting upon was without reasonable foundation. The respondent's business could have been sold to any another entity and not to the new owners and Mr McMillan could not guarantee the applicant employment after the business was sold and could only reassure the applicant that the business had not been sold. The respondent argues that the applicant treated the matter of his ongoing employment with the respondent as a joke as the applicant kept raising the issue of his ongoing employment with Mr McMillan in a joking manner. Even though the applicant spread the rumour that he and other employees of the respondent would be terminated by the new directors this did not eventuate and the applicant's claim that the new owners did not wish to employ any of the respondent's current staff was incorrect as well as the allegation that the new owners intended to terminate a number of employees.

92 The respondent argues that it did not terminate the applicant to avoid paying him his long service leave entitlements and there was no reason for Mr McMillan to terminate the applicant when the issue of these entitlements was about to become someone else's responsibility and the respondent rejects the applicant's claim that he was terminated because the new owners did not like his attitude when there was no evidence to support this. The respondent also argues that all conversations about the applicant's ongoing employment with the respondent were initiated by the applicant and not Mr McMillan or the new directors.

93 Mr McMillan gave evidence that when the applicant contacted him on 10 December 2005 he told the applicant that he would speak to him the following Wednesday when he returned to Busselton. The respondent argues that the applicant's evidence in relation to this call was inconsistent and contradictory and the respondent argues that the two telephone conversations between the applicant and Mr McMillan on 12 and 13 December 2005 did not occur as alleged by the applicant and maintains that Mr McMillan's version of events about these discussions should be preferred.

94 The respondent argues that the applicant repudiated his contract with the respondent and that his contractual arrangement with the respondent ended at the applicant's initiative. The respondent argues that the applicant had no intention of returning to the respondent's office after 13 December 2005 as he did not want to work for the respondent's new owners and claims that it was the applicant who did not wish to work for the new owners as he did not trust them. The respondent argues that Mr McMillan had no intention of dismissing the applicant and he had no direction to do so from the new directors. The respondent therefore argues that the applicant chose to resign from the respondent when he removed his belongings from the respondent's premises.

95 If the Commission does not accept that the applicant repudiated his contract of employment with the respondent then it argues that the applicant by his actions resigned from his employment with the respondent. The respondent relies on an employee not needing to formally resign and a resignation being evidenced by conduct.

96 The respondent argues that Mr McMillan was let down when the applicant removed his belongings from the respondent's office on 13 December 2005 and when Mr McMillan telephoned the applicant to find out why the applicant suggested that they should meet the following day. Mr McMillan attended his office before meeting the applicant on 14 December 2005 and discovered the applicant's termination certificate which the applicant had partially completed and the respondent claims that his evidence in this regard was not shaken during cross-examination. The respondent maintains that Mr McMillan completed the separation certificate citing termination on the grounds of redundancy as he thought this would assist the applicant. It was not in dispute that when the applicant and Mr McMillan met on the morning of 14 December 2005 both parties understood that the employment relationship was at an end as the applicant had already organised alternative employment and the respondent

argues that this confirms that the applicant resigned from his employment with the respondent. Additionally Mr McMillan completed notes confirming this within a week of the applicant ceasing employment with the respondent and they are therefore a contemporaneous record upon which the Commission can rely.

97 If the Commission finds that the applicant was terminated, which the respondent denies, the respondent submits that the applicant's termination was justified as the applicant's behaviour undermined the respondent's reputation and had the ability to cause damage to its business. The applicant repeatedly spread rumours about the business and told other employees that they were to be terminated which was not the case and the applicant made comments that he did not want to work for the new directors and that he did not trust the new owners. Additionally the applicant's performance was marred by his duties as a shire councillor

98 The respondent maintains that the applicant's evidence should be treated with caution as his evidence was contradictory, he did not volunteer key pieces of evidence, his evidence was contrary to the evidence of Mr Nash and he was evasive during cross-examination. On the other hand the evidence given by Mr McMillan was consistent and unshaken during cross-examination and he answered questions directly and was not evasive. Mr McMillan also made statements against his own self interest. The respondent also argues that Mr Honey's evidence was unshaken.

99 If the Commission finds that the applicant has been unfairly terminated the respondent argues that the applicant has not proved that he has suffered a loss or injury caused by his dismissal. The respondent argues that the applicant confirmed that his performance had declined prior to ceasing employment with the respondent and as the applicant was on leave for a month during the period after the applicant ceased employment with the respondent the applicant has therefore not shown on the balance of probabilities that he has suffered a loss of earnings. The respondent also argues that it is unlikely that the applicant would have remained employed by the respondent for any length of time given his distrust of the respondent's new owners.

100 The respondent argues that the applicant may have been terminated in any event prior to his long service leave falling due or after 26 March 2006 as the respondent could exercise its right to terminate the applicant pursuant to the Workplace Relations Act without facing a claim such as this.

101 If compensation is to be awarded the respondent submits that the relevant period to be taken into account is the six months prior to the alleged termination during which time the applicant earned $17081 minus earnings already received ($7350 - see Exhibit A6). Any commissions paid to the applicant subsequent to his termination should also be deducted from these amounts. As the applicant earned $10151 after he ceased employment with the respondent plus $7350 in accumulated earnings this is more than what the applicant earned in the six months prior to his termination and the respondent argues that as the applicant was a commission only employee there was no evidence that he had suffered any loss during any such period of notice.. The respondent claims that on this basis the applicant has not suffered any loss. The respondent argues that when assessing compensation the Commission should also take into account that the applicant removed documentation from the respondent's office which contained information about the respondent's clients when assessing if any compensation is due to the applicant. The respondent also argues that as the Commission cannot find that either notice or payment in lieu thereof was required to be given to the applicant at termination it cannot follow that the termination if it occurred was summary.

102 The respondent is claiming costs if the application is dismissed.

Findings and conclusions

Application lodged out of time

103 The first issue that needs to be determined is whether or not this application should be accepted out of time.

104 Section 29(2) of the Act requires that applications pursuant to s29(1)(b)(i) of the Act be lodged within 28 days after the day on which an employee is terminated. As this application was lodged on 13 January 2006 and the applicant ceased employment with the respondent on 14 December 2005 it is two days out of the required timeframe for lodging a claim of this nature.

105 Section 29(3) of the Act reads as follows:

> "(3) The Commission may accept a referral by an employee under subsection (1)(b)(i) that is out of time if the Commission considers that it would be unfair not to do so."

106 In reaching a decision in this matter as to whether it would be unfair not to accept this application out of time I take into account the relevant factors outlined in the Industrial Appeal Court decision in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (2004) 84 WAIG 683 at 686, as follows:

> "1. Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.
>
> 2. Action taken by the applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.
>
> 3. Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.
>
> 4. The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.
>
> 5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time.
>
> 6. Consideration of fairness as between the applicant and other persons in a like position are relevant to the exercise of the Court's discretion."

107 When considering the issue of fairness, Heenan J further observed in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (op cit) the following:

> "I accept that the concept of fairness is central to a decision whether or not to accept an application under s 29 which is out of time but, with all respect, I cannot accept the submission which was put in this case that it is fairness to the applicant which is either the sole or principal concern. Fairness in this situation involves fairness to all, obviously to the applicant and to his or her former employer, but also to the public interest and to the due and efficient administration of the jurisdiction of the Commission which should not be burdened with unmeritorious stale claims."

108 In applying these guidelines I am mindful that there is a 28 day timeframe to lodge an application and the Commission's discretion in relation to a matter of this nature should not be exercised unless it would be unfair not to do so.

109 On the evidence before me and for the purposes of dealing specifically with the issue of whether or not this application should be accepted I find that given the amount of conflicting evidence between the parties about whether or not the applicant was terminated that there is substance to the applicant's claim that he was unfairly dismissed. In reaching this view I also take into account that there was no dispute that the respondent gave the applicant a separation certificate on or about 16 December 2005 confirming that the applicant had been terminated due to a redundancy situation and my finding later in this decision that if the applicant was terminated he was unfairly terminated.

110 In my view there was an acceptable reason for the delay in lodging this application which I find in this instance to be two days late as I conclude that the applicant ceased employment with the respondent on 14 December 2005 when the applicant and Mr McMillan finalised the applicant's cessation of employment with the respondent during a meeting at the Goose Restaurant. I find that the applicant sought advice and became aware soon after he ceased employment with the respondent that he had 28 days within which to file his application and I accept the applicant's evidence that he experienced difficulties meeting this timeframe for a number of reasons. The applicant went on a long standing holiday with his family for 10 days away from Busselton soon after he ceased employment with the respondent and I am of the view that the Christmas and New Year closedowns impacted on the applicant's ability to obtain advice about his situation. I also accept that the applicant spent time setting up for his new role with Roy Weston South Perth during this period and in any event there was some confusion as to the applicant's date of termination given the series of events which occurred in the week commencing 12 December 2005. I find that all of these events contributed to the applicant not lodging this application within the required timeframe.

111 Even though the applicant did not indicate to the respondent that he intended to contest his termination prior to lodging this application and the respondent was therefore unaware of this application until it was served on it, the respondent did not detail any specific disadvantage it would suffer as a result of this lack of notice. There is the usual disadvantage to the respondent of an application of this nature which would arise in any event if this application had been lodged within the required timeframe and whilst I accept that the required timeframe for lodging applications should be complied with this application was filed only two days out of the required timeframe which in my view is not a period lengthy enough to cause significant damage to the respondent.

112 It is my view that the prejudice suffered by the applicant would be greater than that suffered by the respondent if this application was not accepted as the applicant would not be able to contest his termination which he maintains was unfair particularly given the confusion about the events surrounding the application's cessation of employment with the respondent.

113 When taking into account the above findings and the relevant factors to consider in an application of this nature and when balancing these findings with the issue of fairness I find that it would be unfair not to accept this application. In reaching this view I take into account that I have found there was an acceptable reason for the delay in lodging this application and there is sufficient to establish that the applicant has an arguable case. It is also my view that the respondent is not prejudiced any more than usual in allowing this application which was lodged two days after the required timeframe even though the applicant did not advise the respondent that he would be contesting his termination prior to this application being served on the respondent. When taking into account fairness to both sides I therefore find that it would be unfair for the Commission not to exercise its discretion to grant an extension of time within which to file this application. For these reasons an extension of time in order to lodge this application is granted and an order will issue to that effect.

Findings and conclusions

114 As this application has been accepted I am required to determine whether or not the applicant was terminated in order to attract the Commission's jurisdiction to deal with this application.

Credibility

115 I listened carefully to the evidence given by each witness and closely observed each witness whilst giving their evidence.

116 I accept that in the main the applicant gave his evident to the best of his recollection however I have some reservations about the applicant's evidence about his intentions to remain working with the respondent after the new directors took over the respondent's business and the evidence given by the applicant about his discussions with Mr McMillan during the week the applicant ceased employment with the respondent. The applicant maintained that he was prepared to remain working with the respondent even if the new directors took over at least until he qualified for long service leave and he therefore would not have resigned in December 2005, however in the weeks leading up to his cessation of employment with the respondent the applicant organised a position as a representative with Roy Weston South Perth on a provisional basis and attended a training course at this office in early December 2005. The applicant also gave evidence that he had no intention of working with the new directors if they took over the respondent's business (see transcript page 54) and he told Mr McMillan that because of his lack of trust in the new directors he would not leave his filing cabinet in the respondent's office when he was not there. Even though the applicant qualified his views by saying he would work until his long service leave entitlements accrued, in my view this was inconsistent with his attitude towards the new directors and his actions in seeking out alternative employment. His actions and views in this regard are also at odds with the applicant's claim that he did not cease employment with the

respondent of his own volition after his discussion with Mr McMillan on 12 December 2005 just two days after the documents for the sale of the respondent's business to the new directors had been finalised.

117 I have concerns about the veracity of parts of Mr McMillan's evidence and I formed the view that at times Mr McMillan was not being as candid as he could have been on some important issues. For example, Mr McMillan was less than forthcoming when asked about the details of his negotiations with Mr Honey prior to the sale of the respondent's business and the events leading up to this sale and his evidence about the negotiations for the sale of the respondent's business was inconsistent in part with the evidence given by Mr Honey, whose evidence I accept. I formed the view that at times Mr McMillan's evidence was self-serving and tailored to support the respondent's case, for example Mr McMillan was not convincing when he gave evidence that he was concerned about the applicant's performance in the months leading up to the applicant's cessation of his employment with the respondent and he claimed that he was not undertaking the tasks required of him and when asked about this issue in cross examination Mr McMillan confirmed that he had not given any formal warnings to the applicant about his performance during this period. As I accept the applicant's undisputed evidence that Mr McMillan trusted the applicant to undertake some of his duties when he was away from the respondent's office this indicates to me that Mr McMillan generally had confidence in the applicant's skills and his ability to undertake the tasks required of him and in my view this further undermines Mr McMillan's evidence about the applicant experiencing performance difficulties. Some of Mr McMillan's evidence about his discussions with Mr Honey about retaining the respondent's staff after the respondent's business was sold to the new directors was also contrary to the evidence given by Mr Honey. In the circumstances I have doubts about much of the evidence given by Mr McMillan.

118 I find that the evidence given by all of the other witnesses in these proceedings was given honestly and to the best of their recollection and I therefore accept the evidence given by each of these witnesses. Even though Mr Honey's evidence about his discussions in September 2005 about buying the respondent's business and whether or not the applicant would be terminated differed from the evidence given by Mr Nash on these issues it is my view that nothing turns on this conflict in the evidence. I have reached this view because at the time the conversation between Mr Honey and Mr Nash took place in September 2005 no offer had been made by Mr Honey or the other directors to Mr McMillan to buy the respondent's business and the purchase of the respondent's business was not the only option being looked at by Mr Honey. Furthermore, Mr McMillan was open to offers about the sale of the respondent's business as late as early December 2005 when Ms Atkinson expressed an interest in possibly purchasing the respondent's business and Mr Nash's claim that Mr Honey indicated that the applicant would be terminated by the new directors was not supported by any other evidence given in these proceedings, apart from a rumour to that effect being spread by Mr White.

119 Given that I have concerns about the evidence given by both the applicant and Mr McMillan I will make my findings based on my views about the nature of the evidence given, evidence that is consistent with the written documentation given in these proceedings and evidence consistent with the evidence given by other witnesses.

120 In relation to an unfair dismissal claim brought pursuant to s29(1)(b)(i) of the Act, it is incumbent upon an applicant, on the balance of probabilities, to demonstrate that he or she has been dismissed by the employer to attract the Commission's jurisdiction.

121 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.

122 In *Mohazab v Dick Smith Electronics Pty Ltd* (No 2) (1995) 62 IR 200 at 205, the Full Court of the Industrial Relations Court of Australia said:

> "…'termination at the initiative of the employer' involves a 'termination in which the action of the employer is the principal contributing factor which leads to the termination of the employment relationship … [A]n important feature is that the act of the employer results directly or consequentially in the termination of the employment and the employment relationship is not voluntarily left by the employee. That is, had the employer not taken the action it did, the employee would have remained in the employment relationship'."
>
> (See '*Law of Employment'* Macken, O'Grady, Sappideen and Warburton 5th Edition page 326.)

123 If the applicant was not terminated he argues in the alternative that he resigned due to a constructive dismissal. A resignation can constitute a dismissal for the purposes of the Act but whether or not a particular resignation will do so depends upon the circumstance of each case. The relevant law to be applied in this matter was set out by Beech, SC in *Grant Raymond Lukies v AlintaGas Networks Pty Ltd* (2002) 82 WAIG 2217 at 2220:

> "The Industrial Relations Commission of South Australia in *Lucky "S" Fishing Pty Ltd v Jex* (1997) 75 IR 158 at 164 also considered the decision of the Court of Appeal of New Zealand [*Auckland Shop Employees' Union v Woolworth's (NZ) Ltd* (1985) 2 NZLR 372]. It noted that the Court of Appeal stated that there has been a modification of the test in the *Western Excavating (ECC) Ltd v Sharp* case (1978) ICR 221 at 226 which stated that if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as

discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The Court of Appeal suggested that in constructive dismissal cases the relevant test is whether the conduct complained of is calculated or likely to seriously damage the relationship of confidence and trust between the parties and is such that the employee cannot be expected to put up with it."

124 In *Chris Toncich v People Who Care Incorporated* (2003) 84 WAIG 401 at p403, Kenner C said:

"The question of a resignation, truly voluntary, or a dismissal, is a jurisdictional fact necessary to be found by the Commission in order to ground jurisdiction in matters of this kind. It is well settled that to attract the Commission's jurisdiction in claims of this kind, an employee must be "dismissed": *Gallotti v Argyle Diamond Mines Pty Ltd* (2003) 83 WAIG 353 (IAC); (2003) 83 WAIG 919 (FB). It is also the case, that in circumstances of a "resignation", apparently tendered by an employee, those circumstances may be a dismissal for the purposes of the Act, if the contract of employment is not terminated truly voluntarily by the employee: *Attorney - General v WA Prison Officers Union* (1995) 75 WAIG 3156. Furthermore, an employee may be "constructively dismissed", in the event that the employer conducts itself by way of a breach of the contract of employment, going to its root, so as to justify its acceptance by the employee: *Western Excavating (EEC) Ltd v Sharp* [1978] QB 761 per Denning MR at 769."

125 In my opinion, having regard to all of the evidence before the Commission, and when taking into account my views on witness credit I am not persuaded that the applicant was terminated or that he had no alternative but to resign in mid December 2005.

126 Paragraph 6 sets out the background to this application.

127 I find that in the months leading up to 14 December 2005 the applicant was anxious about his ongoing employment with the respondent given rumours circulating in the local real estate industry about the sale of the respondent's business to new owners and the possibility that the applicant and other members of the respondents' staff were going to be terminated when this sale was finalised. As the applicant was aware that Mr Honey could be one of the new owners of the respondent's business and as he sold properties in the same area in which the applicant operated I find that this added to the applicant's concern about his ongoing employment with the respondent.

128 I find that during September and October 2005 Mr McMillan and Mr Honey had discussions about the sale of the respondent's business and I find that by November 2005 sale documents had been negotiated and drafted by representatives of both Mr McMillan and Mr Honey. There was no dispute that from mid November 2005 onwards the new directors were all working in the respondent's office having been terminated by Mr White due to their intention to operate a business in competition with the Professionals and it was also not in dispute that from mid to late November 2005 onwards the applicant worked in the same office as the new directors until he ceased working with the respondent and that the applicant spent limited time in the respondent's office of his own volition during this period.

129 I find that as a result of the applicant's uncertainty about his ongoing employment with the respondent in the period prior to the finalisation of the sale of the respondent's business in early December 2005 the applicant sought out and obtained alternative employment on a provisional basis with Roy Weston South Perth and I find that the applicant was in the process of ensuring he was able to commence work with this business at short notice by attending a training course with Roy Weston South Perth about email and customer management systems in the week prior to 12 December 2005.

130 It is clear from the applicant's own evidence that when the applicant approached Mr McMillan about the sale of the respondent's business in the period prior to 10 December 2005 that Mr McMillan gave no indication to the applicant that he was going to be terminated by him or that his employment with the respondent was at risk then or in the future nor did Mr McMillan indicate to the applicant that the new owners would not be requiring his services. The applicant gave the following evidence about these discussions:

"Did you have any other discussion with Mr McMillan following that, about your future?---Yes. I told him that I - - that if he was selling the business that I would be sacked.

You told him that if he was selling the business?---That I'd be sacked.

And what brought you to say that?---Because I'd been approached by another agent to come and work at their office.

All right. And why did you tell him that if he sold the business you'd be sacked?---Because that's what this person had told me.

All right. And what did Mr McMillan say?---Basically nothing; that he hadn't sold the business."

(Transcript page 19)

131 I find that once the applicant became aware that the sale of the respondent's business to the new directors had been agreed on or about 10 December 2005 the applicant contacted Mr McMillan on this date to again confront him about his employment status and to clarify whether he would have a job with the respondent on his return from leave as he had organised to take annual leave from 16 December 2005 for four weeks. I find that during this discussion Mr McMillan told the applicant that he would discuss the issue with the applicant on his return to Busselton from Perth as I am of the view that Mr McMillan's evidence about this discussion is more plausible than the applicant's recollection that Mr McMillan would contact him on Monday. I have reached this conclusion as I accept Mr McMillan's claim that he wanted to speak to all staff face to face including the applicant about the sale of the respondent's business when he returned to Busselton on the Wednesday and I accept that whilst he was in Perth he was having discussions with his wife, who was also a director of the respondent about the sale documents.

132 I find that the applicant contacted Mr McMillan on 12 December 2005 and again asked him whether or not he would have a job when the respondent's business was sold. The applicant gave the following evidence about this conversation:

> "And you were going to tell us about calling Mr McMillan again that day, that - - that evening?---That evening? I rang Mr McMillan again on the Monday and asked - - asked again whether I still had a job, and he basically told me that I should go and get a termination certificate, and he wanted to meet me face to face on the Wednesday morning.
>
> Had there ever been discussion between you and he about a termination certificate previously?---Yes, there had.
>
> MR MORISON: And what was the nature of that?---Basically, I kept asking whether - - whether I needed to get a termination certificate if I was going to be sacked. It - - it became a - - I'll say a joke between us.
>
> Now, you say that on - - on that Monday evening when you telephoned him he said you should go and get a termination certificate?---That's correct.
>
> What - - what else was discussed during that conversation?---Not a great deal. He said he wanted to meet up with me face to face on - - on the Wednesday morning."
>
> (Transcript page 21-22)

133 Mr McMillan stated the following in relation to his telephone discussions with the applicant on 10 and 12 December 2005:

> "Do you recall receiving that telephone call from Mr MacGregor?---(No audible response).
>
> What did he say to you?---He wanted to know whether he had a job. He'd heard the business had been sold and wanted to know whether he had a job.
>
> Did you - - ?---And I told him I'd leave it until I got back.
>
> Did you ask him where he had got the information from that the business had been sold?---I can't recall that.
>
> Were you surprised that he made that comment to you?---Yes.
>
> Did you speak with him again after the Saturday in relation to his employment?---He rang me again later that weekend and wanted to know whether he had a job, and I - - I suppose I got a bit terse with him there because I told him, "Do whatever you want to do, Alan, but leave it until I get back." Because at that stage I had had no direction from the three new purchasers of the business.
>
> What did you mean by that, when you told him to - - to do what he wanted to do?---I suppose if he wanted to go he could go, if he wanted to stay he could stay, but just wait until I got back.
>
> MS GIBBS: Mr MacGregor has given evidence that you and he had a telephone discussion on the Monday, the 12th of December - - ?---That would probably - -
>
> - - last year?--- - - be right, yes.
>
> What was referred to in that telephone conversation?---I think that was the telephone call that I - - I said, "Do what you want to do."
>
> Did Mr - - did you and Mr MacGregor ever have any discussions in relation to him obtaining a separation certificate?---No.
>
> Was that discussed in the telephone conversation on the - - Monday, the 12th of December 2005?---No."
>
> (Transcript pages 110-111)

134 I am required to decide whether Mr McMillan told the applicant that he was terminated during their telephone conversation on the evening of 12 December 2005 as claimed by the applicant. As I have concerns about some of the evidence given by both the applicant and Mr McMillan I will reach my conclusions in relation to this issue based on the circumstances surrounding this conversation.

135 In my opinion the applicant was not terminated by Mr McMillan on 12 December 2005. I find that after the applicant's conversation with Mr McMillan on 12 December 2005 the applicant reached the view of his own accord that he would no longer remain working with the respondent because the sale of the respondent's business to the new directors had been finalised and he had decided that he was unable to work with the new directors and it is also my view that the cessation of the relationship between the applicant and the respondent was confirmed on 14 December 2005 when details about the payment of outstanding commissions owing to the applicant were finalised between the applicant and Mr McMillan and the applicant handed over his office keys to Mr McMillan.

136 I have reached this conclusion for a number of reasons. It is my view that when the applicant telephoned Mr McMillan on 12 December 2005, of his own volition, and again asked Mr McMillan about his ongoing employment with the respondent Mr McMillan was annoyed by the applicant's persistent requests for clarification about his employment status because he had already told the applicant that he would discuss this issue with the applicant on his return to Busselton and I accept that he was unaware of any decision made by the new directors about the applicant's ongoing employment with the respondent and Mr McMillan was not in a position to advise the applicant about whether or not the new directors would continue to employ the applicant. Even though the applicant did not give evidence that Mr McMillan told the applicant to 'do whatever you want to do' it is my view that in all likelihood Mr McMillan stated this to the applicant rather than telling him to get a separation certificate and in my view in doing so this was not a statement telling the applicant that he was terminated. I have reached this view as I find that Mr McMillan had no instructions from the new owners at that point about whether or not the applicant would be retained as an employee, as confirmed by the evidence of Mr Honey and I accept that Mr McMillan wanted to sell the respondent's business as a going concern. I also note that Mr McMillan terminated one employee prior to 31 December 2005, a secretary who worked in the respondent's office, after discussing her situation with Mr Honey and there was no

evidence that Mr McMillan had a similar arrangement with Mr Honey to terminate the applicant. I take into account that both the applicant and Mr McMillan gave evidence that during their discussion on 12 December 2005 the applicant was not told that he was terminated and I note that there was no evidence that Mr McMillan sought to have a discussion with the applicant about his ongoing employment after the documents for the sale of the respondent's business were signed around 10 December 2005. I also note that the applicant had the opportunity to clarify his ongoing employment status with the new directors from mid November onwards but chose not to do so.

137 I find that the applicant did not want to work with the new directors, especially Mr Honey, as he worked in the same area as the applicant and in my view the extent to which the applicant did not wish to work with the new directors is evidenced by the applicant's encouragement of a colleague Ms Atkinson to buy the respondent's business as late as early December 2005 and the applicant spending reduced hours in the respondent's office after the new directors commenced employment with the respondent in mid November 2006. Additionally, the applicant gave evidence that he had no intention of working with the new directors (transcript page 54), the applicant did not trust the new directors (transcript page 27) and the applicant sought out and obtained provisional employment and undertook training with Roy Weston South Perth in the week immediately prior to 12 December 2005.

138 I find that after the discussion between the applicant and Mr McMillan on the evening of 12 December 2005 and as a result of the applicant's inability to work with the new directors, which was a decision of the applicant's own making, the applicant took it upon himself the following day to remove relevant items from the respondent's office, including his photo. I reject the applicant's claim that Mr McMillan's behaviour at his meeting with Mr McMillan at the Goose Restaurant on 14 December 2005 was consistent with the applicant having been terminated as it is my view that the behaviour of both Mr McMillan and the applicant at the Goose Restaurant was characterised more as a meeting between colleagues who had worked well together for some time reluctantly parting company and finalising relevant details about the cessation of the employment relationship.

139 Even though Mr McMillan wrote on the applicant's separation certificate that the applicant had been terminated due to a redundancy situation it is my view that Mr McMillan indicated this on this certificate because he thought that he was assisting the applicant and I have no reason to doubt this evidence. I also find that as Mr Honey did not tell Mr McMillan that the applicant would not be required by the respondent when the new directors took over the respondent's operations this supports Mr McMillan's claims in this regard.

140 I am of the view that in all probability Mr McMillan did not tell the applicant to obtain a separation certificate which, according to the applicant, was code for the applicant being terminated. Even though the applicant claimed that if he was told by Mr McMillan to obtain a separation certificate this was tantamount to him being terminated the applicant did not give any details as to when and where conversations about this issue had taken place prior to 12 December 2006 which in my view undermines his claim. I also reject the applicant's evidence that Mr McMillan told him that he was terminated because the new owners did not like his attitude as there was no evidence to corroborate this claim.

141 I acknowledge that the applicant sent an email to a number of people on or about 16 December 2005 indicating that he had been terminated however it is my view that when this email was generated by the applicant it reflected his views about his employment status and did not reflect what had occurred.

142 The applicant claimed that it was in Mr McMillan's financial interest to terminate the applicant prior to the sale of the respondent's business as the applicant's long service leave would not have to be paid by him. Whilst this entitlement was Mr McMillan's responsibility it was not at Mr McMillan's initiative that contact was made between himself and the applicant on 12 December 2005 which in my view undermines this claim.

143 Given the above findings I am of the view that the cessation of the employment relationship between the applicant and the respondent was not at the initiative of the respondent and it follows and I find that the applicant was not terminated. The Commission therefore does not have jurisdiction to deal any further with this application and an order will issue dismissing the application.

144 Whilst I do not concede that I am wrong in reaching the view that the applicant ceased employment with the respondent on his own volition I will deal with the applicant's claim that he was constructively dismissed. I find that when applying the tests of a constructive dismissal to the issues relevant to this dispute that the applicant was not constructively dismissed as it is my view there was no action by the employer which constituted conduct calculated or likely to seriously damage the relationship of confidence and trust between the parties such that the applicant could not be expected to put up with it.

145 I do not accept that the Mr McMillan's actions were the principle contributing factor leading to the applicant's cessation of employment with the respondent. I accept that Mr McMillan's lack of candour towards the applicant about giving him details about the sale of the respondent's business resulted in the applicant being anxious about his ongoing employment with the respondent and to some extent forced the applicant to bring the issue of his employment relationship with the respondent to a head, however, I find that even though Mr McMillan failed to keep the applicant informed about the sale of the respondent's business it is my view that his actions in this regard were not deliberately designed to force the applicant to resign. I accept that Mr McMillan was selling the respondent's business as a going concern and there was evidence from both Mr McMillan and Mr Honey that the issue of the applicant's ongoing employment with the respondent would be considered after the new directors took over the respondent's business. It may well have been the case that the applicant may not have remained employed by the respondent after the new directors took over given that his sales area was the same area covered by Mr Honey however I find that was not a matter for Mr McMillan or the applicant to determine prior to the sale of the respondent's business. In the event only one staff member was terminated by Mr McMillan prior to the new directors taking over on 31 December 2005, none of the respondent's sales staff were terminated after the new directors took over the respondent's business and I accept that the current number of sales staff employed by the respondent is in excess of the number of sales staff employed by the respondent when Mr McMillan was a director.

146 I have already stated that Mr McMillan could have been more forthcoming with the applicant about the state of the negotiations for the sale of the respondent's business to the new directors however I accept that there was no certainty that these negotiations would result in the sale of the respondent's business to the new directors. There was no dispute that as late as the first week in December 2005 Mr McMillan gave details of the respondent's finances to Ms Atkinson as she was being encouraged by the applicant to buy the respondent's business. Furthermore, it is not essential that when a business is being sold for all employees to be kept advised as to the ongoing status of the negotiations for the sale of the business. Whilst Mr McMillan could have been more forthcoming with the applicant when the sale of the respondent's business was imminent given the applicant's lengthy employment with the respondent and his ongoing concerns about his employment status and the fact that the applicant was soon to embark on a period of annual leave in my view his actions in this regard did not leave the applicant with no alternative but to resign. I also take into account that the applicant sought out employment elsewhere on his own volition some weeks prior to the new directors taking over the respondent's business which is not indicative of an employee who is being forced to resign and whilst it is possible that the new directors may not have continued to employ the applicant after the sale of the respondent's business the applicant did not approach the new directors to clarify his situation and discuss possible options in the future even though the new directors were all working in the same office as the applicant from mid November 2005 onwards.

147 I find that when Mr McMillan told the applicant to 'do what you want' on 12 December 2005 that this comment was not designed to force the applicant to resign particularly given Mr McMillan's frustration over the number of approaches the applicant had made to Mr McMillan about his ongoing employment prior to this date. I also reject the applicant's claim that Mr McMillan intended to terminate the applicant in any event as there was no evidence to support this claim apart from the information included on the separation certificate about which I have already made some comment.

148 If I am wrong in reaching the view that the applicant was not terminated which I do not concede, I find that if the applicant was terminated that he was unfairly dismissed. I find that there is no substance to the respondent's claim if the applicant was terminated then the applicant's termination was justified. I accept the applicant's evidence that his performance had not been a concern to Mr McMillan in the months prior to December 2005 sufficient to warrant termination and it is my view that the evidence did not demonstrate that the applicant was performing poorly enough to warrant termination, nor was there sufficient evidence demonstrating that the applicant was neglecting his duties by spending insufficient time on work related duties. There was also no dispute that the applicant had not received any formal written warnings about his behaviour or performance and in my view Mr McMillan's evidence about giving the applicant a verbal warning lacked substance. Whilst the applicant confirmed that he did not spend as much time as usual in the respondent's office from mid November 2005 onwards there was no evidence that this negatively impacted on his performance and I accept that the applicant's earnings in the last six months of his employment with the respondent was in line with seasonal fluctuations. The respondent complained about the applicant spreading rumours about the sale of the respondent's business and who would be terminated however it is the case that a number of persons, including the applicant, were involved in spreading these rumours. In the circumstances I find that the concerns about the applicant's performance in the months leading up to the sale of the respondent's business were not sufficient to justify the applicant's termination and that if it was the case that the applicant was terminated then it is my view that he was unfairly terminated.

149 If the applicant was unfairly terminated I am satisfied on the evidence that the working relationship between the applicant and respondent has broken down such that an order for re-instatement or re-employment would be impracticable and in any event the applicant is not seeking reinstatement.

150 I am therefore required to address the issue of compensation. I apply the principles set out in *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 78 WAIG 3635 and *Tranchita v Wavemaster International Pty Ltd* (1999) 79 WAIG 1886. On the evidence, I am satisfied the applicant took reasonable steps to mitigate his loss as he commenced employment with Roy Weston South Perth soon after he ceased employment with the respondent. I find however that the applicant has not demonstrated on the balance of probabilities that, apart from the payment of notice which would ordinarily be due to be paid to the applicant, that he has suffered a compensable loss as a result of his termination.

151 I am not satisfied that the applicant would have had an ongoing expectation of work with the respondent and would have remained working with the respondent for six months until his long service leave was due. I have reached this view because the applicant gave evidence about his inability to work with the new directors and his lack of trust in them. Additionally, the applicant had already organised a new position with Roy Western South Perth which he was ready to take up as soon as he ceased working with the respondent. I therefore find that the applicant would not have returned to work with the respondent after his period of leave ceased. In the circumstances it is my view that if the applicant was unfairly terminated then his loss would have been the statutory notice period to which he was entitled at termination.

Costs

152 If the applicant was unsuccessful in proving his claim the respondent foreshadowed that it would be seeking an order for costs. The general policy in this jurisdiction is that costs ought not to be awarded except in extreme cases (*Denise Brailey v Mendex Pty Ltd t/a Mair & Co Maylands* (op cit)). I do not believe that in bringing this application to the Commission that the applicant's claims fall into the category of a case where an order for costs should apply. In reaching this view I am not satisfied that the circumstances of this matter are such as to warrant an order for costs against the applicant as I find that the applicant's claims were not totally lacking in substance.

153 An order will now issue dismissing the applications.

2006 WAIRC 05874

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALAN RAY MACGREGOR
	APPLICANT
	-v-
	GEOGRAPHE BAY REAL ESTATE INVESTMENTS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 27 DECEMBER 2006
FILE NO/S	U 41 OF 2006, B 41 OF 2006
CITATION NO.	2006 WAIRC 05874

Result	Dismissed

Order

HAVING HEARD Mr I Morison of counsel on behalf of the applicant 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 –

1. THAT application U 41 of 2006 be and is hereby accepted out of time.
2. THAT applications U 41 of 2006 and B 41 of 2006 be and are hereby dismissed.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2006 WAIRC 05835

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEREK MANN
	APPLICANT
	-v-
	COMPOWER ACES
	RESPONDENT
CORAM	COMMISSIONER S WOOD
HEARD	TUESDAY, 5 DECEMBER 2006
DELIVERED	WEDNESDAY, 13 DECEMBER 2006
FILE NO.	B 434 OF 2006
CITATION NO.	2006 WAIRC 05835

CatchWords	Contractual benefits claim - Entitlements under contract of employment - Annual Leave - Wages - Performance allowance - Industrial Relations Act 1979 (WA) s.29(1)(b)(ii)
Result	Application granted
Representation	
Applicant	Mr D Mann
Respondent	Mr C Vella

Reasons for Decision

1 This is an application pursuant to section 29(1)(b)(ii) of the Industrial Relations Act 1979 ("the Act") which was lodged on 11 July 2006. Mr Mann claimed denied contractual benefits for Annual Leave ($1,581.09) and an allowance ($345.81) for 51.34 hours of annual leave which he says was not paid upon his resignation.

2 The applicant tendered a number of payroll advices covering his period of employment with the respondent. The payroll advices contained in [Exhibit A6] indicate the amount of leave taken and the period in which it occurred; 21 April 2005 - 24 hours, 5 May 2005 – 24 hours, 22 September 2005 – 8 hours, 17 November 2005 – 56 hours and 15 December 2005 – 12 hours. The total amount of leave taken as evidenced from the payroll advices is 124 hours. The applicant states that he was employed on 25 October 2004 and his last day of employment was 18 December 2005.

3 The applicant claims a total employment period of 57 weeks. The contract of employment states that the applicant was paid an hourly rate of $25.00, which was later increased to $30.77. The applicant was to work 40 hours per week and was entitled to four weeks annual leave per year. The applicant says the total annual leave entitlement is then 175.384 hours and that 124 hours were taken during his period of employment. This then leaves a residual of 51.384 hours. Multiplied by the hourly rate of $30.77 gives an amount of $1,581.08. The allowance component is then calculated by dividing the outstanding annual leave entitlement by hours worked per fortnight and then multiplying by the allowance component to give a figure of $345.81.

4 Mr Vella for the respondent tendered a document which he says goes to prove that Mr Mann's productivity was low during a period of his employment. He does not say that Mr Mann was on leave during that time. Mr Vella also suggested that Mr Mann had taken leave at times other than the dates which Mr Mann provided in evidence. He could not provide the details as he could not obtain them from the employee who was responsible previously for such records. Mr Mann denies this and points to the payslips which he provided in evidence.

5 It is clear from the payslips that leave has been recorded when taken. It is obvious that any evidence to be adduced by either party must be brought forward at hearing. The Commission must accept the evidence of Mr Mann as being credible, particularly as he has provided accurate detail of his leave, matched against the payslips. It is also clear, as I found on the last occasion, that the allowance payment was a regular payment and should therefore be paid whilst on leave. It was paid previously when Mr Mann took leave. I would therefore order that the respondent pay the applicant the amount of $1,926.89 in total which incorporates $1,581.08 in annual leave and an allowance component of $345.81. Payment to be made within 7 days from the date of the order less any taxation payable to the Commissioner for Taxation.

6 The parties at last hearing had agreed that an amount of $738.48 was due for unpaid wages. Mr Vella submitted that he would pay that amount. Consequently, that amount was not included in the previous order of the Commission. The parties now advise the Commission that the amount has not been paid. That amount will therefore be incorporated in the order now to issue, and will be payable within 7 days less any taxation payable to the Commissioner of Taxation.

2006 WAIRC 05865

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEREK MANN
	APPLICANT
	-v-
	COMPOWER ACES
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	THURSDAY, 21 DECEMBER 2006
FILE NO	B 434 OF 2006
CITATION NO.	2006 WAIRC 05865

Result	Application granted
Representation	
Applicant	Mr D Mann
Respondent	Mr C Vella

Order

HAVING heard Mr D Mann on his own behalf and Mr C Vella on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

1. THAT the said respondent do hereby pay within 7 days of this order, as and by way of a denied contractual entitlement for annual leave, the amount of $1,926.89 to Derek Mann, less any taxation that may be payable to the Commissioner of Taxation.

2. THAT the said respondent do hereby pay within 7 days of this order, as and by way of a denied contractual entitlement for unpaid wages, the amount of $738.48 to Derek Mann, less any taxation that may be payable to the Commissioner of Taxation.

(Sgd.) S WOOD,
Commissioner.

[L.S.]

2006 WAIRC 05832

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DALE CHRISTOPHER MILES
	APPLICANT
	-v-
	J.L.F. COMMERCIAL PTY LIMITED
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
HEARD	TUESDAY, 17 OCTOBER 2006, WEDNESDAY, 18 OCTOBER 2005, THURSDAY, 19 OCTOBER 2006
DELIVERED	WEDNESDAY, 13 DECEMBER 2006
FILE NO.	U 239 OF 2006, B 239 OF 2006
CITATION NO.	2006 WAIRC 05832

CatchWords	Termination of employment - Harsh, oppressive and unfair dismissal claim - Principles applied - Applicant unfairly dismissed - Contractual benefits claim - Entitlements under contract of employment - Application granted - *Industrial Relations Act 1979* (WA) s 5, s 7, s 23A(6), (7), (8) & (9) & s 29(1)(b)(i) & (ii); & *Minimum Conditions of Employment Act 1993* (WA) s 5, s 7(c) & s 24(2)(b)
Result	Declarations made and Orders issued that the Respondent pay the Applicant $13,443.91 (gross) for acquisition commissions, $615.38 (gross) as salary, $3,333.33 (gross) as damages for reasonable notice and $18,738.71 (gross) as compensation.
Representation	
Applicant	Mr K Trainer (as agent)
Respondent	Mr M Diamond (of counsel)

Reasons for Decision

1 Dale Christopher Miles ("the Applicant") claims that he was harshly, oppressively and unfairly dismissed on 22 February 2006 by J.L.F. Commercial Pty Limited ("the Respondent"). The Applicant's claim is made under s 29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act"). The Applicant also makes claim under s 29(1)(b)(ii) of the Act that he has been denied by the Respondent contractual benefits namely:

(a) an amount of $19,243.60 as commissions on land sourced and packaged as house and land packages for the JLF Group of Companies;

(b) $1,038.47 being six days' accrued annual leave and four days' salary; and

(c) two months' pay in lieu of notice calculated on the basis of annual salary of $40,000 per annum plus an amount representing average commissions which could have been earnt by the Applicant during that period of notice.

Background

2 The owner of the JLF Group of Companies, Mr John Fitzgerald, is a land developer in Queensland. In 1999, Mr Fitzgerald launched Custodian Wealth Builders in Queensland which is an organisation which markets house and land packages to investors. They regularly hold seminars with potential investors and recommendations are made about what type of property investors should buy. Sometime before 2004, the JLF Group of Companies began acquiring land in Western Australia for on-sale to investors.

3 Mr Fitzgerald has written a number of books about the acquisition of property, in particular he has published a book called "Seven Steps to Wealth". The first step promoted by Mr Fitzgerald is that an investor should buy the worst house in the best street. The second step is that the rental return on the property should be equivalent to approximately four per cent of the purchase price and the third step is that the land content should be 40 per cent of the total amount paid. In identifying appropriate land representatives employed by the Respondent to source and package land are required to look at the criteria that overlay the first three steps, which is, purchasing land close to major infrastructure, such as schools, transport and shops. Once bundles of lots are identified as satisfying the Respondent's criteria and the land is assessed as feasible to return a profit through a feasibility study, the land is purchased from the owner of the land through a put and call option agreement. Once the agreement is signed the Respondent goes through a due diligence process. The JLF Group of Companies usually do not acquire a title to each lot as all the lots are on-sold to investors as house and land packages.

4 On 14 June 2005, the Applicant was offered a position in the Respondent's research and acquisitions team in Perth. Prior to being offered employment with the Respondent, the Applicant worked for 18 months for Joyce Investments, sourcing land for house and land packages for sale and selling. The JLF Group of Companies was a client of Joyce Investments. The Applicant became aware that the Respondent was seeking to engage a research and acquisitions salesman so he enquired about the position. After speaking to Scott Watson, who is the JLF Group of Companies General Counsel, and Mr Fitzgerald, the

Applicant was offered the position. The Applicant's contract of employment described the nature of his role and responsibilities as follows:

"In brief and without in any way limiting the nature of the role your responsibilities will include:

- Research and identify developed land stock for purchase under put and call option agreements at wholesale discount
- Package up land stock for re-sale as house and land packages
- Liase [sic] with the construction department and builders in relation to the design of houses with the view to achieving maximum margin
- Liase [sic] with valuers and co-ordinate valuations with the view to achieving maximum margin
- Research and identify projects
- Generate business development
- Maintain existing business networks
- Service the sales team"

(*Exhibit 2*)

5 It was an express term of the Applicant's contract of employment that in consideration of him successfully sourcing and packaging up land stock as house and land packages a commission calculated at 1.25 per cent of the margin earned on each house and land package would be paid.

6 The Applicant was summarily dismissed by the Respondent on 22 February 2006 after Mr Watson received information which led him and the Respondent to conclude that the Applicant was receiving secret commissions from a developer or a real estate agent from whom the Applicant was sourcing land on behalf of the Respondent. The Applicant denies that such an arrangement was entered into and says that the document provided to the Respondent from which that assumption was made mistakenly contained his name. The Applicant also says that the Respondent's investigation into the matter was deficient in that he was not afforded procedural or substantive fairness. The Respondent says that its investigation was sufficient and on the evidence it had collected it was open for Mr Watson to conclude that the Applicant was to receive secret commissions from a real estate agent.

7 In relation to the Applicant's claim for contractual benefits, in respect of his claim for commission the Applicant claims that he sourced 26 blocks of land at a location known as Horizons at Sinagra which were packaged as house and land packages. The amount claimed by him in respect of these blocks is $8,780. The Applicant also claims that he sourced 18 blocks of land which were packaged as house and land packages at Bottazzi Park at Madeley. The commission he claims is owing in relation to those lots is $6,576.79.

8 For the location known as Archers Hill at Pearsall, the Applicant says that he sourced five blocks of land which were packaged as house and land packages. The amount of commission claimed by him in respect of these lots is $2,278.56. In relation to Pearsall Heights, the Applicant claims that he sourced four blocks which were packaged as house and land packages and the commission he should have been paid on those four lots is an amount of $1,608.25.

9 The Commission was provided with an agreed document that sets out the margin on each block in dispute. The amounts claimed as commission is not in dispute between the parties. What is in dispute is whether the Applicant did all that was required of him pursuant to the terms of his contract of employment to earn the commissions.

10 The Applicant also claims that he is entitled to payment for two inspection tours undertaken by him after 9 January 2006 and prior to the termination of his employment. His contract of employment expressly provides in respect of inspection tours:

"Inspection Tours

In consideration for you attending inspection tours with investors which will include but without limitation picking up investors from Perth airport or another nominated location, conducting an inspection tour of available custodian house and land product with the intention of aiding the investors in the selection of one or more custodian house and land product; provide tours of surrounding infrastructure and points of interest and then to transport the investors to the conveyancing office chosen by the contractor to organise all contract signing and other relevant matters in connection with the investors contract in respect of such property or properties; transporting of investors back to their accommodation in Perth or the airport (as required) a commission of $1,000.00 would be paid."

(*Exhibit 2*)

The Applicant's Evidence

11 Whilst the Applicant worked for Joyce Investments he was approached by a salesperson who worked for one of the JLF Group of Companies, Custodian Wealth Builders. The salesperson told the Applicant that they were looking to employ an acquisition person in Perth so the Applicant spoke to Mr Watson and Mr Fitzgerald about the position. Some time after the Applicant met with Mr Watson a contract of employment was emailed to him. The Applicant signed the contract of employment and returned it to Mr Watson. The Applicant commenced work on 20 June 2005 (*Exhibit 2*). The Applicant says that he obtained the position because of his broad knowledge of the Perth area and because he knows a lot of owners, developers and syndications in the Perth metropolitan area who sell land.

12 The Applicant addressed each of the duties set out in his contract of employment and testified that he carried out those duties. He explained that his job was to research and acquire land. To do that he had to drive around the metropolitan area to look at land and telephone representatives of syndications and developers to see what land was coming up for development in the metropolitan area. The purpose of acquiring land was that each lot would be packaged by building a house and sold to investors to rent out the properties. Consequently, the house and land packages had to be attractive to potential investors. He

says he was instructed that he was to acquire land at a 10 per cent discount and to try and locate land within a 25 kilometre radius of Perth. The Respondent also required land to be sourced in an area where 70 per cent of occupiers were owner occupiers. He was also instructed that each lot should be within a five minute walking radius to private schools, close to hospitals and other facilities and that the value of the land should be 40 per cent of the price of the package. The Applicant says the Respondent's criteria made it difficult to identify land for purchase. He was told by developers that they would not sell at a discounted price as the market was changing rapidly. The market was "over heated" and land was selling very quickly. People were queuing for land, so developers were not interested in selling to the Respondent.

13 As part of the Applicant's terms and conditions of employment it was expressly agreed that he would be on three months' probation which could be extended. When three months expired on 20 September 2005, Mr Watson extended the probationary period. It was put to the Applicant in cross-examination the reason why his probationary period was extended was that he was not performing as he had been unable to identify land and he was having difficulties with the put and call option agreement. The Applicant said that the reason why he was having difficulty finding land was because of the Respondent's criteria in an over heated real estate market in Western Australian. When re-examined he testified that Mr Watson raised with him when he extended his probation that he should get "up to speed" with the put and call option agreement.

14 The land purchased by the Respondent is purchased through a put and call option agreement which gives the Respondent 30 days to seek a price from builders on a sample of blocks and obtain a valuation of the land from a valuer. Mr Watson drafts the put and call option agreement for the purchase of all bundles of lots. The Applicant said that he found the put and call option document to be very complicated. He conceded that he found it hard to follow and that some developers he dealt with, such as market gardeners, also found it very difficult to understand the requirements of the put and call option agreement.

15 In late August 2005, Nicholas Huebner, the Manager of the Research and Acquisitions Department located in Queensland, came to Western Australia. The Applicant says that he came to help him (the Applicant) to identify land as the Respondent had a shortage of house and land packages to offer to clients. The Applicant denied that Mr Huebner was sent to Western Australia because of poor performance on his behalf. He said that Mr Huebner was only in Western Australia for three to four weeks and by the time Mr Huebner arrived he (the Applicant) had located and identified land at Sinagra and Madeley for the Respondent to purchase and he had also identified the land at Pearsall. He said, however, that Mr Watson identified and sourced the blocks at Pearsall Heights.

16 When the Applicant was cross-examined, it was put to him that to achieve payment of acquisition commissions he had to project manage each bundle of lots of land that was sourced and acquired for house and land packages. The Applicant disagreed and said that he carried out all the duties required of him and he was not employed as a project manager.

17 Given the criteria specified by the Respondent, it took him some time to get a few deals together. With the exception of Pearsall Heights (Archers Hill) once he identified land he sent information about the land to Mr Watson with an estimate of the growth and prices of comparable sales together with a recommendation to purchase to enable Mr Watson to provide approval to purchase. After approval was granted the Applicant discussed the purchases with Paul Thynne who was responsible for the construction of all houses on the lots. The Applicant says that he provided to the construction department information about what sort of buildings were required, how many houses, how many square metres, whether air-conditioning was required and similar matters. The construction department then sought orders from builders and the process of due diligence commenced. At that point in time, Mr Watson became involved in the documentation required for that process. Although, it was the construction department's job to carry out the construction of the houses the Applicant says that he assisted the construction department by providing them with information from local builders that he knew and had a good relationship with. He was not engaged to sell the house and land packages. Another department in the JLF Group of Companies was responsible for that.

18 If the builders were busy sometimes they would have to obtain an extension. The Applicant testified that he liaised with the valuers. He, however, did not arrange valuations. When cross-examined he agreed that Michelle Young, who is Mr Watson's professional assistant in Queensland, arranged the valuations by instructing licensed valuers and Ms Young also carried out the feasibility studies.

19 The lots at Sinagra and Madeley were purchased by the Respondent through David Goddard who is a sales manager with First One Realty in West Perth and who was acting for the owners of the land. The Applicant approached Mr Goddard in relation to both of those bundles of lots of land. When asked in cross-examination whether he conducted a feasibility study for the Madeley project, he said that he knew from his own experience that the blocks were well priced as he knew the area well as he had been selling land in Western Australia for 16 years. He also testified that he gave instructions to the construction department to prepare the house plans for the Madeley project. He disagreed that these instructions were given by Mr Huebner. In relation to Sinagra, he testified that whilst Mr Huebner may have done a lot of research on the land that research was carried out after he (the Applicant) had sourced the land and that Mr Huebner typed up the project summaries. Ms Young also assisted by typing up spreadsheets for the feasibility study in relation to each of the blocks after Mr Watson gave his approval to purchase.

20 In relation to Pearsall Heights, he agreed that Mr Watson had assisted him in negotiating the contracts but he (the Applicant) negotiated the contract with the owners of the land. As a result of discussions with the owners and with Mr Watson a less complicated put and call option agreement was put together. He also agreed that Mr Watson liaised with the construction department to put the house plans together and Ms Young prepared or gave instructions to the valuers to prepare the valuations and put the paperwork together for the feasibility study. The Applicant says that he had no authority to instruct the valuers.

21 In relation to Pearsall (Archers Hill) the Applicant agreed that Mr Watson had sourced the land but said that he (the Applicant) had some discussions with the salesperson about the land so Mr Watson agreed that they would go 50/50 on the deal. The Applicant agreed that Mr Watson liaised with the construction department about the deal and Ms Young arranged the valuations.

22 When asked what research he conducted of comparable sales, he said that reiwa.com provides information and when making an assessment of the feasibility of purchasing land, information can to be sourced from real estate agents, reiwa.com and

Department of Land Administration ("DOLA") about what houses had recently been sold in the local area. He said that he also visited builders who could provide more up-to-date information about project costs than he could obtain from a computer. He also said that he conducted research of proposed schools by contacting the Education Department and churches.

23 On 20 December 2005, Mr Watson provided a letter to the Applicant which stated that he had completed his probationary period. The letter was provided to the Applicant at his request as he (the Applicant) had recently applied for a loan:

> "RESEARCH & ACQUISITIONS PERTH
>
> Dear Dale,
>
> I refer to your letter of appointment dated 14 June 2005 and confirm that you have now completed your probationary period.
>
> As is more particularly outlined in your letter of appointment your rennumeration [sic] package includes a salary of $40,000 together with the following commission structure:
>
> *ACQUISITIONS*
>
> A commission calculated at the rate of 1.25% of the margin earned on each house and land package.
>
> *INSPECTION TOURS*
>
> $1,000 for each run which proceeds to an unconditional contract.
>
> The commissions are directly attributable to the number of lots the group is acquiring and selling.
>
> Conservatively, in the current financial year we expect the groups [sic] requirements to be in excess of 150 lots.
>
> Based on you achieving a margin of $35,000 per lot your acquisitions commission per lot would be $437.50 and with 150 lots being required your total acquisition commission would be $60,000.
>
> Kind regards
>
> Scott Watson
>
> General Counsel
>
> JLF Group of Companies"

(*Exhibit 3*)

24 The Applicant stated when he gave evidence that it was his opinion that up until the 22 February 2006, he had positive feedback from Mr Watson and Mr Fitzgerald about his work and he was looking forward to doing a lot of deals in the year 2006.

25 When the Applicant arrived at work on Wednesday, 22 February 2006, Mr Watson was in the office. Mr Watson usually visited Perth about once a month. Mr Watson was using the Applicant's computer. This was not unusual as Mr Watson often used his (the Applicant's) computer when he was in Perth. The Applicant started a conversation with Mr Watson about information Mr Watson required but Mr Watson said to him, "Are you receiving secret commissions?" The Applicant said, "No." He testified that he did not recall what was then said but he recalled that Mr Watson showed him a spreadsheet on the computer that Mr Watson had received from Mr Goddard on 16 February 2006 in relation to the Sinagra project. The spreadsheet contained a list of each of lot, the agreed purchase price for each lot and the agreed rebate to JLF. It also contained columns relating to additional fees payable to FPG on each lot and the net amount to the developer after discount. The spreadsheet also contained three other columns. The first was the amount to be paid on each lot to the property owner, Keith Moylan. The second showed amounts in respect of each lot to be paid to the Applicant and the third column contained a net amount to be paid on each lot to FPG. The Applicant testified that when he saw his name on the spreadsheet he was dumbfounded and shocked as he was not to receive any commissions from First One Realty and that he was only getting paid by the Respondent. He told Mr Watson that it was a mistake as his name should not have been on the document. A couple of minutes later Mr Watson asked the Applicant to leave the room, so he went about his work. A short time later, Mr Watson called the Applicant back into his office and told him that he had spoken to Mr Moylan who had told him whatever was on the spreadsheet was right. Mr Watson told the Applicant that he had to let him go. It was clear to the Applicant that his employment was terminated, so he packed up his belongings and left the office. When cross-examined the Applicant conceded that the email to Mr Watson from Mr Goddard which had the spreadsheet attached indicated that he had also been sent a copy of the spreadsheet on 16 February 2006 but he says he did not received it. After the Applicant left the office he telephoned Mr Goddard and told him what had transpired. Mr Goddard appeared bemused and asked, "What for?" The Applicant then telephoned Mr Watson and told him it was a mistake and that it was probably a conjunctional arrangement but he did not know. However, Mr Watson told him that he and Mr Goddard had concocted the story and he did not believe him. The Applicant spoke again to Mr Goddard who asked him if he got his job back. The Applicant told him, "No." Mr Goddard offered him a job but the Applicant declined as he was still very upset and stressed.

26 The Applicant testified that prior to his employment being terminated on two occasions he conducted inspection tours. He said that on each occasion he took clients to two or three locations, showed them local hospitals, recreational and shopping centres and gave them a recommendation to purchase particular land. He also provided each of them with a suburb profile and arranged for them to enter into a purchase agreement for a block and building contract. Whilst the Applicant concedes that none of the clients proceeded with the purchases he says that pursuant to the express terms of his contract of employment he should be paid $1,000 for each inspection tour. When cross-examined about this issue it was put to the Applicant that prior to

being employed by the Respondent, he was informed by Mr Watson that the Applicant would be unable to do any inspection tours until the Respondent obtained a real estate licence. The Applicant agreed that he was informed of that. He said, however, Luke Rogers, an employee of the Respondent, entered into an arrangement with the Respondent to use Mr Rogers' real estate licence on behalf of the Respondent in early 2006. The Applicant agreed that Mr Rogers had offered him an amount of $400 to conduct each inspection tour but testified that he had declined that amount as his agreement was not with Custodian Wealth Builders.

27 The Applicant was not paid wages for the last four days he worked for the Respondent. Nor did he receive payment of any accrued annual leave or commissions. He, however, received an advance of $3,052.16 gross on his commissions on 9 December 2005. The Applicant concedes that this amount received as an advance should be taken into account as a deduction from his claim for contractual benefits for commission.

28 After the Applicant's employment was terminated he commenced employment in the beginning of March 2006 with National Homes acquiring land on commission only. He worked for National Homes until June 2006. Whilst he was employed by National Homes he completed four land deals. At the time of giving evidence he had been paid $2,300 gross including GST on one sale and he expected to be paid an amount of $8,000 on the other three sales after settlement of each sale. The Applicant left National Homes as he decided to set up and open his own business selling house and land packages. He entered into a partnership with another person and commenced trading in mid-August 2006. At the time of giving evidence he had not received any income from his new venture. He said, however, that he was waiting for finance to purchase 16 blocks for clients and he expected that when the deal was complete he would earn a gross amount of $60,000 to $70,000. They have other projects in the pipeline and he estimates that he will earn approximately $300,000 to $500,000 during the first 12 months of trade.

29 David Goddard gave evidence on behalf of the Applicant. He is the Sales Manager of First One Realty. In 2005, he was introduced to the Applicant by First One Realty's sales team as the Applicant wanted to acquire some blocks of land on behalf of JLF. At that time Mr Goddard was acting as the agent for Mr Moylan whose company owned land in the Horizons at Sinagra development. Mr Goddard said at that time the developer was very keen to get out of the development quickly as it had run 12 months over schedule as blocks were selling slowly. Mr Goddard presented a proposal to purchase blocks to the developer from Applicant on behalf of JLF. Two to three weeks later, Mr Watson contacted him about the put and call option agreement. The agreement guaranteed that if the Respondent did not find buyers for the land JLF would acquire the land at a certain period of time. He said that although the price was firmed up the deal was up in the air for some time because of the length of time it took to sign the appropriate documents. He said that Mr Watson made the deal very technical through the put and call option agreement which impeded process. He says that he dealt with no one other than the Applicant and Mr Watson in relation to the Sinagra project. In relation to the Madeley project, he testified that they had an approach from the Applicant to purchase the Madeley blocks on behalf of JLF. He said that Mr Watson was also involved in the put and call option agreement for that project. Mr Goddard initially spoke to the Applicant and then with Mr Watson about any concerns the developers and their lawyers had with legal issues arising out of the put and call option agreement.

30 Mr Goddard had no involvement in the Archers Hill at Pearsall or Pearsall Heights projects.

31 Mr Goddard prepared the spreadsheet which stated the Applicant was to be paid $1,000 for each lot of the Horizons at Sinagra development purchased by JLF. He explained that they intentionally increased the purchase price of the blocks to give the developer more as settlement was going to be delayed and there was going to be an extra fee paid to First One Realty. He said the net payments to FPG were payments to the Formica Property Group which is the main company who funds some of First One Realty's projects. He said that he does work for FPG but he does not get paid by them. He said there was an error in the spreadsheet in that the amounts indicated on the spreadsheet to be paid to the Applicant were in fact the amounts to be paid to him and no payments were intended to be made to the Applicant. Some time after Mr Goddard sent the spreadsheet to Mr Watson and whilst he was away from his office he received a telephone call from the Applicant who told him that he had been dismissed for taking secret commissions. He said to the Applicant that he did not know what he was talking about. The Applicant then explained that the spreadsheet stated he was to receive $1,000 for each block. He then went back to his office, looked at the spreadsheet and telephoned Mr Watson and told him there was an error and it should be his (Mr Goddard's) name on the spreadsheet and that the Applicant was not getting paid $1,000 for each block. Mr Watson told him that he did not believe him. Mr Goddard then telephoned the Applicant and told him he was sorry that it caused a problem for him. He said that the Applicant was extremely upset and very down for something he did not do. Mr Goddard says that he spoke to Mr Watson a couple of days later about the put and call option agreement on the Madeley or Sinagra projects and he tried to tell Mr Watson again that the spreadsheet contained an error but Mr Watson did not want to know about it. When asked about whether Mr Huebner had any dealings with him (Mr Goddard) about the Sinagra and Madeley projects, Mr Goddard said that the only people he dealt with were the Applicant and Mr Watson and he had never heard of Mr Huebner.

The Respondent's Evidence

32 Scott Watson is a solicitor employed full-time by the JLF Group of Companies. His position is General Counsel of the JLF Group of Companies and he is located in Queensland. His primary role is to manage research and acquisitions. In the role of market research he and his acquisitions staff research the Australian Bureau of Statistics information, local councils' statistics and demographics. They also carry out market research to ascertain where infrastructure will lie in the future. Then they look at buying blocks to on-sell as house and land packages that will return a sufficient margin of profit from each block. To do that they obtain valuations on the land and obtain data of sales evidence in the area. The Respondent sells at market value. If the valuations are less than what they anticipate they reduce the sale price of the house and land packages. Mr Watson testified that it is not a criterion that they seek to purchase land within a 25 kilometre radius of Perth. He gave examples of two developments that have been developed by the JLF Group of Companies that are more than 35 kilometres from the centre of Perth and they are Seville Grove and Merriwa. Mr Watson explained the process that they use to acquire land. In particular, he said that after the land is identified and the price is agreed with the owner of land they do an initial assessment of viability to

assess whether they can make a financial gain. Then instructions are given to him to prepare a put and call option agreement. During the period of the put and call option agreement they have a period of due diligence. During the due diligence period valuations of prices of houses and plans are obtained through the construction department. Mr Watson said that although the construction department carries out that task they need some guidance from the person in the area which in Western Australian was the Applicant. The valuations are conducted by licensed valuers who are employed by external valuation companies.

33 Mr Watson first met the Applicant when Joyce Investments were the Respondent's contractors in Perth. The Respondent had a disagreement with Joyce Investments and decided to set up their own research and acquisitions team in Perth. The Applicant was aware they were looking for staff, so he spoke to him (the Applicant) and had a number of discussions with the Applicant about what was involved. The Applicant was aware of some of the Respondent's sale processes and systems. He explained to the Applicant they would offer a base salary as a number of aspects of his work would not be remunerated by commission and that to obtain payment of acquisition commissions he had to do whatever it took to bring projects in that were successful or financially viable. He also explained to the Applicant that he had to arrange valuations because the Respondent on-sold the properties at market value. So he told the Applicant that he had to make sure whatever profit margin they make comes off a valuation amount. He says he told the Applicant that he could not buy land and sell it at any price which he (Mr Watson) thought was what Joyce Investments were doing because they were finding it difficult to buy land at the right price. He says that the role of the Applicant was to direct, instruct and liaise with all the relevant departments of the JLF Group of Companies at all stages of sourcing, acquiring and putting together the house and land packages to on-sell to investors.

34 It was also a term of the Applicant's employment that he would be paid for conducting inspection tours or runs providing they were successful, that is a sale proceeded to a conclusion. Prior to the Applicant commencing employment he told the Applicant he would not be conducting tours immediately as they did not have a real estate licence in Perth. Eventually they appointed their manager of the Perth office, Mr Lucas Rogers, to conduct tours as he became licensed as a real estate agent in Western Australia. Mr Watson understood that Mr Rogers offered the Applicant $400 to conduct each inspection tour which was payable if the tour led to a concluded sale and proceeded to settlement.

35 Prior to the Applicant commencing employment Mr Watson drew up the Applicant's contract of employment (*Exhibit 2*). He said the document was a summary of discussions he had with the Applicant and the dot points on page 1 (set out in paragraph 3 of these reasons for decision) were the essential items the Respondent required the Applicant to carry out. When cross-examined, he said the letter was an offer and not a contract. He intended a formal contract be entered into after the probationary period expired. However, he conceded that the letter contained all of the Applicant's terms and conditions of employment.

36 When the Applicant commenced work Mr Watson came to Perth and provided the Applicant with an induction. His practice is to come to Perth every month for a few days. When the Applicant commenced employment he already had contacts with some of the builders used by the Respondent. Mr Watson prepared a letter of introduction for the Applicant to send to potential owners of land so that the Respondent could start purchasing stock. Mr Watson also introduced him to some developers. During the initial three months' probationary period the Applicant did not identify any land that was feasible to purchase. Although the Applicant was a personable person his computer skills were lacking so he (Mr Watson) tried to give him positive feedback. Mr Watson said the Applicant completed a computer course after the feedback was given. The other areas that let him down was his lack of understanding of the put and call option agreement. Mr Watson testified that although the document is a legal document a person in the Applicant's position is required to understand the basic aspects of the agreement to communicate the structure such as timeframes, purchase prices and security, and to explain to the vendors that during the option period they are going to arrange houses and sell house and land packages to end users and if the Respondent cannot on-sell a lot within the time frames set out in the put and call option agreement they will purchase it outright. Mr Watson also said that the Applicant let himself down with time management as he was communicating about land that met the Respondent's criteria but nothing seemed to be happening.

37 At the end of the three months' probationary period Mr Watson extended the Applicant's probationary period for another three months. Mr Watson provided the Applicant with a summary of the put and call option agreement and encouraged him to read the document in full. He also provided him with standard letters of instruction to Mr Watson to prepare a put and call option agreement and letters of instruction to the construction department. Mr Watson asked Mr Huebner to give the Applicant a spreadsheet containing steps as to how to make a project successful and instructed the Applicant to have a diary of bring ups. During that period the Applicant came to Queensland two or three times for training.

38 Because no land had been identified towards the end of the Applicant's first probationary period arrangements were made for Mr Huebner who is a member of the sales and acquisitions team in Queensland to come to Perth to source land for house and land packages as the Respondent was running out of stock. Mr Watson said that Mr Huebner arrived in Perth on 1 September 2005 and stayed for five weeks. Mr Watson testified that he assumed that Mr Goddard introduced the Madeley project to the Applicant and Mr Huebner and that occurred because the Applicant would have sent a letter of introduction to Mr Goddard. He said that the Applicant had discussions and meetings with Mr Goddard and the Applicant initially had communications with Mr Goddard about the Madeley project land but other than that he did not think the Applicant had a great deal of involvement in the project. He said, however, that the Applicant's role was to communicate with Mr Goddard and follow anything up that was asked by Mr Huebner. Mr Watson testified that he was asked by Mr Huebner to draft the put and call option agreement for the Madeley project. Mr Watson prepared the document and returned it to Mr Huebner. He assumed that Mr Huebner forwarded the document to Mr Goddard. Mr Watson then had negotiations with Mr Goddard about the time frames in the put and call option agreement which was unusual. Mr Watson then negotiated the terms of the put and call option agreement with the landowner's lawyers and he monitored the state of the project and made sure that Mr Huebner was arranging house plans, valuations and all the other things that needed to be done. Mr Watson said that he was doing more driving than he would have anticipated for this project because they were under pressure to source a viable project in Western Australia. He said that whilst Mr Huebner was in Perth, Mr Huebner was chasing him and provided him (Mr Watson) with house plans and the valuations of a selection of houses so Ms Young could prepare a feasibility study so he (Mr Watson) could

assess the project. Ms Young also ordered the valuations. When the project came in unconditional he instructed the construction department to award the contracts to build to their preferred builder and for Joyce Investments to show potential purchasers the packages. However, they had disagreements with the landowner and the Respondent had to buy some of the blocks as the settlement of the project was delayed.

39 When cross-examined, Mr Watson conceded that based on Mr Goddard's evidence the Applicant had sourced the land in the Sinagra and the Madeley projects. Further, he accepted that the Applicant had negotiated some of the terms of the purchase in respect of those projects. In relation to the Sinagra project, although in examination-in-chief Mr Watson said the land was introduced by Mr Goddard about the same time as the Madeley land, he conceded when cross-examined that the Applicant had sourced this land. Mr Watson testified that the Applicant had some discussions with Mr Goddard about the price of the Sinagra land but it was Mr Huebner who asked him (Mr Watson) to prepare the put and call option agreement. Again they had difficulties getting the agreement finalised but the process took less time as by that time Mr Goddard was familiar with the document. It is Mr Watson's opinion that Mr Huebner did most of the driving of the Madeley and Sinagra projects. In particular, he says that Mr Huebner made sure that there were house plans, the feasibility study was done and the project summary was done. Mr Watson said he thought Mr Huebner met personally with the valuers and Mr Huebner continually hounded him (Mr Watson) about whether the put and call option agreements had been prepared on time. In his view Mr Huebner oversaw both of these projects. After the Sinagra deal was complete Mr Watson asked the construction department to award the project to the preferred builder and asked the construction department to forward house plans to the selling agents in Perth. Mr Watson or Ms Young also forwarded documents to the selling agents to prepare the land contracts. Mr Watson and Ms Young also took these steps in respect of the Madeley project.

40 Mr Huebner was paid 1.25 per cent on the margin of profit for the Sinagra and Madeley projects. Mr Watson said that Mr Huebner was paid the commission on these projects because he was involved in the initial discussions and then he project managed those projects either personally or by delegating to other members of staff. When asked whether he knew Mr Huebner had done these things Mr Watson said that he knew generally what Mr Huebner had done. He then said that the process usually takes about six weeks but because they were under pressure to obtain stock in Western Australia Mr Huebner was relying upon him (Mr Watson) and Ms Young more heavily than otherwise had he been in Queensland to get the project finalised. When questioned further he said he did not know what the Applicant had done on the projects. Mr Watson said because of the shortage of stock Mr Huebner's was sent to Perth and told he was not to come back until he sourced some land and he was personally responsible for both projects or delegating the steps to complete the job.

41 In relation to the Archers Hill at Pearsall project there were four lots. Mr Watson said that the Applicant sourced the land and was in negotiation with the vendors. He became aware the Applicant had spent a long time trying to explain the put and call option agreement to the vendors when the Applicant asked him to meet with the landowners. At that time the Applicant was pushing him to go ahead without a formal put and call option agreement. Mr Watson met with the landowners and told them that he was happy to make changes to the agreement and they were able to agree on the formal terms of sale. Mr Watson testified that the Applicant's role was to introduce him to the developer's representatives but he (Mr Watson) did the deal. After the deal was struck Mr Watson asked the Applicant to obtain information from the developers and site plans. This information was then forwarded to the construction department to arrange house plans. Mr Watson asked Ms Young to prepare valuations and instructed the construction department to award contracts to build with the preferred builder and to arrange and forward contracts for the sale of the house and land packages. Mr Watson was paid the acquisition commissions on this project.

42 In relation to the Pearsall Heights project, the Respondent had previously sourced 33 lots from the owner of the Pearsall Heights land. Mr Watson telephoned the agent for the developer and arranged to meet the developer. Mr Watson then reached a deal to purchase that land at the meeting. Although the Applicant attended the meeting he says he has no recollection of any agreement with the Applicant to share the commission on a 50/50 basis. Mr Watson was also paid acquisition commissions on the Pearsall Heights project. Mr Watson says that he arranged for house plans and he would not have needed the Applicant to do much more on the project as Mr Watson already had the site plans from the previous transaction.

43 Mr Watson said that the Applicant often telephoned him and told him there was land available and that the Respondent should jump to purchase because it was a good deal. Mr Watson agreed that the Applicant told him (Mr Watson) that the market was very tight in Western Australia and prices changed dramatically between one week to the next and any delays in the formal process meant that prices were increasing and it was costing them business. Mr Watson said to the best of his knowledge the Applicant did not do any research. The Applicant regularly said that he knew a bargain when he saw it but he never presented Mr Watson with any hard facts. In particular, he never conducted any infrastructure research. Mr Watson said that he could not rely upon the Applicant's experience as they needed hard facts of sales evidence and an estimate of profit before a decision could be made to purchase. Mr Watson said that the Applicant was not prepared to do that and he provided information in a piecemeal form and did not do so in writing.

44 Mr Watson testified that Ms Young is his professional assistant and her primary role is to put formal requests to valuers for valuations. She provides them with information and plans and if a valuation comes back which is not expected then she provides feedback so that further information can be fed to the valuers which could lead the valuers to change their opinion. Mr Watson makes the decision whether a project is feasible but he says the person who is responsible for the project is responsible for obtaining the valuations. The Applicant was required to talk to the valuers.

45 In Mr Watson's opinion the Applicant did not do a lot of things he was required to do. When cross-examined, Mr Watson conceded that it was never put to the Applicant whilst he was employed by the Respondent or until sometime after the particulars of answer of claim were filed in the Commission that his performance was not sufficient for him to satisfy the criteria for payment of the acquisition commissions in respect of each of the four projects. However, Mr Watson contended that the Applicant would have understood prior to 22 February 2006 that he was not entitled to commissions because he had not done all that was necessary to obtain a commission. A series of emails from 3 March 2006 to 9 March 2006 was put to Mr Watson in which the Applicant's claim for commissions was discussed and Mr Watson said to the Applicant on 9 March

2006, "As I have mentioned previously we are not prepared to pay you any commissions on grounds you were receiving amounts from the developer direct." (*Exhibit 7*) When asked about this email Mr Watson said that at the time he sent the email he did not want to get into a lengthy discussion about commissions. When re-examined he said that when he sent the emails he had not considered whether any commissions or accrued entitlements were payable to the Applicant.

46 In relation to the letter that Mr Watson provided to the Applicant on 20 December 2005, Mr Watson said that he provided the letter to the Applicant as he was applying for bank finance and he wanted to help the Applicant obtain a loan. He said that the calculations of commission contained in the letter was based upon the Applicant being successful in sourcing all house and land packages in Perth for a 12 months period. Mr Watson said, however, that at the time he wrote the letter he did not think that the Applicant could achieve that target.

47 In relation to the spreadsheet which led to the Applicant's termination of employment, Mr Watson testified that Mr Goddard sent him the spreadsheet because they had a dispute about what had been paid on the Madeley project so he (Mr Watson) wanted information about what was to be paid for the Sinagra project so they could obtain an agreement up front. When he received the spreadsheet, he saw that the Applicant was to be paid $29,000. He brought the spreadsheet to the attention of Mr Fitzgerald and the financial controller of the JLF Group of Companies and made arrangements to travel to Perth to speak to the Applicant face to face about the document. When Mr Watson arrived at the Applicant's office on 22 February 2006, the Applicant was not present. Mr Watson used the Applicant's computer to open his own system and did some work before the Applicant came into the office at 9:00 am. When the Applicant arrived he said to him, "I have to talk to you about something. Are you receiving any benefits financially or otherwise?" The Applicant looked puzzled and said, "No." Mr Watson said to the Applicant, "Don't lie to me. Are you sure?" and the Applicant said, "No, I am not." Mr Watson then showed him the spreadsheet and asked him to explain and the Applicant simply said to call Mr Goddard. Mr Watson then attempted to telephone Mr Goddard. He was unable to speak to him so he left a message on Mr Goddard's telephone and told the Applicant he would telephone Mr Moylan as he was a director of the developer. Mr Watson spoke to Mr Moylan. He explained to Mr Moylan that he had received a spreadsheet containing amounts that people were to receive and it was recorded that the Applicant was to receive $1,000 for each block. Mr Watson said that Mr Moylan replied that he did not know who Dale Miles was but that the spreadsheet set out various commissions payable to various people as part of the transactions. When cross-examined, he conceded that when he spoke to Mr Moylan he did not establish whether Mr Moylan had direct knowledge of the matters stated on the spreadsheet. After Mr Watson spoke to Mr Moylan he spoke to the Applicant again and told him based on the information he had to hand, he had to let him go. Mr Watson made notes of his conversation with the Applicant and Mr Moylan (*Exhibits C and D*).

48 After Mr Watson spoke to the Applicant, the Applicant packed up his belongings and left the office. Mr Watson said that he did not tell the Applicant he had to leave straight away. However, when cross-examined, he conceded that he expected the Applicant to leave immediately. Mr Watson testified that he did not have any conversation with Mr Goddard about the matter. He decided that it was not necessary to speak to Mr Goddard as he had all the evidence he needed to make the decision to dismiss the Applicant. He formed the view that any opinion that Mr Goddard would have provided would have been tainted as the Applicant would have had time to speak to Mr Goddard about the matter. The only conversation he had with Mr Goddard about the matter was to have an indirect conversation about it some time later.

49 When asked in cross-examination, if it was ever put to the Applicant whilst he was employed that he was not doing what he needed to do to earn a commission, Mr Watson said that he explained this to the Applicant when he extended the Applicant's probationary period and before the probationary period was confirmed. However, he conceded that he did not tell the Applicant that he had not done enough to earn commissions.

50 Mr Watson also conceded when cross-examined that he has attended meetings with other members of the research and acquisitions team at which negotiations had been held for the purchase of land. In particular, he said he attended a meeting with Mr Huebner on one particular project but Mr Huebner received the commission for that project and Mr Watson did not. He also said that when he has attended other meetings with other representatives and the fact that he did so, did not disqualify those representatives for payment of acquisition commissions.

51 Nicholas Huebner is the Manager of Research and Acquisitions in Queensland. His title is superior to the position held by the Applicant. He is also paid a base salary and commissions for acquisitions calculated at 1.25% of the margin. Mr Huebner testified that to be paid commission, he is required to successfully manage a project by researching and identifying land and then to work closely with the construction department to get the houses designed and the valuers to get the valuations performed well. One process which he says is essential is to carry out feasibility studies.

52 In mid-August 2005, Mr Huebner was told to come to Western Australia to help the Applicant out and train him to fit into the role as they had a shortage of stock of land in Western Australia. A week later, on or about 20 August 2005, Mr Huebner arrived in Western Australia. He initially said that he was in Perth for a month but he later said when cross-examined that he was in Perth for four to five weeks. He left sometime in late September 2005. When cross-examined he said that he came to Perth on 21 August 2005 and left about 20 September 2005. He then said that he was not there in October 2005. He also said that the Applicant showed him the Madeley estate. He says that whilst he was in Perth he worked on up to eight or ten projects and out of those there were two projects that were successful and they were the Madeley and Sinagra projects.

53 In relation to Madeley, Mr Huebner testified in evidence-in-chief that it was Mr Goddard who telephoned the Applicant and himself to say that he (Mr Goddard) had found some land. When cross-examined about this matter, Mr Huebner said that Mr Goddard may have received an introductory letter from the Applicant. Then he conceded that he did not know if the Applicant had sent Mr Goddard an introductory letter or who approached who but he had guessed it was Mr Goddard. He then said that before he (Mr Huebner) came to Perth, the Applicant called him every day to say that he was looking at land at Madeley, Sinagra and Canning Vale and many other places. When it was put to Mr Huebner that the Applicant's evidence is that he made the approach to Mr Goddard about Sinagra, Mr Huebner said that he had simply guessed that Mr Goddard had approached the Applicant.

54 Mr Huebner said that he negotiated the terms of the deal for both Madeley and Sinagra. He said that he did it from the start of the negotiations and he managed both projects. When asked what the Applicant did, he said that it was his (Mr Huebner's) role to help train the Applicant so he gave him the role of being the main communicator with Mr Goddard as the Applicant was the one that should have been creating relationships and getting to know people. He says that the Applicant negotiated the terms of the agreement based on what he (Mr Huebner) directed him to do.

55 Mr Huebner said that usually after the put and call option agreement is signed substantial negotiations are entered into and sometimes this process takes weeks to be completed. However, he also said that when a request is made to Mr Watson to draw up the put and call option agreement, that is the beginning of the deal. On 1 September 2005, in an extremely very brief email, he requested Mr Watson to draft the put and call option agreement. He said that when you put the put and call option agreement in place many things can change.

56 Mr Huebner said that he prepared the Madeley project summary in October 2005 (*Exhibit E*). The document contains a summary of the development and the area, location, an assessment of rent returns, a table comparing prices of land in Madeley against the Perth Annual Median House Sale Prices and some comparable sales information. The document also contains statistical information from the Bureau of Statistics and the Real Estate Institute about population, income, age of occupants, average weekly rent and house prices. It also contains information about the location of schools, university, transport, shops, recreational facilities, medical and other infrastructure. Mr Huebner said that he prepared this information after talking to a number of people including agents about rents. Mr Huebner said that the Applicant had no input into this report. He also liaised with the construction department and gave instructions to them about the type of house that would suit the lots and sought the preparation of house plans.

57 Mr Huebner said that most of the emails about the two projects were sent out in the Applicant's name. However, Mr Huebner claims that he wrote all of the emails including almost all the emails sent out in the Applicant's name. When cross-examined he said that although he had his own email address he used the Applicant's office and that is why he used the Applicant's email address.

58 On 31 August 2005, Mr Huebner sent an email to the construction department with a copy to Mr Watson and the Applicant about the Madeley project. The email was sent from Mr Huebner's email address. The email states that they are currently in negotiations on 21 lots of the Bottazzi Park Estate, Madeley in WA. He then attached a pdf of a document and he requested a range of house designs with a number of specifications. He gave details of the lot numbers and when the titles were requested. He requested designs by Thursday, 15 September 2005 and he also stated, "Dale has already sent this email request last week in the FW: Zabia Heights, Bottazzi Park and Horizon" email. Please disregard that part of the email. Let me know if you need anything." (*Exhibit F*)

59 In relation to the Sinagra project, Mr Huebner said that he carried out the same tasks that he did in relation to the Madeley project. In particular, he negotiated the deal, the price, the option period and proceeded to supervise the due diligence. He again said that, in his opinion, it was Mr Goddard who suggested the land to the Applicant but when cross-examined he was unable to say whether that was the case or not as he had no direct knowledge of that matter. Mr Huebner also testified that he directed the Applicant what to say to Mr Goddard in relation to all negotiations about the two projects. However, he conceded that he never attended any meeting with the owners of the land or agents. The deals were all done by telephone and email. He said, however, that he made some of the telephone calls and that Mr Goddard did know who he was because he spoke to Mr Goddard at least three or four time on both deals and in every conversation that he listened to that the Applicant had with Mr Goddard, he heard the Applicant state, "Nick said this or that."

60 Mr Huebner was paid acquisition commissions in respect of both the Madeley and the Sinagra projects.

61 Mishelle Young is the professional assistant to Mr Watson. She is located in Southport in Queensland. Her duties are to assist Mr Watson. She prepares documents, feasibility studies, orders valuations, deals with property managers and takes instructions from Mr Watson. When asked what her role was in relation to the four projects in question in this matter, she said that she received instructions which were the same as she is given for every other project that she deals with. She was firstly asked to prepare a feasibility study so they can see how much the project will cost. After she provided that to Mr Watson, he requests construction to prepare a tender. After those are approved valuations are ordered. They then go back into feasibility. Once approved the properties are put on a price list for sale. She said that these are standard duties conducted by her on every project. She testified that she did not recall who gave her the information which was necessary to prepare the documents. In particular, she does not recall if she received any information from the Applicant or Mr Huebner. She said that everything she receives goes on the file and if any information was sent from Mr Huebner that information would be on the file. In relation for requests for valuations, she said that she has the authority to make requests. She did not know whether the Applicant had the authority to do so. In relations to instructions to the construction department, she said that she usually makes requests on behalf of Mr Watson as she does not act on her own volition.

62 Mr Lucas Rogers is the Manager of the Custodian Wealth Builders in Perth. He worked in the same office as the Applicant when the Applicant was employed by the Respondent. The Applicant was not under his charge. Mr Rogers is a licensed real estate agent. He says that he entered into an agreement with the Respondent to conduct inspection runs or tours. When they have a prospective client, someone takes them out and shows them land that is available. He testified that he reached a verbal agreement with the Applicant that if he (the Applicant) carried out an inspection he (Mr Rogers) would pay him (the Applicant) $400. He said he cannot recall when the Applicant conducted tours but he is recalled he conducted two. He said in both cases the sales did not proceed as the deals fell through, so the Applicant was not entitled to any payments.

Credibility

63 Having heard the witnesses and observed them carefully when they gave their evidence and having considered the way in which the Respondent's case was conducted, I have concluded that where their evidence departs I prefer the evidence given by the Applicant and Mr Goddard to the evidence given by Mr Watson. In relation to Mr Huebner, save where his evidence is

supported by documentary evidence, I reject his evidence entirely. I accept Ms Young's evidence but I did not find her evidence assisted in the resolution of any of the material issues in this matter. As to Mr Rogers, I did not find him to be an untruthful witness but I did not find his evidence material.

64 In relation to the Applicant, I find that he gave his evidence in a forthright and honest way and without exaggeration. Nor did he speculate on matters not within his knowledge. In contrast, Mr Watson's evidence was peppered with assumptions which did not appear to be based on direct evidence such as saying that he thought that Mr Huebner met with valuers in Perth. It is apparent from Mr Watson's evidence that he would not have been in Perth when Mr Huebner was in Perth except for a few days when he visited each month. Mr Watson speculated about one material matter and that is he assumed that Mr Goddard approached the Applicant to purchase land at Madeley and Sinagra on behalf of JLF. Sourcing land for JLF to purchase is obviously one of the most important duties for the Applicant to perform. The Respondent's contention that the reason why the Applicant has not been paid any acquisition commissions was because he had not performed the duties necessary to earn those commissions is a defence thought of well after the Applicant's employment was terminated. Mr Watson claimed when he gave evidence that prior to the Applicant ceasing employment the Applicant would have known that he had done insufficient work to be paid a commission. This contention is plainly not credible. There is no evidence that the Applicant was informed that was the case. To the contrary he was paid an advance of commissions of an amount of $3,052.16 gross on 9 December 2005 and on 20 December 2005 Mr Watson provided the Applicant with a letter stating that conservatively it was expected the Applicant would purchase over 150 lots which would result in him being paid a total acquisition commission of $60,000. On 6 March 2006, the Applicant asked Mr Watson in an email whether JLF was going to pay him the commissions on the deals he had done. On 9 March 2006, Mr Watson responded by saying that no commissions would be paid on grounds that the Applicant was receiving amounts from the developer direct. On 11 April 2006, the Respondent filed its notice of answer and counter-proposal to B239 of 2006 in which the Respondent pleaded that the Applicant was not entitled to be paid commissions as contrary to the Applicant's duty of good faith he sought and/or received secret commissions. The Respondent also pleaded that the Applicant had not invoiced the Respondent for the amount alleged to be payable. The Commission's file records that Mr Watson served a copy of the notice of answer on the Applicant's agent on 11 April 2006. Despite the fact that almost seven weeks had elapsed between the termination of the Applicant's employment and the filing of the notice of answer and counter-proposal the defence that the Applicant had not done what was required of him pursuant to the express terms of his contract to earn any commission was not raised until some time later.

65 As to Mr Huebner, I did not find him a credible witness. He unequivocally testified when giving evidence in chief that Mr Goddard contacted the Applicant and suggested that JLF purchase the lots at Madeley and Sinagra. Plainly Mr Huebner had no basis to make such a statement as he had no direct knowledge of the issue. In addition, one material aspect of Mr Huebner's evidence was given without notice to the Applicant. This was the evidence given by Mr Huebner that although most of the emails about the Madeley and Sinagra projects were sent under the Applicant's name under the Applicant's email address, the emails were actually written by him (Mr Huebner). It is apparent from the emails sent by Mr Huebner on 31 August 2005 (*Exhibit F*) that he did have the capacity to send emails from his own email address in Perth. Mr Watson's evidence that he was able to access his emails from the Applicant's computer supports this finding. This part of the Respondent's case was not put to the Applicant when he was cross-examined. Given that an essential element of the Respondent's defence to the claim for acquisitions commissions in respect of the Madeley and Sinagra projects was that Mr Huebner negotiated the price and oversaw or project managed the projects, the essence of Mr Huebner's evidence in relation to this point should have been put to the Applicant. Failure to do so in my opinion attracts the rule in *Browne v Dunn* (1894) 6 R 67. In *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation* [1983] 1 NSWLR 1 at 16 Hunt J formulated the rule as follows:

> "It has in my experience always been a rule of professional practice that, unless notice has already clearly been given of the cross-examiner's intention to rely upon such matters, it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings. Such a rule of practice is necessary both to give the witness the opportunity to deal with that other evidence, or the inferences to be drawn from it, and to allow the other party the opportunity to call evidence either to corroborate that explanation or to contradict the inference sought to be drawn."

66 In applying this rule to this matter, I accept the Applicant's evidence that in relation to the Madeley and Sinagra projects he negotiated the purchase of the land with Mr Goddard and that he contacted the construction department in respect of providing house designs in respect of both projects sometime before 31 August 2005 (see *Exhibit F*). I accept that Mr Huebner sent one email to the construction department about the Madeley project (*Exhibit F*) and one email instructing Mr Watson to draw up the put and call option agreement (*Exhibit G*). Mr Huebner also prepared a project summary for the Madeley project (*Exhibit E*). In relation to what else was required to ensure the projects were successful, Mr Watson drafted the put and call option as he did with all land purchased by the Respondent and Ms Young instructed the valuers and prepared the feasibility as she always does in relation to each project that she is involved in. I also accept that the Applicant liaised with the construction department and the valuers and conducted research about comparable land and planned infrastructure.

Was the Applicant Unfairly Dismissed?

67 The question to be determined by the Commission is whether the legal right of the Respondent to dismiss the Applicant has been exercised harshly or oppressively against the employee so as to amount to an abuse of that right (*Ronald David Miles, Norma Shirley Miles, Lee Gavin Miles and Rose & Crown Hiring Service trading as The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385 at 386).

68 Where an employee is dismissed summarily the onus is on the Applicant to demonstrate the dismissal was not fair on the balance of probabilities. However, there is an evidential onus upon the employer to prove that the summary dismissal is justified (*Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers* (1988) 68 WAIG 677 at 679).

69 If an inquiry held by an employer is unfair, the Commission may investigate the merits of the matter by considering all of the evidence de novo. However, the requirement to accord procedural fairness, not every denial of procedural fairness will entitle an employee to a remedy. No injustice will result if after a review of all the circumstances of the termination it can be said that the employee could be justifiably dismissed (*Shire of Esperance v Mouritz* (1990) 71 WAIG 891; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 430 per Brennan CJ, Dawson and Toohey JJ, and at 466 per McHugh and Gummow JJ).

70 The ordinary standard of proof required of a party who bears the onus in civil litigation is proof on the balance of probabilities. Where criminal conduct is alleged a Court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct (*Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 per Mason CJ, Brennan, Deane and Gaudron JJ at 170-171). The test to be applied is the "Briginshaw" test which was expressed by Dixon J in *Briginshaw v Briginshaw and Another* (1938) 60 CLR 336 at pages 361-362 as follows:

> "... when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty … at common law … it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal."

71 In *Bi-Lo Pty Ltd v Hooper* (1992) 53 IR 224 it was held by the Full Bench of the Industrial Commission of South Australia at 229 to 230:

> "An employee is entitled to both substantive and procedural fairness in respect of a dismissal. Substantive fairness will be satisfied if the grounds upon which dismissal occurs are fair grounds. Broadly speaking a dismissal will be procedurally fair if the manner or process of dismissal and the investigation leading up to the decision to dismiss is just.
>
> Where the dismissal is based upon the alleged misconduct of the employee, the employer will satisfy the evidentiary onus which is cast upon it if it demonstrates that insofar as was within its power, before dismissing the employee, it conducted as full and extensive investigation into all of the relevant matters surrounding the alleged misconduct as was reasonable in the circumstances; it gave the employee every reasonable opportunity and sufficient time to answer all allegations and respond thereto; and that having done those things the employer honestly and genuinely believed and had reasonable grounds for believing on the information available at that time that 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.
>
> If a fact or facts come to light subsequent to the dismissal which cast a different light on the Commission of the alleged misconduct, such fact or facts will not necessarily or automatically render the dismissal harsh, unjust or unreasonable. In our view in such circumstances what will need to be considered is whether the employer, if it had acted reasonably and with all due diligence, could have ascertained those facts before the dismissal occurred.
>
> The Commission is required to objectively assess the subjective actions and beliefs of the employer as at the time of dismissal and not at some subsequent time: see *Gregory v Philip Morris* (1998) 24 IR 397 at 413; 80 ALR 455 at 471; see also *Stearnes v Myer SA Stores* Print No 9A/1973 at 5.
>
> Whether the employer will satisfy that objective test will depend upon the facts of each case. The gravity of the alleged offence will dictate the nature and extent of the inquiry which the employer must conduct. An employer must ensure that an employee is given as detailed particulars of the allegations against him/her as is possible, an opportunity to be heard in respect of such allegations, and a chance to bring forward any witnesses he/she may wish to answer those allegations."

72 In my opinion the Respondent cannot prove to the requisite standard the acts to justify the summary dismissal of the Applicant. When the test in *Bi-Low Pty Ltd v Hooper* (op cit) is applied it is patently clear that the Respondent failed to investigate the matter. The allegation of receiving secret commissions made against the Applicant is an allegation of very serious misconduct which constitutes an indictable offence in Western Australia (see s 529 *Criminal Code*). The nature of the allegation is one of the most serious allegations that can be made against a person engaged in the business of purchasing land. Mr Watson's conversation with Mr Moylan was extremely brief. It should have been apparent to Mr Watson that when Mr Moylan said he did not know who the Applicant was that he (Mr Watson) needed to make further enquiries. Mr Watson says he made no enquiry of Mr Goddard, yet Mr Goddard did try to explain to Mr Watson that the spreadsheet contained a mistake. Mr Watson took the matter no further.

I accept Mr Goddard's evidence that the Applicant's name on the spreadsheet was a mistake and there was no intention to pay the Applicant any sum. It follows therefore that having made that finding the Applicant has proved that he was harshly, oppressively and unfairly dismissed.

Claim for Acquisition Commissions

73 Pursuant to the express terms of the Applicant's contract of employment, the Applicant was entitled to be paid a commission if he successfully sourced and packaged up land stock as house and land packages. It is apparent from the evidence that to do so the Applicant was required to in respect of each project:

(a) research and identify land that potentially could satisfy the JLF criteria;

(b) negotiate with owners/developers and their agents to purchase land;

(c) ensure instructions were given to Mr Watson to draw up a put and call option agreement;

(d) provide instructions and information to the construction department;

(e) liaise with valuers and builders; and

(f) provide information to Mr Watson so that Ms Young could prepare a feasibility study.

74 In respect of the Madeley and Sinagra projects, I am satisfied that the Applicant carried out all of these tasks albeit that some of these tasks were carried out with the assistance of Mr Huebner. Perhaps in the circumstances one might ask why an arrangement was not made to pay part of the commission to Mr Huebner. However, no such arrangement was made or contemplated. When the express terms of the contract are considered it is clear that the Applicant has provided to the requisite standard that he is owed the amounts of $6,576.79 (Madeley) and $8,780 (Sinagra).

75 In relation to Pearsall Heights it is clear from the Applicant's evidence that he did not carry out all of the tasks required of him. For this reason, I am not satisfied that the Applicant is entitled to be paid the acquisition commissions in respect of this project. In respect of the Pearsall (Archers Hill) project, I am satisfied that the Applicant and Mr Watson reached an agreement that he would be paid 50% of the acquisition commissions. Consequently, I am satisfied that the Applicant is owed $1,139.28 in respect of this project.

76 The Applicant, however, received $3,052.16 as an advance on commissions and he agrees that amount should be deducted from the commission owed to him.

77 For these reasons I will make an order that the Respondent pay the Applicant $13,443.91 for acquisition commissions.

Other Contractual Benefits Claims

78 In respect of the Applicant's claim for $2,000 for conducting inspection tours, in essence the Respondent's case is that it contracted out inspection tours to Mr Rogers who set his own conditions for payment of inspection tours. Mr Rogers' evidence was not challenged on that point. Mr Rogers says he offered the Applicant a $400 fee for each tour if a tour led to the settlement of a property. The Applicant testified that he did not accept that arrangement. However, I do not find it necessary to resolve the conflict between these two versions of events as Mr Rogers gave uncontradicted evidence that he was acting on his own behalf when he asked the Applicant to conduct tours. Consequently, the Applicant's claim fails as he is unable to prove that Mr Rogers was acting on behalf of the Respondent when he conducted the tours.

79 I am not satisfied that the Applicant's claim for accrued annual leave has been made out. The Respondent correctly points out that the contract only expressly provides for the taking of leave and not payment, the Applicant's claim is for payment in lieu of leave pursuant to s 24(2)(b) of the *Minimum Conditions of Employment Act 1993* ("the MCE Act"). Pursuant to s 5 of the MCE Act the entitlement to payment is implied into the Applicant's contract of employment. The Respondent contends, however, that the Industrial Magistrate's Court has exclusive jurisdiction to deal with breaches of the minimum conditions in the MCE Act. Section 7(c) of the MCE Act provides that a minimum condition of employment may be enforced:

> "where the condition is implied in a contract of employment, under section 83 of the IR Act as if it were a provision of an award, industrial agreement or order other than an order made under section 32 or 66 of that Act."

80 In *Brown v The University of Western Australian* (2004) 84 WAIG 189, Sharkey P with whom Coleman CC and Gregor C agreed held at [51] to [64] that the express operation of ss 5 and 7 of the MCE Act creates the condition that minimum conditions exist and may only be enforced in the industrial courts constituted by Industrial Magistrates and are not to be read as contractual benefits to which s 29(1)(b)(ii) applies. In reaching this decision Sharkey P at [56] read the word "may" in s 7 as enabling and not discretionary. The reasoning of the Full Bench, however, appears to be contrary to the observations of Heenan J (with whom Parker J agreed) in *Garbett v Midland Brick Company Pty Ltd* (2003) 83 WAIG 893 at [83] where His Honour observed:

> "The enforcement of the rights conferred by the minimum conditions implied under the Act is dealt with separately in s 7 of the *MCEA*. This provides that a minimum condition of employment may be enforced:
>
> (a) where the condition is implied in a workplace agreement, under Division 1 of Part 5 of the *Workplace Agreements Act 1993*;
>
> (aa) where the condition is implied in an employer-employee agreement, under s 83 of the *Industrial Relations Act*;
>
> (b) where the condition is implied in an award, under Part 3 of the *Industrial Relations Act*; or
>
> (c) where the condition is implied in a contract of employment, under s 83 of the *Industrial Relations Act* as if it were a provision of an award, industrial agreement or order other than an order made under s 32 or s 66 of that Act.
>
> It is to be noted that s 7 does not purport to make any of the avenues of enforcement of the implied conditions, which it mentions the sole or exclusive method of enforcement, unlike s 46 dealing with the determination of complaints for offences under Pt 6 of the Act."

81 However, His Honour's observations could be said to be obiter dictum as His Honour then went on to say at [84]:

> "In this case, the absence of any finding below as to the express terms of the employment obligations between the appellant and the defendant means that it is not possible to say whether the conditions implied into the obligations between the appellant and the defendant in this case may be enforced under the *Workplace Agreements Act* or under s 83, or Pt III of the *Industrial Relations Act*. Generally speaking, it would seem to be desirable in cases dealing with rights implied under the *MCEA* to identify the workplace agreement, the employer-employee agreement, the award or the contract of employment which contains the mutual obligations of the parties in order to identify the statutory forum specially available for its enforcement. In this instance, however, I consider that the absence of such a finding will not affect the outcome of this appeal nor restrict this Court in the consideration of the issues raised by the appeal. This is because no attempt was ever made by the appellant to enforce any condition implied into the employment obligations

between himself and the appellant, rather, the only relief sought by the appellant was sought under s 29(1) and s 23(3)(h) for alleged harsh, oppressive or unfair dismissal. Mr Garbett was not seeking enforcement of, or damages for, breach of any condition implied into the obligations between himself and the appellant but, rather, was contending that the breach of the implied condition which he alleged rendered the termination of his employment by the respondent harsh, oppressive or unfair. In other words, if the appellant established that there had been a breach of an implied term, in what I shall call the contract of employment between himself and the respondent, the question would then be, not what damages or other relief the appellant could obtain for breach of an implied condition in the contract of employment, but whether the breach of the implied condition, taken in the context of all other features of the employment relationship, resulted in the termination of employment in the instant case being harsh, oppressive or unfair. That this is a broader enquiry than a determination of the respective legal rights of the parties to the contract of employment, is recognised by the authorities already cited at page 26 and page 27 above and expressly by Walsh J in *North West County Council v Dunn* (1971) 126 CLR 247 at 263."

82 Consequently, it could be said that the reasoning in *Brown v The University of Western Australian* (op cit) constitutes good law. As a single Commissioner of this Commission, I am bound by decisions of the Full Bench by the doctrine of precedent. When the decision of *Brown v The University of Western Australian* (op cit) is applied to this matter the Applicant's claim for accrued annual leave must fail.

83 The Applicant's contract of employment expressly provided that he was entitled to a salary of $40,000 per annum. Consequently, I will make an order that the Respondent pay the Applicant $615.38 gross for four days' salary calculated on the Applicant's fortnightly gross salary of $1,538.46.

84 In respect of the Applicant's claim for two months' pay in lieu of notice, the Commission is required to assess a contractual benefits claim for notice prior to assessing compensation for the unfair dismissal (see *Matthews v Cool or Cosy Pty Ltd & Anor* (2004) 84 WAIG 199) and take that amount into account when assessing compensation.

85 The Respondent submits that if the Commission finds that summary termination was not justified the following clause in the Applicant's contract of employment is capable of being construed as a term requiring two weeks' notice.

> "After commencement you would enter a probationary period of three months commencing on the first day of employment and at the end of that period you would either become a permanent staff member, continue for a further probationary period or be discharged on the giving of two weeks notice without prejudice."
>
> (*Exhibit 2*)

86 However, with respect, the difficulty with the Respondent's argument is that the clause clearly only applies to giving notice at the end of the probationary period. The Respondent concedes that if the argument is rejected that a claim for reasonable notice is open but that when the principles in *Tarozzi v WA Italian Club (Inc)* (1991) 71 WAIG 2499 are considered a period of two weeks or four weeks at the most would be considered reasonable.

87 The principles to be applied in considering what will constitute reasonable notice were summarised by Beech C in *Scanlan v Greenport Nominees Pty Ltd t/a Indiana Tea House* (1998) 78 WAIG 4452 at 4454 :

> "What period will constitute reasonable notice depends upon the facts *(Quinn v Jack Chia (Australia)* [1992] 1 VR 567, (1991) 43 IR 91; *Irons v Merchant Capital* (1994) 116 FLR 204; *Cohen v Nichevic* [1976] WAR 183). That requires a determination of what a reasonable period of notice would have been in this case *(Quinn v Jack Chia (Australia),* above). Reasonable notice is to be assessed at the time it is to be given not at the time of the commencement of the contract *(Quinn v Jack Chia (Australia),* above; and cf. *Martin-Baker Aircraft Co Ltd v Canadian Flight Equipment Ltd* [1955] 2 All ER 722). What constitutes reasonable notice will be calculated according to each particular circumstance by balancing a number of factors (see for example *Dyer v Peverill* (1979) 2 NTR 1). A number of those factors are conveniently summarised by the authors of The Law of Employment, Macken, McCarry and Sappideen, 4th ed., p.166-167 ... "

88 The factors considered by the authors of *The Law of Employment* were also considered by the Full Bench of this Commission in *Tarozzi v WA Italian Club (Inc)* (op cit) at 2501. Those factors are:

> "(a) The high or low grade of the appointment.
>
> (b) The importance of the position.
>
> (c) The size of the salary.
>
> (d) The nature of the employment.
>
> (e) The length of service of the employee.
>
> (f) The professional standing of the employee.
>
> (g) His/her age.
>
> (h) His/her qualifications and experience.
>
> (i) His/her degree of job mobility.
>
> (j) What the employee gave up to come to the present employer (eg a secure longstanding job).
>
> (h)[sic] The employee's prospective pension or other rights."

89 In this particular matter the Applicant was not employed for a long period nor was he employed in a senior position. His professional standing and experience in the industry made it likely that he would secure employment within a relatively short time. In these circumstances, I am of the opinion that a period of reasonable notice would have been one month's pay which is

equal to $3,333.33 gross. I will make an order that the Respondent pay the Applicant that amount as damages for failing to provide the Applicant with reasonable notice.

Compensation

90 A question that arises in these proceedings is whether compensation caused by the unfair dismissal should be assessed without regard to the acquisition commissions claimed by him. Section 23A (6) to (9) of the Act provides:

> "(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.
>
> (7) In deciding an amount of compensation for the purposes of making an order under subsection (6), the Commission is to have regard to —
>
> (a) the efforts (if any) of the employer and employee to mitigate the loss suffered by the employee as a result of the dismissal;
>
> (b) any redress the employee has obtained under another enactment where the evidence necessary to establish the claim for that redress is also the evidence necessary to establish the claim before the Commission; and
>
> (c) any other matter that the Commission considers relevant.
>
> (8) The amount ordered to be paid under subsection (6) is not to exceed 6 months' remuneration of the employee.
>
> (9) For the purposes of subsection (8) the Commission may calculate the amount on the basis of an average rate received by the employee during any relevant period of employment."

91 When regard is had to s 23A(8) of the Act, it is clear that the maximum amount of compensation the Commission can award is six months' remuneration which may be calculated on the basis of an average rate received whilst employed. Whilst s 23A(8) does not expressly contemplate an assessment of remuneration based on what an employee should have received whilst employed the provision confers a discretion. In my opinion the maximum amount that could be awarded to the Applicant should be assessed as $40,000 per annum for salary and $3,052.16 (advance on commissions) and $13,443.91 (acquisition commissions) which were earnt over a period of eight months which equates to an average of $5,395.34 per month or a maximum of six months' remuneration of $32,372.04. From that amount should be deducted the amounts of one month's pay for notice ($3,333.33), and $10,300 earnings from National Homes during the six months after he was dismissed by the Respondent. From mid-August 2006, the Applicant fully mitigated his loss. Consequently, the Applicant's loss caused by the dismissal was $18,738.71. For these reasons I will make an order that the Respondent pay the Applicant $18,738.71 as compensation.

2006 WAIRC 05626

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DALE CHRISTOPHER MILES
	APPLICANT
	-v-
	JLF CORPORATION PTY LTD T/AS CUSTODIAN WEALTH BUILDERS (ACN 010231222 / ABN 93139033832)
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	THURSDAY, 19 OCTOBER 2006
FILE NO/S	U 239 OF 2006
CITATION NO.	2006 WAIRC 05626

Result	Order issued to amend the name of the Respondent
Representation	
Applicant	Mr K Trainer (as agent)
Respondent	Mr M Diamond (of counsel)

Order

Having heard Mr Trainer as agent for the Applicant and Mr Diamond of counsel on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT the name of the Respondent be deleted and that be substituted therefor the name, J.L.F. Commercial Pty Limited.

[L.S.]

(Sgd.) J H SMITH,
Commissioner.

2006 WAIRC 05625

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DALE CHRISTOPHER MILES
	APPLICANT
	-v-
	JLF CORPORATION PTY LTD T/AS CUSTODIAN WEALTH BUILDERS (ACN 010231222 / ABN 93139033832)
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
DATE	THURSDAY, 19 OCTOBER 2006
FILE NO/S	B 239 OF 2006
CITATION NO.	2006 WAIRC 05625

Result	Order issued to amend the name of the Respondent
Representation	
Applicant	Mr K Trainer (as agent)
Respondent	Mr M Diamond (of counsel)

Order

Having heard Mr Trainer as agent for the Applicant and Mr Diamond of counsel on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT the name of the Respondent be deleted and that be substituted therefor the name, J.L.F. Commercial Pty Limited.

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

2006 WAIRC 05851

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DALE CHRISTOPHER MILES
	APPLICANT
	-v-
	J.L.F. COMMERCIAL PTY LIMITED
	RESPONDENT
CORAM	SENIOR COMMISSIONER J H SMITH
DATE	TUESDAY, 19 DECEMBER 2006
FILE NO/S	U 239 OF 2006, B 239 OF 2006
CITATION NO.	2006 WAIRC 05851

Result	Declarations made and orders issued
Representation	
Applicant	Mr K Trainer (as agent)
Respondent	Mr M Diamond (of counsel)

Order

HAVING heard Mr Trainer, as agent for the Applicant and Mr Diamond, 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 harshly, oppressively and unfairly dismissed.

(2) ORDERS that the Respondent pay to the Applicant within 14 days of the date of this order the sum of $18,738.71 (gross) as compensation.

(3) DECLARES that the Respondent owes the Applicant contractual benefits.

(4) ORDERS that the Respondent pay to the Applicant within 14 days of the date of this order:

(a) $13,443.91 (gross) for acquisition commissions;

(b) $615.38 (gross) as salary; and

(c) $3,333.33 (gross) as damages for reasonable notice.

(5) ORDERS that B 239 of 2006 be and is hereby otherwise dismissed.

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

2006 WAIRC 05843

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TALIT MAHMOOD AHMED PAUL
	APPLICANT
	-v-
	THE DIRECTOR, AUSTRALIAN FEDERATION OF ISLAMIC COUNCILS
	RESPONDENT
CORAM	COMMISSIONER S WOOD
HEARD	MONDAY, 4 DECEMBER 2006
DELIVERED	THURSDAY, 14 DECEMBER 2006
FILE NO.	U 527 OF 2006
CITATION NO.	2006 WAIRC 05843

CatchWords	Termination of employment – Constructive dismissal –Application referred outside of 28 day time limit – Not unfair not to accept out of time – Industrial Relations Act 1979 (WA) s 29(3)
Result	Not unfair not to accept the application out of time; Application dismissed
Representation	
Applicant	Mr TMA Paul
Respondent	Mr M Jensen of Counsel

Reasons for Decision

1 This is an application pursuant to s.29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act"). The application came on for hearing pursuant to s.29(3) of the Act. The applicant, Mr Paul, resigned from his employment on 15 June 2005. He lodged his application on 1 November 2006. The application then on its face is some 67 weeks and 6 days out of time.

2 Mr Paul was a teacher. A parent and student made an accusation against him to Mr King, the Principal of the school. Following this Mr Paul was called to the Principal's office, in the presence of two other religious staff. He was informed of the accusation and told to take the rest of the day off and think about it. The merits of the termination rest on this one incident; this one meeting on 14 June 2005. Mr Paul handed in his resignation at the first opportunity next morning.

3 Mr Paul has been greatly affected by this one event. He has obtained other employment, but believes the incident lacked procedural fairness and seeks redress. The accusation was that he stood too close to the student, made the student feel uncomfortable and looked 'weird' at the student.

4 The law in relation to s.29(3) applications is as outlined in the decision of *Malik v Paul Albert, Director General, Department of Education of Western Australia* 84 WAIG 683. Steytler J in his judgment says:

> "Like E M Heenan J, I consider that the principles enunciated by Marshall J in ***Brodie-Hanns v MTV Publishing Ltd*** (1995) 67 IR 298 are apposite. As E M Heenan J has said, Marshall J there identified the following six "principles" (at 299 - 300):
>
> "1. Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.
>
> 2. Action taken by the applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.
>
> 3. Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.
>
> 4. The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.

5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time.

6. Consideration of fairness as between the applicant and other persons in a like position are relevant to the exercise of the Court's discretion.""

5 Leaving aside the question of merit for now, there can be no doubt that the above factors weigh against the applicant in respect of accepting this application out of time. The delay in bringing the application is considerable; some 67 weeks. Mr Paul says that it took him some time to obtain the strength to make such an application; to bring the matter into the public arena. That being so the extent of delay is still significant and an important factor in this application.

6 Mr Paul at no time prior to the application contested the termination. He resigned his employment; albeit he is alleging that the dismissal was constructive in nature. The respondent was not aware of Mr Paul's dissatisfaction until the application was lodged.

7 There is prejudice to the respondent. The respondent does not plead that particular matter with any strength. However, given the considerable delay, to then have to rehearse the one incident reliably almost 17 months later would be difficult. It must be said that there is some prejudice to the respondent in respect of that matter.

8 Each of the factors mentioned above must weigh in the respondent's favour. If I then go to the merit of the application, the prime issue is whether there has, in fact, been a termination at the hand of the respondent (see *The Attorney General v Western Australian Prison Officer's Union of Workers* 75 WAIG 3166). This is often referred to as was the employee pushed or did he/she trip.

9 In this matter there was no evidence presented by either party that the employee was, in fact, pushed out of his employment. The relevant incident occurred one day at school, followed by a resignation the next morning. The evidence of Mr Paul is that he suspects that there was a design to get him out of employment. There is no actual evidence that could lead me to that conclusion. Mr Paul was upset after the accusation was raised. It was the day of a school carnival and Mr Paul was not engaged directly in teaching. He was told to take the rest of the day off and consider the situation. Mr King says he wanted to assess how the matter should be handled. I accept this. The resignation was handed in early the next day by the applicant of his own volition. There was no dialogue between the two men between the time of the meeting and the next day and I take that into account.

10 As for the meeting, I find that words to the effect of, "Go home and think about it" were said. Mr King does not deny that something like that might have been said. Mr King says that Mr Paul was upset, was not needed for teaching that day and that he wanted Mr Paul to consider how the situation might be handled. The two religious staff were there as support for Mr Paul. Mr King's evidence is not disingenuous; it is not, in my view, meant to mislead the Commission in any way. I accept his evidence. The meeting was simply called to deal with allegations that were made by a parent and student.

11 The allegations are put no more highly than Mr Paul, a teacher, had stood too close and made the student feel uncomfortable and looked at the student in a weird manner; whatever a weird manner might mean. An allegation should of course be addressed promptly. I do not underestimate the damage that such allegations can cause. I do not underestimate the concern to student and teacher, or the potential damage to professional reputation. However on the scale of things, the allegation is not of such seriousness that it would require immediate and dramatic action.

12 I accept the evidence of Mr King that a meeting was to occur the next day to talk about what should occur. I accept the evidence of Mr King that in his view, in hindsight, it would have been better if the other two staff had not been present at the meeting. I cannot put that issue more highly than it is an unfortunate circumstance and a misinterpretation on Mr Paul's part of the intent of the discussion. I accept Mr King's evidence that he meant the persons to be there to be of some support and, in that sense, the submission of Mr Jensen for the respondent is correct. He submitted that it is quite regular for other persons to attend such a meeting. Out of that scenario I think it is unfortunate there has been some misinterpretation of what was intended to occur. I base this conclusion on the evidence I have heard.

13 Mr Paul was not dismissed; he simply resigned in unfortunate circumstances. That being the case, I have no jurisdiction.

14 The declaration that I make is that it would not be unfair not to accept the application out of time, and an order will issue dismissing the application.

2006 WAIRC 05844

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TALIT MAHMOOD AHMED PAUL
	APPLICANT
	-v-
	THE DIRECTOR, AUSTRALIAN FEDERATION OF ISLAMIC COUNCILS
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	THURSDAY, 14 DECEMBER 2006
FILE NO	U 527 OF 2006
CITATION NO.	2006 WAIRC 05844

Result	Not unfair not to accept the application out of time; Application dismissed
Representation	
Applicant	Mr TMA Paul
Respondent	Mr M Jensen of Counsel

Order

HAVING heard Mr T Paul on his 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, pursuant to s.29(3), it would not be unfair not to accept the referral of Mr Paul's application.

(2) ORDERS that the application be dismissed.

(Sgd.) S WOOD,
[L.S.] Commissioner.

2006 WAIRC 05859

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHELLEY TAYLOR
	APPLICANT
	-v-
	WAVSG & LINC INC
	RESPONDENT
CORAM	COMMISSIONER J H SMITH
HEARD	THURSDAY, 16 NOVEMBER 2006
DELIVERED	WEDNESDAY, 20 DECEMBER 2006
FILE NO.	U 296 OF 2005
CITATION NO.	2006 WAIRC 05859

CatchWords	Termination of Employment - Application compromised – Jurisdiction – Power to make orders in terms of compromise – Whether terms of compromise have substantially been complied with by the Respondent – Whether the application should be dismissed in the public interest - *Industrial Relations Act 1979* (WA) s 7, s 23 s 23A, s 27(1)(a)(ii), s 29(1) & s 29(1)(b)(i)
Result	Application dismissed
Representation	
Applicant	In person
Respondent	Mr D Johnston (as agent)

Reasons for Decision

1 Shelley Taylor ("the Applicant") made an application under s 29(1(b)(i) of the *Industrial Relations Act 1979* ("the Act") claiming that she was harshly, oppressively or unfairly dismissed by the WAVSG and Linc Inc ("the Respondent") on 7 December 2005.

Background

2 The file records a s 32 conference was convened by the Commission in respect of this matter on 23 February 2006 by Deputy Registrar Wilson. The Applicant was represented by an agent at the conference, Mr K Trainer. The Applicant also attended the conference. The Respondent was represented by Mr E Rea, as agent and the President, Mr Dyke. Mr J Harmon, the Vice President of the Respondent also attended the conference. Deputy Registrar Wilson made a report dated 16 June 2006 in which he stated that during the course of the conference the parties were able to exchange points of view and, following extensive negotiations between the parties without Deputy Registrar Wilson being present, announced they had been able to agree on terms to settle the matter.

3 In her application, the Applicant says that she was employed by the Respondent as a community researcher/advocate. Although the Respondent does not dispute her occupation, one of the material issues in dispute between the parties was whether the Applicant was engaged as an employee. At all material times the Respondent maintained that the Applicant was engaged as a contractor.

4 The terms of the settlement agreed at the conference which are not in dispute are that:

(a) the Applicant would be paid a net settlement sum of $7,500;

(b) the Applicant would be provided with a record of service;

(c) an advertisement would be published in the column known as "Can we help you" in the Western Australian newspaper containing a statement the terms of which were to be agreed between the parties which related to the fact that the Applicant was no longer working for the Respondent and that she continues her advocacy work for the veteran community and where she can be contacted;

(d) that the Applicant would discontinue an action against the Respondent in the Local Court by filing a notice of discontinuance;

(e) that no further legal action would be taken; and

(f) the terms of the settlement would be set out in a deed.

5 The Applicant also says that it was a term of the settlement that a digital camera which was purchased by her would be returned to her.

6 Some time in mid March 2006, the Applicant was paid the settlement sum. It is common ground that the Applicant discontinued her action against the Respondent in the Local Court shortly after the conference on 23 February 2006.

7 On the morning of the hearing on 16 November 2006 the Applicant was provided with a certificate of service. The only complaint the Applicant has about the certificate of service is that she says that it is poorly drafted in the sense that it has no format and it is not set out properly. During the hearing on 16 November 2006, the terms of the advertisement to be placed in the column "Can we help you" were finally agreed. The terms of that advertisement are as follows:

> "The Board of Management of WAVSG and Lincs Inc is advising that Ms Shelly Taylor, the Community Researcher for the Honouring the Memory Project, is no longer undertaking that role. Ms Taylor continues to be a veteran's advocate and can be contacted through the Veteran's Review Board."

8 During the hearing the Respondent undertook to have the advertisement published in The West Australian newspaper. The Commission was informed by Mr Johnston on behalf of the Respondent on 30 November 2006 that the advertisement was so published and a copy of the advertisement that appeared on Monday, 27 November 2006 in Public Notices of The West Australian newspaper was received by the Commission on 1 December 2006.

9 In relation to the deed, following the conference on 23 February 2006, the Applicant's agent, Mr Trainer, prepared a draft deed and sent it to the Respondent's agent, Mr Rea. After some discussion between the parties and redrafting of the deed, the Respondent says that the parties were unable to agree on the terms of the deed. The Applicant disputes that and says that she agreed on the terms of the deed and she signed a copy of a deed which was tendered by her as Exhibit 1 some time in early March 2006. She testified that the original of Exhibit 1 was forwarded to the Respondent's agent, Mr Rea, for the Respondent's signature. It was put to the Applicant in cross-examination that she had not signed a deed, as the Respondent never received a signed copy of a deed from the Applicant. The Applicant maintained that she did sign a deed and it was sent to Mr Rea some time during the first week of March 2006. It is common ground, however, that the Respondent did not execute a deed and a decision was made to pay the Applicant the sum of $7,500 dollars without the Respondent signing a deed of settlement.

10 In relation to the tax to be paid, it was agreed between the parties following the conference that the Respondent would pay an amount of GST on $7,500.

11 The Applicant says that in her opinion an agreement was reached at the conference to compromise her claim but the terms have not been fulfilled. The Applicant now seeks an order that the camera be returned to her. This is the only order she seeks. The Respondent seeks an order that the application be dismissed as it says it has fulfilled all the terms of settlement which are capable of being fulfilled and it has substantially complied with the terms of the compromise agreement.

12 The Applicant testified that there was a discussion about the return of the camera at the conciliation conference and it was agreed that a digital camera which had been left at the Respondent's premises that she had paid for whilst she was employed would be returned to her. She gave uncontradicted evidence that it was agreed that she would discontinue her Local Court action against the Respondent and that both parties agreed at the conference that they would take no further legal action. The Applicant says that the Respondent has breached the latter term of the settlement in that legal action has been taken in the Magistrates' Court against her. Since the agreement to compromise was reached she has received two summonses, one of which is for recovery of funds which are said to belong to the Respondent, in relation to which the Respondent alleges the Applicant banked for her personal use and the second is for reimbursement of expenses.

13 When cross-examined the Applicant conceded that there was no reference in the deed (which she says she signed) about a camera being returned to her but she said the matter was agreed to outside the courtroom. It was also put to the Applicant that she received a cheque for $750 for the GST payable on the amount of $7,500. The Applicant denied that to be the case but during the lunchbreak the Applicant was able to contact Mr Trainer about the issue. After lunch, she informed the Commission that Mr Trainer informed her that he had received a cheque for $750 drawn in her favour which represented the GST payment and that the cheque had been forwarded to her. The Applicant said, however, that she did not receive it. After the Applicant produced her relevant bank records, the Respondent undertook to check its records to ascertain whether the

cheque had been cashed and agreed that if it had not, it would reissue a cheque to the Applicant. On 1 December 2006, the Commission was informed by the Respondent's agent, Mr Johnston, that the cheque for $750 had not been presented so the cheque had been stopped and a new cheque for $750 was issued to the Applicant on 30 November 2006.

14 When asked why Mr Trainer was not called to give evidence, the Applicant said that she could not afford to pay him to come to court.

15 When it was put to the Applicant that the reason why the deed was not signed by the Respondent was because there was a dispute in relation to the wording of the deed, the Applicant said that she did not know whether that was the case as the wording of the deed was dealt with by Mr Rea and Mr Trainer.

16 Prior to receiving the cheque for $7,500 the Applicant was asked by the Respondent to produce an invoice. She did so on 20 March 2006. The document is a Tax Invoice/Statement and states an amount of $500 is allocated for out-of-pocket expenses and the remainder is for training at university level.

17 Edward Patrick Rea gave evidence on behalf of the Respondent. At the material time Mr Rea acted as the Respondent's agent he was employed by the firm, Workplace Relations and Management Consultants ("WRMC"). Mr Rea testified that he attended the conciliation conference on 23 February 2006 and that although it was obvious there was a great deal of animosity between the parties, the parties were eventually able to come to an agreement. Mr Rea says that the core disagreement between the parties was whether there was an employment relationship. It was agreed at the conference that the amount of $7,500 would be paid to the Applicant as a net amount but following the conference he received a telephone call from Mr Trainer who asked if the Respondent were willing to pay the GST on that amount which was an amount of $750. Mr Rea testified that his client agreed to pay that amount providing the Applicant provided the Respondent with an invoice. A copy of an invoice was later sent to him by facsimile which he sent to Mr Dyke. Mr Rea asked Mr Trainer for the original. However, after Mr Trainer was unable to locate the original Mr Dyke informed Mr Rea that the facsimiled copy was sufficient.

18 Mr Rea testified that at the conference before Deputy Registrar Wilson it was agreed that the parties would exchange drafts of the advertisement to be placed in the "Can we help you" column. When asked whether there was any discussion about a digital camera he said that he did not recollect that there was but that there was a disagreement about a number of things and a camera could have been discussed because there was a discussion about a computer. He, however, said that even if there was a discussion about a camera, any issue relating to a camera did not form part of the terms of the settlement. Mr Rea testified that he did not receive a copy of a deed signed by the Applicant from Mr Trainer. Mr Rea initially said that he prepared a draft deed but after being asked to look at a copy of a draft (*Exhibit C*), Mr Rea testified that the draft did not contain words that he would have used and Mr Rea said that although it is usual for the Respondent to draft a deed, it was his recollection that Mr Trainer drafted the proposed deed. He said that no agreement was reached in relation to the terms of a deed of settlement because the Respondent objected to any reference in the deed to the Applicant being an employee of the Respondent. In particular, the Respondent objected to the recitals in paragraphs 1 and 2 of Exhibit 1, which stated that the Applicant was employed by the Respondent as a community/researcher and that her employment was subject to the continuation of funding from Lotteries West. Mr Rea said the reason why this was objected to was the Respondent did not admit at any point in time that there was an employment relationship between the parties. He also said that there was also a dispute about the form of the advertisement that was to be set out at appendix A of the deed. He agreed that he had seen an unsigned document in the form of Exhibit 1 but says he did not receive a copy of that document signed by the Applicant.

19 In relation to the camera, Mr Rea testified that he received a telephone call from Mr Trainer who said that the Applicant wanted a camera that she had left in the Respondent's office returned. After Mr Trainer had raised the matter with him (Mr Rea) twice, Mr Rea spoke to Mr Dyke about the matter and he received a response from Mr Dyke which Mr Rea repeated in an email to Mr Trainer from Mr Rea on or about 21 March 2006. In the email Mr Rea stated:

> "Good morning Ken,
>
> Our Client says that the camera to which your Client refers is not in any of the drawers or elsewhere in the office. He seems to be certain of this but I prevailed on him to check and let me know. He was quite incensed by the request and says that your Client has been written to requesting the return of a laptop and a digital camcorder but has been ignored.
>
> The response to your wording is attached.
>
> Regards,
>
> Eddy"

(*Exhibit D*)

20 Prior to Mr Dyke's response, despite the fact that the parties were in disagreement about the terms of the deed in respect of the characterisation of a contractual relationship between the parties whilst the Applicant was engaged by the Respondent and the terms of the notice to appear in the "Can we help you" column the Respondent decided that it did not wish to execute a deed. Mr Rea discussed the matter with Mr Trainer and told Mr Trainer that the money would be paid and Mr Trainer agreed that the deed could be dispensed with so long as the Applicant was paid the settlement sum and the parties agreed to the wording that was to be set out in the newspaper advertisement. Mr Rea hand delivered the cheque for $7,500 to Mr Trainer on 15 March 2006 to forward to the Applicant (*Exhibit G*). On 1 May 2006, Mr Rea wrote to Mr Trainer in the following terms and enclosed a cheque for $750:

"Dear Ken,

Re: S Taylor v WA Veteran's Support Group & LINC

We continue to represent the Respondent in relation to the above application.

Enclosed is our Client's cheque in the amount of $750.00 made in the favour of your Client.

The enclosed cheque is, in addition to the previous cheque of $7,500.00 hand delivered to your office 15 March 2006, in settlement of all matters arising out of or from the contractual relationship between Ms Shelley Taylor and the Western Australia [sic] Veteran's Support Group & LINCS Incorporated the parties, without admission of liability.

I await your response to my email 17 March 2006 concerning the wording to which our Client agrees to insert in the Can we help column of the newspaper.

….

Regards

Eddy Rea

Senior Advocate"

(*Exhibit J*)

Was a Concluded Agreement Reached and What were the Terms of the Agreement?

21 The terms of the settlement which are not in dispute are set out in paragraph 4 of these reasons for decision.

22 The evidence given by the Applicant and Mr Rea in these proceedings do not materially conflict except in relation to whether the camera was a term of the agreement to compromise the Applicant's claim. In relation to this issue I prefer the evidence given by Mr Rea to the evidence given by the Applicant. I do not accept the Applicant's contention that it was a term of the agreement to compromise her claim that a digital camera would be returned to her. The reason why I have reached this conclusion is that the Applicant's evidence in relation to this issue was vague. Her evidence was simply that it was a term of the settlement that her digital camera would be returned to her (transcript page 5 and 15). She, however, gave no evidence about how that came to be a term of the settlement. She simply said that it was agreed outside the courtroom. Further, neither Exhibit 1 nor Exhibit C (copies of proposed terms of a deed) contain such a term. The first draft of the deed was prepared by the Applicant's agent, Mr Ken Trainer. When regard is had to the fact that the return of a camera was not referred to in either Exhibit 1 or Exhibit C and the fact that the evidence establishes that Mr Trainer prepared a draft of one if not both of Exhibit 1 and Exhibit C, I accept Mr Rea's evidence that the return of a camera to the Applicant was not a term of the agreement to compromise the Applicant's claim.

23 I am also satisfied that Mr Rea's evidence establishes that it was agreed on or about 15 March 2006, that the parties agreed to vary the terms of the compromise agreement to dispense with the requirement that the terms of the settlement be set out in a deed. The agreement reached between Mr Trainer and Mr Rea, as agents appointed to act on behalf of the parties, bound their principals (namely the Applicant and the Respondent) to that agreement.

Have the Terms of the Compromise been Satisfied?

24 The evidence establishes that with the exception of the term that no further legal action would be taken, all terms of the compromise agreement have now been satisfied. Where a compromise creates a new obligation a discharge of the original claim is conditional on performance of the terms of the compromise agreement. The legal effect of a compromise agreement and the failure to perform a term of a compromise agreement was considered by Brinsden J in *Nissho Iwai (Australia) Ltd v Shrian Oskar* [1984] WAR 53. His Honour held at page 58 that in the case before him that there was a contract intended to create new antecedent obligations which did not effect an absolute discharge of the cause of action as the defendant has not performed his promise. The consequence at law was that the plaintiff was left in the position that it could sue on the new contract or rescind the new contract and proceed on the original cause of action.

25 In this matter the Respondent does not admit that it has not performed the term that no further legal action would be taken. Whether the actions commenced in the Magistrates' Court breach that term and/or whether the term can be pleaded as a bar to proceedings in that Court is a matter for the Magistrates' Court. In this matter the Applicant does not seek to rescind the terms of the compromise agreement, the only order she seeks is an order returning the camera to her. My finding that the return of the camera was not a term of the agreement to compromise the Applicant's claim militates against an order in the terms sought by the Applicant. In any event the Commission has no power to make such an order even if a finding was made that it was a term of the agreement to compromise. The Commission's powers in respect of claims for unfair dismissal brought under s 29(1)(b)(i) of the Act are set out in s 23A of the Act. Section 23A can only be invoked when the Commission makes a determination that the dismissal of an employee is harsh, oppressive or unfair. Further, even when such a determination is made the Commission has no power under s 23A of the Act to make an order in respect of possession and/or return of personal property. Further, it is doubtful that such a matter could be regarded as an "industrial matter" within the meaning of ss 7, 23 and 29(1) of the Act (see the discussion in *Hotcopper Australia Ltd v Saab* (2002) 82 WAIG 2020 at [18] and [26] to [27] per Anderson J with whom Parker and Hasluck JJ agreed).

26 As the Applicant does not seek to rescind the compromise agreement and the evidence does not support any claim she may have in relation to a camera and the order sought in any event is beyond the power of the Commission to make, I will make an order dismissing the Applicant's claim.

2006 WAIRC 05860

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHELLEY TAYLOR
	APPLICANT
	-v-
	WAVSG & LINC INC
	RESPONDENT
CORAM	SENIOR COMMISSIONER J H SMITH
DATE	WEDNESDAY, 20 DECEMBER 2006
FILE NO/S	U 296 OF 2005
CITATION NO.	2006 WAIRC 05860

Result	Dismissed
Representation	
Applicant	In person
Respondent	Mr D Johnston (as agent)

Order

HAVING heard the Applicant in person and Mr Johnston, 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 s 29(1)(b)(i) application be and is hereby dismissed.

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

SECTION 29(1)(B)—Notation of—

Parties		Number	Commissioner	Result
Dean Ellis	Chapmans Barristers & Solicitors	B 418/2006	Commissioner P E Scott	Application Dismissed
Geoffrey Robert Gibson	Mukinbudin Community Financial Services Limited	U 28/2006	Commissioner S M Mayman	Application discontinued
Jane McPherson	Ocean Fresh Linen Service	U 395/2006	Commissioner S M Mayman	Application struck out for want of prosecution
Janet Morrison	Lobster Australia Pty Ltd	U 69/2006	Commissioner S M Mayman	Application discontinued
Janet Morrison	Lobster Australia Pty Ltd	B 155/2006	Commissioner S M Mayman	Application discontinued
John Ballinger	LR & IM Rusin t/as Les Transport	B 519/2006	Commissioner S Wood	Application discontinued
Kira Jay Kennedy	Colli Timber and Hardware	U 456/2006	Commissioner S M Mayman	Application discontinued
Marie Nicholls	Ocean Fresh Linen Service	U 392/2006	Commissioner S M Mayman	Application struck out for want of prosecution
Nicholas Andrew Gerring	Rob Hurst & Jim Hurst - Aquaflo Pure Water Co	B 415/2006	Commissioner S Wood	Application discontinued
Peter Anthony Weeden	Magellan Metals Pty Ltd	B 479/2006	Commissioner S M Mayman	Application discontinued

Parties		Number	Commissioner	Result
Philip Ross Couper	WMC Resources Limited	B 426/2006	Commissioner S Wood	Application discontinued
Philip Ross Couper	WMC Resources Limited	U 426/2006	Commissioner S Wood	Application discontinued
Prakash Naidu	Burswood International Resort Casino	U 441/2006	Commissioner J L Harrison	Discontinued
Roberta Thiersch Faustino	Titan Recruitment and Consulting Pty Ltd	U 544/2006	Commissioner S M Mayman	Application discontinued
Sean Anthony O'Connor	National Security Systems Pty Ltd	B 311/2005	Commissioner S M Mayman	Application struck out for want of prosecution
Shirley Nieuwpoort	Binary Industries	B 46/2005	Commissioner S M Mayman	Application struck out for want of prosecution

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Civil Service Association of Western Australia (Incorporated)	Director General, Department of Education and Training	Scott C	PSAC 31/2005	17/01/2006	Dispute regarding disciplining process of a union member	Concluded
The Construction, Forestry, Mining and Energy Union of Workers	City of Joondalup	Wood C	C 95/2006	15/11/2006	Dispute regarding carpenters to wear high visibility clothing at all times during working hours.	Concluded

PROCEDURAL DIRECTIONS AND ORDERS—

2006 WAIRC 05866

CONTRACTUAL ENTITLEMENT OF EMPLOYEES

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 P E SCOTT

DATE THURSDAY, 21 DECEMBER 2006

FILE NO P 60 OF 2002

CITATION NO. 2006 WAIRC 05866

Result Direction Issued

Direction

WHEREAS this is an application to the Public Service Arbitrator ("the Arbitrator") pursuant to section 80E of the Industrial Relations Act 1979 ("the Act") filed on the 2nd day of December 2002; and

WHEREAS the Arbitrator convened conferences on Friday the 8th day of August 2003, Tuesday the 29th day of June 2004, Wednesday the 24th day of August 2005, Tuesday the 21st day of March 2006 and Wednesday the 20th day of December 2006 for the purpose of conciliation; and

WHEREAS at the latter conference the parties advised that they reached an in principle agreement in July 2007 however it was yet to be finalised; and

WHEREAS the Respondent advised that it is prepared to meet with the Applicant;

NOW THEREFORE, the Arbitrator, pursuant to section 32(8)(a)(ii) of the Act hereby directs:

1. THAT the parties shall meet no later than close of business Thursday the 1st day of February 2007 for the purpose of discussing the resolution of the matter.

2. THAT the parties shall report back to the Arbitrator in respect of those discussions on Friday the 2nd day of February 2007.

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

ENTERPRISE BARGAINING AGREEMENT—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Fleet and Equipment Services Enterprise Bargaining Agreement 2007 AG 82/2006	28/12/2006	The Fire and Emergency Services Authority of Western Australia	The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers - Western Australian Branch	Commissioner J L Harrison	Registered
Health Services Union - WA Health State Industrial Agreement 2006 PSAAG 19/2006	20/12/2006	The Minister for Health in his incorporated capacity under s.7 of the Hospitals and Health Services Act 1927 (WA) as the Hospitals formerly comprised in the Metropolitan Health Service and the WA Country Health Service	Health Services Union of Western Australia (Union of Workers)	Commissioner P E Scott	Agreement Registered
Western Australia Poliice Industrial Agreement 2006 PSAAG 20/2006	20/12/2006	Commissioner of Police	The Western Australian Police Union of Workers	Commissioner P E Scott	Agreement Registered

NOTICES—Appointments—

2007 WAIRC 00009

APPOINTMENT

ADDITIONAL PUBLIC SERVICE ARBITRATOR

I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, acting pursuant to the provisions of section 80D(2) of the *Industrial Relations Act 1979*, hereby appoint, subject to the provisions of the Act, Senior Commissioner J H Smith to be an additional Public Service Arbitrator for a period of one year from the 12th January 2007.

Dated the 12th day of January, 2007

CHIEF COMMISSIONER A.R. BEECH

RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 29/2006	Arthur Edward Pettifor	Dept. Environment and Conservation	Scott C	Reclassification Appeal Withdrawn By Leave	14/12/2006

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2006 WAIRC 05873

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES MICHAEL RAY AND OTHERS

APPLICANT

-v-

UNITED GROUP RESOURCES

RESPONDENT

CORAM COMMISSIONER S M MAYMAN

DATE THURSDAY, 21 DECEMBER 2006

FILE NO/S OSHT 7 OF 2006

CITATION NO. 2006 WAIRC 05873

Result Application for joinder granted

Representation

Applicant Mr L Edmonds (of counsel)

Respondent Mr J Blackburn (of counsel)

Order

WHEREAS the applicants referred this matter to the Tribunal seeking joinder to OSHT 6 of 2006;

AND WHEREAS this matter was listed For Mention Only on 20 December 2006;

AND HAVING HEARD from Mr L Edmonds (of counsel) of behalf of the applicants; from Mr J Blackburn (of counsel) on behalf of the respondent;

NOW THEREFORE, I the undersigned pursuant to the powers conferred on the Tribunal under the *Occupational Safety and Health Act 1984* hereby order –

THAT application OSHT 7 of 2006 by joined to application OSHT 6 of 2006.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2006 WAIRC 05867

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	MALCOLM STANLEY PETERS
	APPLICANT
	-v-
	LEIGHTON KUMAGAI JOINT VENTURE
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 21 DECEMBER 2006
FILE NO/S	OSHT 5 OF 2006
CITATION NO.	2006 WAIRC 05867

Result	Application discontinued
Representation	
Applicant	Mr G MacLean (of counsel)
Respondent	Mrs E Hartley and later Mr P D Evans (both of counsel)

Order

WHEREAS this is an application pursuant to Section 35C of the *Occupational Health and Safety Act 1984*;

AND WHEREAS the matter was listed for a jurisdictional hearing on 28 and 29 August 2006;

AND WHEREAS on 19 December 2006 the applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Occupational Health and Safety Act 1984,* hereby orders -

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.