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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—UNIONS—Application for alteration of Rules

2007 WAIRC 01193

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2007 WAIRC 01193
CORAM	**:**	THE HONOURABLE M T RITTER, ACTING PRESIDENT
		COMMISSIONER S WOOD
		COMMISSIONER S M MAYMAN
HEARD	**:**	WEDNESDAY, 8 AUGUST 2007; ADDITIONAL WRITTEN SUBMISSIONS RECEIVED ON 11 SEPTEMBER 2007
DELIVERED	**:**	FRIDAY, 26 OCTOBER 2007
FILE NO.	**:**	FBM 2 OF 2007
BETWEEN	**:**	THE ELECTRICAL AND COMMUNICATIONS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF EMPLOYERS)
		Applicant
		AND
		N/A
		Respondent

CatchWords:

Industrial Law (WA) – Application to alter rules of organisation relating to its name – Alteration of name to reflect changing nature of industry and effect alignment with national organisation – Name change consistent with names of other state based organisations – Statutory criteria not complied with – Application not authorised in accordance with rules – Notice defective – Application dismissed

Legislation:

Industrial Relations Act 1979 (WA), s55, s55(4), s56, s58(3), s62(1), (2), s62(4)

Industrial Relations Commission Regulations 2005, r71

Interpretation Act 1984 (WA), s56

Result:

Application dismissed

Representation:

Counsel:

Applicant: Mr C Martin (of Counsel), by leave

Case(s) referred to in reasons:

Construction, Mining and Energy Workers Union of Australia, Western Australian Branch v The Operative Plasterers and Plaster Workers Federation of Australia (Industrial Union of Workers) Western Australian Branch and Another (1990) 70 WAIG 281

Re an application by the Association of Professional Engineers Australia (Western Australian Branch) (1993) 73 WAIG 2667

The Association of Professional Engineers, Australia (Western Australian Branch) Organisation of Employees (2007) 87 WAIG 2556

Case(s) also cited:

No additional cases cited.

Reasons for Decision

RITTER AP:

The Application

1 The applicant is an organisation of employers that is registered under Division 4 of Part II of the *Industrial Relations Act 1979* (WA) (*the Act*).

2 The applicant seeks to alter its rules to change its name. Accordingly, pursuant to s62(2) of *the Act*, the applicant has applied to the Full Bench to authorise the Registrar of the Commission to register this alteration to the rules. Regulation 71 of the *Industrial Relations Commission Regulations 2005* sets out a procedure to be followed in an application of this type. The applicant has complied with this procedure.

The Alteration Sought

3 Notice of the application to amend the rules, as required by *the Act*, was given in the Western Australian Industrial Gazette (WAIG) on 23 May 2007 ((2007) 87 WAIG 843). The contents of the notice were as follows:-

> "*Notice is given of an application by "The Electrical and Communications Association of Western Australia (Union of Employers)" to the Full Bench of the Western Australian Industrial Relations Commission for the alteration to its name rule, being Rule 1 - Name.*
>
> *The name of the Association in Rule 1 is to be altered to include the word "National" before the word "Electrical". The proposed alteration is underlined below:*
>
> ***1 – NAME***
>
> *The name of the Association shall be "The* ***National*** *Electrical and Communications Association of Western Australia (Union of Employers)". The registered office of the Association at which the business of the Association shall be conducted shall be at 22 Prowse Street, West Perth or at such other place or places as the Management Committee shall from time to time decide.*
>
> *The matter has been listed before the Full Bench at 10:30 am on Wednesday 8 August in the President's Court (Floor 17). A copy of the Rules of the organisation and the proposed rule alteration may be inspected on the 16th Floor, 111 St Georges Terrace, Perth.*
>
> *Any organisation/association registered under the Industrial Relations Act 1979, or any person who satisfies the Full Bench that he/she has a sufficient interest or desires to object to the application may do so by filing a notice of objection (Form 13) in accordance with the Industrial Relations Commission Regulations 2005.*"

The Facts

4 The application was supported by a statutory declaration of Mr Rodney James Hale made on 5 April 2007. Mr Hale also made two other statutory declarations but they do not add any significant facts. Mr Hale is the Secretary of the applicant. In addition, at the hearing of the application, evidence was given by Mr Peter Barry Tuck, the Group Chief Executive Officer of the applicant, an electrical group scheme and college of electrical training which are three arms of a single business.

5 Mr Hale declared that the following documents were distributed to members of the applicant by email on or about 20 October 2006:-

(a) Notice of a Special General Meeting on 20 November 2006.

(b) The Special General Meeting agenda paper.

(c) A document headed "*Proposed amendment to Rules of Electrical & Communications Association of WA*".

(d) A document headed "*Electrical and Communications Association of Western Australia name change proposal*".

6 Mr Hale declared the email was forwarded to email addresses held by the applicant on behalf of each of its members which are regularly updated to ensure currency. All email addresses were checked for accuracy prior to the bulk email distribution on 20 October 2006. In the event that inaccuracies were found, they were, prior to 20 October 2006 corrected by the applicant's administrative staff in consultation with the relevant member. Mr Hale also annexed to his statutory declaration a copy of the email addresses which the documents were sent to on 20 October 2006. Also annexed to Mr Hale's statutory declaration was a copy of the applicant's members and their email addresses as of 5 April 2007.

7 Mr Hale also declared that members who joined the applicant after the bulk mail out and prior to 20 November 2006 received the documents previously forwarded by post.

8 Mr Hale declared that notice of the Special General Meeting was placed on the window adjacent to the front door of the registered office of the applicant on or about 20 October 2006. Additionally, an advertisement of the Special General Meeting was placed in the public notices section of The West Australian newspaper on 8 November 2006.

9 The notice of Special General Meeting set out the time, date and location of the meeting and set out as the only item of business, "*General Business – Supplementary Agenda Paper Changes to the ECA Constitution*".

10 The agenda paper set out as general business the consideration and adoption of a change to the constitution of the applicant "*to reflect the changing nature of the Industry in Western Australia and effect an alignment with the National Electrical Contractors Association of Australia*". The agenda set out two proposed resolutions. The first was the amendment to the rules of the applicant as described in the document marked "*proposed amendment to the rules and constitution of the Electrical and Communications Association of WA*". The second was that the applicant commence an application in the Commission to alter the rules of the applicant in accordance with the first resolution.

11 At the bottom of the agenda paper there was a note as follows:-

> "*NOTE. Should any member be opposed to and or object to the amendment of the Associations Rules and Constitution they may lodge a notice of objection with the Registrar of the Western Australian Industrial Relations Commission.*"

12 The document entitled "*Proposed amendment to Rules of Electrical & Communications Association of WA*" set out the proposed alteration to add the word "*National*" before the word "*Electrical*". On this document the current rule showing the proposed amendment was then set out.

13 The document explaining the name change proposal said relevantly:-

(a) The applicant is the key organisation for electrical contractors in Western Australia.

(b) The applicant maintains an affiliation with the National Electrical Contractors Association (NECA) and a chapter of it, the NECAWA, exists and has common office holders with the applicant. The NECAWA chapter is not however active in its own right.

(c) In accordance with the constitutions of the applicant and the NECAWA, and by agreement between them, membership of the applicant automatically results in membership of the NECAWA.

(d) The applicant's President and Senior Vice President are both executive members of the NECA and participate in the business of that organisation. The applicant is a full participant in national programs initiated through the NECA structure and the applicant's staff members contribute to national projects and committees on a regular basis. The applicant's Chief Executive Officer participates in NECA secretariat meetings with his counterparts in other states on a regular basis.

(e) The industry has increasing national orientation. Issues confronting electrical and communications contractors tend to be common across state boundaries. An example was the impact of the "*Workchoices*" legislation.

(f) All mainland states apart from Western Australia now operate under the NECA banner. This reflects the national nature of the industry.

(g) It "*is felt that [the applicant], as a full participant in the activities of its national and state cousins, should adopt the title National Electrical and Communications Association of Western Australia to recognize this reality. The adoption of a common name and badging will diminish confusion for industry participants and will clarify the national affiliation of ECAWA while maintaining the state-based focus its members demand*".

14 Mr Hale declared that the Special General Meeting took place at the date and time notified. A quorum of 15 members attended. Mr Hale declared this was in accordance with rule 21 of the applicant's rules.

15 A copy of the minutes of the Special General Meeting was annexed to Mr Hale's statutory declaration. The minutes disclosed there were 15 attendees and in addition Mr Hale and Mr Martin, an in-house solicitor of the applicant. The minutes recorded that both motions referred to earlier were carried. Mr Hale declared that both motions were passed by unanimous vote. This was in accordance with rule 28(1)(d) of the applicant's rules, which provides for a ⅔ majority vote to pass motions to alter the rules.

16 In his evidence, Mr Tuck said relevantly:-

(a) He had an involvement with the NECA in providing strategic advice and direction as a member of the NECA secretariat. The CEOs of each of the state organisations participated in the secretariat.

(b) The Presidents of each of the state organisations meet on a regular basis to work towards common goals and to develop common strategies to enhance the electrical and communication industries. Also, other participants from each of the state organisations meet and deal with various issues that affect the whole of Australia.

(c) These included the skills shortage in Western Australia, the supporting of class 457 visas for overseas workers to partly address the skills shortage, the development of national wiring rules and common standards of work and work practices. The issues confronting the relevant industries have an increasingly national focus.

(d) There was also recognition of excellence of work in awards for employers and employees.

(e) The various state organisations co-operated in projects. An example was given of an "*eco smart electrician programme*" being developed in Victoria which will be presented in Western Australia by the Western Australian college.

(f) The NECA does not work independently to carry out programmes in Western Australia. It is co-operative with the Western Australian state organisation.

(g) The applicant is not bound by motions carried by the NECA. Additionally, the NECA does not have any control over the finances of the applicant.

(h) The name change sought was consistent with the names of the other state based organisations which were called, for example "*NECA Victoria*".

(i) The applicant was not and was not intending to become a branch of the NECA. It simply wanted to change its name to show that it was part of a federal organisation although not bound by that organisation.

17 Mr Martin who appeared for the applicant provided written submissions which set out the reasons for the application and the benefits of the proposed name change. The submissions were consistent with the facts I have set out.

The Rules about Amendment

18 Rule 28 provides for the amendment of rules of the applicant in the following terms:-

*"**AMENDMENT OF RULES***

28. Subject to the provisions of this Rule, the Rules may be amended by a resolution passed at a general meeting of the members of the Association.

1. No amendment of the Rules shall be made unless:

a. Notice of the meeting is given to all members at least one month prior to the date upon which the meeting is held;

b. That notice sets out the proposed amendment of the Rules and the reasons for the amendment;

c. The notice of meeting explains that, notwithstanding the fact that the resolution may be passed at the meeting, any member may object to the proposed amendment by forwarding a written objection to the Registrar of the Western Australian Industrial Relations Commission to reach him no later than 21 days after the date of the meeting; and

d. The resolution is passed by at least two thirds of those members attending the meeting, either in person or by proxy, who are eligible to vote."

19 Rule 20 provides that Special General Meetings may be called at the instance of the President or any ten members.

The Statutory Criteria

20 The application is, as stated earlier, made under s62(2) of *the Act*. Pursuant to s62(4), ss55, 56 and 58(3) of *the Act* "*apply, with such modifications as are necessary, to and in relation to an application by an organisation for alteration of a rule of a kind referred to in subsection (2)*". As I stated in *The Association of Professional Engineers, Australia (Western Australian Branch) Organisation of Employees* (2007) 87 WAIG 2556 at [34], this could have been drafted in clearer terms.

21 Section 55(2) of *the Act* requires the publication of, in this case and by reference to s62(4), a notice of the application of the alteration of the rules. As stated, this occurred by the publication of the notice in the WAIG on 23 May 2007. Section 55(3) of

the Act provides that an application shall not be listed for hearing before the Full Bench until after the expiration of 30 days from the day on which the notice referred to in s55(2) has been published. This subsection has been complied with as the application was not heard until 8 August 2007.

22 Section 55(4) of *the Act* provides that the Full Bench shall refuse an application by an organisation unless it is satisfied that:-

> "*(a) the application has been authorised in accordance with the rules of the organisation;*
>
> *(b) reasonable steps have been taken to adequately inform the members —*
>
> *(i) of the intention of the organisation to apply for registration;*
>
> *(ii) of the proposed rules of the organisation; and*
>
> *(iii) that the members or any of them may object to the making of the application or to those rules or any of them by forwarding a written objection to the Registrar,*
>
> *and having regard to the structure of the organisation and any other relevant circumstance, the members have been afforded a reasonable opportunity to make such an objection;*
>
> *(c) in relation to the members of the organisation —*
>
> *(i) less than 5% have objected to the making of the application or to those rules or any of them, as the case may be; or*
>
> *(ii) a majority of the members who voted in a ballot conducted in a manner approved by the Registrar has authorised or approved the making of the application and the proposed rules;*
>
> *(d) in relation to the alteration of the rules of the organisation, those rules provide for reasonable notice of any proposed alteration and reasons therefor to be given to the members of the organisation and for reasonable opportunity for the members to object to any such proposal; and*
>
> *(e) rules of the organisation relating to elections for office —*
>
> *(i) provide that the election shall be by secret ballot; and*
>
> *(ii) conform with the requirements of section 56(1),*
>
> *and are such as will ensure, as far as practicable, that no irregularity can occur in connection with the election.*"

23 I will defer consideration of the requirements of s55(4)(a) of *the Act* until later.

24 Mr Hale's statutory declaration satisfies me that reasonable steps were taken to adequately inform the members of the applicant of the three things set out in s55(4)(b) of *the Act*, as necessarily modified for the purposes of considering a rule alteration application. Accordingly, I am satisfied the members of the applicant were afforded a reasonable opportunity to object to the proposed alteration of the rules.

25 The facts set out in Mr Hale's statutory declaration also established that less than 5 per cent of the members of the applicant objected to the alteration of the rules. This satisfies the requirement set out in s55(4)(c). In fact, no one has objected. There is no notice of any objection that has been given to the applicant of which the Full Bench has been made aware and additionally a Deputy Registrar has advised the Full Bench that no objection application has been received by the Commission.

26 I am also satisfied that s55(4)(d) as necessarily modified has been complied with. This finding is made on the basis of the contents of the rules about notice being provided to the members as set out earlier and the actions taken by the applicant set out in the statutory declaration of Mr Hale. The statutory declaration and attached documents show what the applicant did to provide notice to members and advise them they could object.

27 There is no evidence of any applicability of s55(4)(e) to the present application. Sections 56 and 58(3) of *the Act* are also not applicable to the present application.

28 This leaves consideration of the requirements of s55(4)(a) of *the Act*. At the conclusion of the hearing I advised Mr Martin that if the Full Bench, in the process of deciding the application, considered there was an issue which might lead to it being refused, then an opportunity would be provided to make submissions about it.

29 On 28 August 2007, my associate, as instructed by the Full Bench, wrote a letter to the applicant which requested submissions upon an issue in the following terms:-

> "*The issue arises because of the contents of s55(4)(a) of the Industrial Relations Act 1979 (WA) (the Act) which is incorporated into an application to alter registered rules pursuant to s62(4) of the Act. Relevantly, this subsection provides that the Full Bench "shall refuse an application" unless it*

> *is satisfied that "the application has been authorised in accordance with the rules of the organisation"*
>
> *The issue is that rule 28(1)(c) requires there to be a statement in the notice of the special general meeting that members can object within 21 days to the Registrar of the Western Australian Industrial Relations Commission. The notice of the special general meeting advised of the possibility of an objection but did not specify the time limit of "21 days". It might be therefore that the rules for the amendment of rules of the applicant were not complied with. If so then the consequence set out in s55(4)(a) would seem to follow so that the Full Bench would be required to refuse the application.*
>
> *The Full Bench would like to receive your additional submissions upon whether given the above, the statutory criteria in s55(4)(a) of the Act has been complied with. The Full Bench is prepared to receive written submissions on the issue by 4.00pm on 11 September 2007.*"

30 The letter concluded with an invitation for the applicant to advise if they also wanted to make oral submissions. No such request was made and the applicant filed additional submissions as directed.

31 The submissions recounted aspects of the facts. In paragraph [8] it said that each "*notice outlining that members may object to the proposed changes did not inform the members to do so within 21 days of the Special General Meeting*". The submissions emphasised that no-one had in fact objected to the rules alteration sought. It was accepted however that rule 28(1)(c) had not been complied with as the notice of meeting had not explained that "*any member may object to the proposed amendment by forwarding a written objection to the Registrar of the Western Australian Industrial Relations Commission to reach him no later than 21 days after the date of the meeting*" (Additional written submissions paragraphs [14], [21], [23]). The written submissions also accepted that s55(4)(a) of *the Act* had not been satisfied.

32 The applicant sought to avoid the consequence that the application be refused. It was submitted there was a discretion to allow the application, notwithstanding the lack of authorisation in accordance with the rules.

33 To support this proposition the applicant cited *Re an application by the Association of Professional Engineers, Australia (Western Australian Branch)* (1993) 73 WAIG 2667; 36 AILR 13 (*Re APEA*). There the Full Bench by majority (Halliwell SC, Negus C; Sharkey P dissenting) authorised the Registrar to register an alteration to the rules of the organisation. Sharkey P thought the alteration should not be authorised as s55(4)(b) of *the Act* had not been complied with. Negus C (with whom Halliwell SC agreed) decided that authorisation should be given. Whilst the reasons of Negus C are with respect not entirely clear, he noted at page 2669 that s55 did not prescribe how members are to be informed of a proposed rule change. Negus C said: "*In the absence of such prescription, then it follows that the question of compliance or otherwise with S.55(4) in relation to an application for authorisation of a rule change is an exercise of discretion by the members of the Full Bench.*"

34 Negus C then said:-

> "*In turning my mind to the proper exercise of the discretion vested in my office, I cannot believe that the intention of the legislature was to encourage the Industrial Relations Commission to involve itself in the internal affairs of registered organisations, to impose its views upon them or to place the hurdles of legal technicality in the way of their proper decision making processes. S.66 and S.55 together surely provide a wealth of protection for any individual or for a minority group, from the possible 'tyranny of democracy' which might occur if the will of the majority was to run amok and impinge upon the rights of that individual or minority group.*
>
> *In dealing with an application of this type, it is necessary for the Full Bench to apply a test of reasonableness to the steps taken by the organisation to inform the members of their rights to make objection and to have those objections considered and addressed.*"

35 The applicant submitted the "*discretion*" of the Full Bench extends to s55(4)(a) of *the Act*. It was submitted that all rules except rule 28(1)(c) were complied with, members were aware of the alteration sought, the reasons for them and the entitlement to object. It was also submitted that the "*breach of rule 28(1)(c) was not carried out with any degree of malicious intent or impropriety*". I accept the latter submission without reservation.

36 Despite this however, in my opinion the terms of s55(4)(a) of *the Act* mandate that the present application must be refused. Section 55(4)(a) uses the words "*shall refuse*". The use of "*shall*" imports in the context a requirement to refuse the application unless there is satisfaction in the terms described. This opinion is not inconsistent with s56 of the *Interpretation Act 1984* (WA) and "*The Wall and Ceiling Fixer's Case*", a decision of the Industrial Appeal Court; *Construction, Mining and Energy Workers Union of Australia, Western Australian Branch v The Operative Plasterers and Plaster Workers Federation of Australia (Industrial Union of Workers) Western Australian Branch and Another* (1990) 70 WAIG 281 at 286.

37 *Re APEA* does not support the present application. Section 55(4)(b) involves an assessment by the Full Bench of the reasonableness of the actions taken. That assessment is an exercise of evaluative judgment. The assessment required by s55(4)(a) is not. To the extent that the reasons of Negus C and Halliwell SC in *Re APEA* suggest to the contrary, such

observations are obiter and with respect in my opinion wrong. The reasoning does not take cognizance of the legislative terms used in both the preamble of s55(4) and s55(4)(a) itself.

38 Section 55(4)(a) of *the Act* requires the Full Bench to be satisfied the application "*has been authorised in accordance with the rules of the organisation*". In my opinion authorisation in accordance with the rules involves compliance with the process required by the rules to pass a motion to apply to alter the rules. This includes all aspects of the process including relevant notice requirements.

39 Put slightly differently, in the context of an application to alter the rules, s55(4)(a) of *the Act* requires the Full Bench to analyse and determine:-

(a) What is required under the rules to authorise an alteration application.

(b) What actions have been taken to purportedly comply with these requirements.

(c) Whether compliance has occurred.

40 In the present case the process of authorisation is contained in rule 28. The process includes the provision of a notice which contains amongst other things the explanation contained in rule 28(1)(c). The explanation did not incorporate all of what was required. Due to this the notice did not comply with rule 28(1)(c). The applicant accepts this. The application was not therefore authorised in accordance with the rules. The applicant also accepts this. As a result the application must therefore be refused.

41 This result stems from the wording of s55(4)(a) of *the Act* and rule 28(1)(c). It is a regrettable outcome given the technical nature of the lack of compliance, the effort that has gone into the amendment process, the sound reasons for the making of the application and that I have found that a reasonable opportunity to object was afforded to members yet not acted upon.

42 Section 55(4)(a) does not however contain any scope for the Full Bench to be satisfied there has been substantial compliance with the authorisation process. This may cause a harsh result in a particular case and this is one of them. The terms of the legislation may however be inferred to reflect an intention that applications to alter the rules of an organisation should only be allowed if there is strict compliance with what the rules require. The contents of s55(4)(a) are part of the fairly tight supervisory role over the rules of organisations that the Commission is charged with by *the Act.*

43 Although the application must be refused, there is of course nothing to prevent the applicant making another application if all of the requirements of *the Act* and rules are met.

44 There are two other matters that I will mention. The first is that rule 28(1) is cast in terms of an amendment being made. It does not mention that in accordance with s62(1) of *the Act*, no amendment will be effective until registration by the Registrar and the giving of a certificate of registration of the alteration to the organisation. To that extent the rule is anomalous, but the Full Bench is not required to consider any consequence of this in the present application.

45 The second relates to the drafting of s62(4) of *the Act*. I have earlier referred to this. In my opinion the drafting style, which Brinsden J called "*lazy"* at page 286 of the *The Wall and Ceiling Fixer's Case,* is liable to produce confusion and difficulty of application. Organisations should be able to clearly understand the process required to alter their rules. In my respectful opinion this is a matter which would benefit from legislative attention.

Conclusion and Order

46 As stated in my opinion the Full Bench must refuse the application. The appropriate order is that the application is dismissed.

COMMISSIONER S WOOD:

47 I have had the benefit of reading the Reasons for Decision of His Honour the Acting President. I agree with those reasons and have nothing to add.

COMMISSIONER S M MAYMAN:

48 I have had the advantage of reading in draft form the Reasons for Decision of His Honour the Acting President. I agree with those Reasons and have nothing to add.

2007 WAIRC 01194

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE ELECTRICAL AND COMMUNICATIONS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF EMPLOYERS)
	APPLICANT
CORAM	FULL BENCH THE HONOURABLE M T RITTER, ACTING PRESIDENT COMMISSIONER S WOOD COMMISSIONER S M MAYMAN
DATE	FRIDAY, 26 OCTOBER 2007
FILE NO	FBM 2 OF 2007
CITATION NO.	2007 WAIRC 01194

Decision	Application dismissed
Appearances	
Applicant:	Mr C Martin (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on 8 August 2007, and having heard Mr C Martin (of Counsel), by leave, on behalf of the applicant, it is this day, 26 October 2007, ordered that:-

1. The application is dismissed.

By the Full Bench

(Sgd.) M T RITTER,
Acting President.

[L.S.]

FULL BENCH—Procedural Directions and Orders—

2007 WAIRC 01191

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHIEF EXECUTIVE OFFICER, DEPARTMENT OF AGRICULTURE AND FOOD
	APPELLANT
	-AND-
	TREVOR JAMES WARD
	RESPONDENT
	-AND-
	CHIEF EXECUTIVE OFFICER, DEPARTMENT OF AGRICULTURE AND FOOD
	APPELLANT
	-AND-
	JOHN MARTIN WALL
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S WOOD
DATE	THURSDAY, 25 OCTOBER 2007
FILE NO/S	FBA 14 OF 2007, FBA 15 OF 2007, FBA 16 OF 2007 AND FBA 17 OF 2007
CITATION NO.	2007 WAIRC 01191

Decision	Orders and directions

Order

Upon the application of the appellant filed on 18 October 2007 and by consent it is ordered that:-

1. Appeals FBA 14, 15, 16 and 17 of 2007 be consolidated in the one proceeding.
2. A single appeal book be lodged and served for the consolidated proceeding.
3. A single set of an outline of submissions and list of authorities be lodged and served for the consolidated proceeding in accordance with Practice Note 1 of 2007.

By the Full Bench

(Sgd.) M T RITTER,
Acting President.

[L.S.]

PUBLIC SERVICE ARBITRATOR—Awards/Agreements—Variation of—

2007 WAIRC 01171

GOVERNMENT OFFICERS SALARIES, ALLOWANCES AND CONDITIONS AWARD 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	ANIMAL RESOURCES AUTHORITY AND OTHERS
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
DATE	TUESDAY, 16 OCTOBER 2007
FILE NO/S	P 12 OF 2007
CITATION NO.	2007 WAIRC 01171

Result Award varied

Order

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

THAT the Government Officers Salaries, Allowances and Conditions Award 1989 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 15th day of October 2007.

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

SCHEDULE

1. Clause 46. – Motor Vehicle Allowance: Delete subclause (5) of this clause and insert the following in lieu thereof:

(5) Allowance for towing employer's caravan or trailer.

In cases where officers are required to tow the employer's caravans on official business, the additional rate shall be 7.0 cents per kilometre. When the employer's trailers are towed on official business the additional rate shall be 4.0 cents per kilometre.

2. Clause 49. – Relieving Allowance: Delete subclause (1)(d) of this clause and insert the following in lieu thereof:

(d) If an officer whose normal duties do not involve camp accommodation is required to relieve or perform special duty resulting in a stay at a camp, the officer shall be paid camping allowance for the duration of the period spent in camp, and in addition, shall be paid a lump sum of $163.00 to cover incidental personal expenses: Provided that an officer shall receive no more than one lump sum of $163.00 in any one period of three (3) years.

3. Clause 50. – Removal Allowance: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) When an officer is transferred to a new locality in the interests of the employer, or in the ordinary course of promotion or transfer, or on account of illness due to causes over which the officer has no control, the officer shall be reimbursed:

(a) The actual reasonable cost of conveyance for the officer and dependants.

(b) The actual cost (including insurance) of the conveyance of an officer's household furniture effects and appliances up to a maximum volume of 35 cubic metres, provided that a larger volume may be approved by the employer in special cases.

(c) An allowance of $534.00 for accelerated depreciation and extra wear and tear on furniture, effects and appliances for each occasion that an officer is required to transport furniture, effects and appliances. Provided that the employer is satisfied that the value of household furniture, effects and appliances moved by the officer is at least $3,199.00.

(d) Reimbursement of reasonable expenses in kennelling and transporting of domestic pet or pets up to a maximum amount of $169.00.

Pets are defined as dogs, cats, birds or other domestic animals kept by the officer or the officer's dependant/s for the purpose of household enjoyment.

Pets do not include domesticated livestock, native animals nor equine animals.

4. Clause 50. – Removal Allowance: Delete subclause (6) of this clause and insert the following in lieu thereof:

(6) Where an officer is transferred to Government owned or private rental accommodation, where furniture is provided, and as a consequence the officer is obliged to store furniture, the officer shall be reimbursed the actual cost of such storage up to a maximum allowance of $992.00 per annum. Actual cost is deemed to include the premium for adequate insurance coverage of the value of the furniture stored. An allowance under this subclause shall not be paid for a period in excess of four years without the approval of the employer.

5. Schedule I. – Overtime Allowance: Delete this Schedule and insert the following in lieu thereof:

PART I - OUT OF HOURS CONTACT

(Operative on and from 23 August 2004)

Standby	$6.89 per hour
On Call	$3.45 per hour
Availability	$1.72 per hour

Subclause (2) of Clause 64. – Expired General Agreement Salaries of this Award defines salary for calculation purposes.

PART II - MEALS

(Operative from the first pay period commencing on or from 15 October 2007)

Breakfast	$9.00 per meal
Lunch	$11.05 per meal
Evening Meal	$13.25 per meal

6. Schedule O. – Overtime Allowance: Delete this Schedule and insert the following in lieu thereof:

ANNUAL INTERSTATE ALLOWANCE RATES

(Operative from the first pay period commencing on or from 19 October 2005)

	Single	With Dependents
	$	$
Adelaide	$2,473	$3,370
Brisbane	$2,690	$3,588
Melbourne	$2,767	$4,091
Sydney	$4,262	$5,091

2007 WAIRC 01184

GOVERNMENT OFFICERS SALARIES, ALLOWANCES AND CONDITIONS AWARD 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	ANIMAL RESOURCES AUTHORITY AND OTHERS
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
DATE	MONDAY, 22 OCTOBER 2007
FILE NO	P 12 OF 2007
CITATION NO.	2007 WAIRC 01184

Result Correction Order Issued

Correction Order

WHEREAS on Tuesday 16 October 2007 an Order in this matter was deposited in the Office of the Registrar; and

WHEREAS the Order contained an error;

NOW THEREFORE the Public Service Arbitrator pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT Clause 6 of the schedule to the Order issued by the Public Service Arbitrator in Application P 12 of 2007 on 16 October 2007 be replaced by Clause 6 in the attached Schedule.

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

SCHEDULE

6. Schedule O. – Overtime Allowance: Delete this Schedule and insert the following in lieu thereof:

ANNUAL INTERSTATE ALLOWANCE RATES

(Operative from the first pay period commencing on or from 15 October 2007)

	Single	With Dependents
	$	$
Adelaide	$2,473	$3,370
Brisbane	$2,690	$3,588
Melbourne	$2,767	$4,091
Sydney	$4,262	$5,091

2007 WAIRC 01170

GOVERNMENT OFFICERS (SOCIAL TRAINERS) AWARD 1988

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

DISABILITY SERVICES COMMISSION

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
COMMISSIONER P E SCOTT

DATE TUESDAY, 16 OCTOBER 2007

FILE NO/S P 9 OF 2007

CITATION NO. 2007 WAIRC 01170

Result Award varied

Order

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

THAT the Government Officers (Social Trainers) Award 1988 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 15th day of October 2007.

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

SCHEDULE

1. Clause 42. – Motor Vehicle Allowance: Delete subclause (5) of this clause and insert the following in lieu thereof:

(5) Allowance for Towing the Employer's Caravan or Trailer

In the case where employees are required to tow the Employer's caravans on official business, the additional rate shall be 7.0 cents per kilometre. When the Employer's trailers are towed on official business the additional rate shall be 4.0 cents per kilometre.

2. Clause 45. – Relieving Allowance: Delete subclause (4) of this clause and insert the following in lieu thereof:

(4) If an employee whose normal duties do not involve camp accommodation is required to relieve or perform special duty resulting in a stay at a camp, the employee shall be paid camping allowance for the duration of the period spent in camp, and in addition, shall be paid a lump sum of $163.00 to cover incidental personal expenses: Provided that an employee shall receive no more than one lump sum of $163.00 in any one period of three (3) years.

3. Clause 46. – Removal Allowance: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) When an employee is transferred in the public interest, or in the ordinary course of promotion or transfer, or on account of illness due to causes over which the employee has no control, the employee shall be reimbursed:

(a) The actual reasonable cost of conveyance of the employee and dependants.

(b) The actual cost (including insurance) of the conveyance of an employee's household furniture effects and appliances up to a maximum volume of 35 cubic metres, provided that a larger volume may be approved by the Employer in special cases.

(c) An allowance of $534.00 for accelerated depreciation and extra wear and tear on furniture, effects and appliances for each occasion that an employee is required to transport his or her furniture, effects and appliances provided that the Employer is satisfied that the value of household furniture, effects and appliances moved by the employee is at least $3,199.00.

(d) Reimbursement of reasonable expenses in kennelling and transporting of domestic pet or pets up to a maximum amount of $169.00.

Pets are defined as dogs, cats, birds or other domestic animals kept by the employee or the employee's dependents for the purpose of household enjoyment.

Pets do not include domesticated livestock, native animals or equine animals.

4. Clause 46. – Removal Allowance: Delete subclause (6) of this clause and insert the following in lieu thereof:

(6) Where an employee is transferred to government owned or private rental accommodation, where furniture is provided, and as a consequence the employee is obliged to store furniture, the employee shall be reimbursed the actual cost of such storage up to a maximum allowance of $992.00 per annum. Actual cost is deemed to include the premium for adequate insurance coverage for the value of the furniture stored. An allowance under this subclause shall not be paid for a period in excess of four years without the approval of the Employer.

5. Schedule E. – Overtime Allowance: Delete this Schedule and insert the following in lieu thereof:

PART I - OUT OF HOURS CONTACT

Standby	$6.32 per hour
On Call	$3.16 per hour
Availability	$1.58 per hour

PART II - MEALS

(Operative from the first pay period commencing on or from the 15th day of October 2007)

Breakfast	$9.00 per meal
Lunch	$11.05 per meal
Evening Meal	$13.25 per meal

2007 WAIRC 01173

GRAYLANDS SELBY-LEMNOS AND SPECIAL CARE HEALTH SERVICES AWARD 1999

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

THE METROPOLITAN HEALTH SERVICE BOARD AND ANOTHER

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR

COMMISSIONER P E SCOTT

DATE TUESDAY, 16 OCTOBER 2007

FILE NO/S P 6 OF 2007

CITATION NO. 2007 WAIRC 01173

Result Award varied

Order

HAVING heard Mr M Sims on behalf of the Civil Service Association of Western Australia Incorporated, Mr G Bucknall on behalf of the Health Services Union of Western Australia (Union of Workers) and Mr A Harper on behalf of the respondents, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT the Graylands Selby-Lemnos and Special Care Health Services Award 1999 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 15th day of October 2007.

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

SCHEDULE

1. Clause 35. – Motor Vehicle Allowance: Delete subclause (5) of this clause and insert the following in lieu thereof:

(5) Allowance for towing Departmental caravan or trailer.

In case where officers are required to tow departmental caravans on official business, the additional rate shall be 7.0 cents per kilometre. When departmental trailers are towed on official business the additional rate shall be 4.0 cents per kilometre.

2. Clause 38. – Relieving Allowance: Delete subclause (4) of this clause and insert the following in lieu thereof:

(4) If an officer whose normal duties do not involve camp accommodation is required to relieve or perform special duty resulting in a stay at a camp, the officer shall be paid camping allowance for the duration of the period spent in camp, and in addition, shall be paid a lump sum of $163.00 to cover incidental personal expenses: Provided that an officer shall receive no more than one lump sum of $163.00 in any one period of three (3) years.

3. Clause 39. – Removal Allowance: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) When an officer is transferred in the public interest, or in the ordinary course of promotion or transfer, or on account of illness due to causes over which the officer has no control, the officer shall be reimbursed:-

(a) The actual reasonable cost of conveyance of the officer and dependants.

(b) The actual cost (including insurance) of the conveyance of an officer's household furniture effects and appliances up to a maximum volume of 35 cubic metres, provided that a larger volume may be approved by the Employer in special cases.

(c) An allowance of $534.00 for accelerated depreciation and extra wear and tear on furniture, effects and appliances for each occasion that an officer is required to transport his or her furniture, effects and appliances provided that the Employer is satisfied that the value of household furniture, effects and appliances moved by the officer is at least $3,199.00

(d) Reimbursement of reasonable expenses in kennelling and transporting of domestic pet or pets up to a maximum amount of $169.00.

Pets are defined as dogs, cats, birds or other domestic animals kept by the officer or the officer's dependants for the purpose of household enjoyment.

Pets do not include domesticated livestock, native animals nor equine animals.

4. Clause 39. – Removal Allowance: Delete subclause (6) of this clause and insert the following in lieu thereof:

(6) Where an officer is transferred to government owned or private rental accommodation, where furniture is provided, and as a consequence the officer is obliged to store furniture, the officer shall be reimbursed the actual cost of such storage up to a maximum allowance of $992.00 per annum. Actual cost is deemed to include the premium for adequate insurance coverage for the value of the furniture stored. An allowance under this subclause shall not be paid for a period in excess of four years without the approval of the employer.

5. Schedule H. – Overtime Allowance: Delete this schedule and insert the following in lieu thereof:

PART 1 - OUT OF HOURS CONTACT

(Operative from the first pay period on or after 15th day of October 2004)

Standby	$6.51 per hour
On Call	$3.25 per hour
Availability	$1.63 per hour

PART II - MEALS

(Operative from the first pay period commencing on or from the 15th day of October 2007)

Breakfast	$9.00 per meal
Lunch	$11.05 per meal
Evening Meal	$13.25 per meal
Supper	$9.00 per meal

The allowances prescribed in this schedule shall apply from the dates indicated and shall be varied in accordance with any movement in the equivalent allowances in the Public Service Award 1992.

2007 WAIRC 01174

INSTITUTION OFFICERS ALLOWANCES AND CONDITIONS AWARD 1977, NO. 3 OF 1977

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	HONOURABLE MINISTER FOR FAMILY AND CHILDREN'S SERVICES AND ANOTHER
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
DATE	TUESDAY, 16 OCTOBER 2007
FILE NO/S	P 7 OF 2007
CITATION NO.	2007 WAIRC 01174

Result Award varied

Order

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

THAT the Institution Officers Allowances and Conditions Award 1977, No. 3 of 1977 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 15th day of October 2007.

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

SCHEDULE

1. Clause 37. – Motor Vehicle Allowance: Delete subclause (5) of this clause and insert the following in lieu thereof:

(5) Allowance for towing an Employer's caravan or trailer.

In case where officers are required to tow an Employer's caravans on official business, the additional rate shall be 7.0 cents per kilometre. When an Employer's trailers are towed on official business the additional rate shall be 4.0 cents per kilometre.

2. Clause 40. – Relieving Allowance: Delete subclause (4) of this clause and insert the following in lieu thereof:

(4) If an officer whose normal duties do not involve camp accommodation is required to relieve or perform special duty resulting in a stay at a camp, the officer shall be paid camping allowance for the duration of the period spent in camp, and in addition, shall be paid a lump sum of $163.00 to cover incidental personal expenses: Provided that an officer shall receive no more than one lump sum of $163.00 in any one period of three (3) years.

3. Clause 41. – Removal Allowance: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) When an officer is transferred in the public interest, or in the ordinary course of promotion or transfer, or on account of illness due to causes over which the officer has no control, the officer shall be reimbursed:

(a) The actual reasonable cost of conveyance of the officer and dependants.

(b) The actual cost (including insurance) of the conveyance of an officer's household furniture effects and appliances up to a maximum volume of 35 cubic metres, provided that a larger volume may be approved by the Employer in special cases.

(c) An allowance of $534.00 for accelerated depreciation and extra wear and tear on furniture, effects and appliances for each occasion that an officer is required to transport his or her furniture, effects and appliances provided that the Employer is satisfied that the value of household furniture, effects and appliances moved by the officer is at least $3,199.00.

(d) Reimbursement of reasonable expenses in kennelling and transporting of domestic pet or pets up to a maximum amount of $169.00.

Pets are defined as dogs, cats, birds or other domestic animals kept by the officer or the officer's dependants for the purpose of household enjoyment.

Pets do not include domesticated livestock, native animals or equine animals.

4. Clause 41. – Removal Allowance: Delete subclause (6) of this clause and insert the following in lieu thereof:

(6) Where an officer is transferred to government owned or private rental accommodation, where furniture is provided, and as a consequence the officer is obliged to store furniture, the officer shall be reimbursed the actual cost of such storage up to a maximum allowance of $992.00 per annum. Actual cost is deemed to include the premium for adequate insurance coverage for the value of the furniture stored. An allowance under this subclause shall not be paid for a period in excess of four years without the approval of the Employer.

2007 WAIRC 01172

PUBLIC SERVICE AWARD 1992

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	DEPARTMENT OF INDIGENOUS AFFAIRS AND OTHERS
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
DATE	TUESDAY, 16 OCTOBER 2007
FILE NO/S	P 13 OF 2007
CITATION NO.	2007 WAIRC 01172

Result Award varied

Order

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

THAT the Public Service Award 1992 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 15th day of October 2007.

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

SCHEDULE

1. Clause 47. – Motor Vehicle Allowance: Delete subclause (5) of this clause and insert the following in lieu thereof:

(5) Allowance for towing Departmental caravan or trailer

In case where officers are required to tow departmental caravans on official business, the additional rate shall be 7.0 cents per kilometre. When departmental trailers are towed on official business the additional rate shall be 4.0 cents per kilometre.

2. Clause 50. – Relieving Allowance: Delete subclause (4) of this clause and insert the following in lieu thereof:

(4) If an officer whose normal duties do not involve camp accommodation is required to relieve or perform special duty resulting in a stay at a camp, the officer shall be paid camping allowance for the duration of the period spent in camp, and in addition, shall be paid a lump sum of $163.00 to cover incidental personal expenses: Provided that an officer shall receive no more than one lump sum of $163.00 in any one period of three (3) years.

3. Clause 51. – Removal Allowance: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) When an officer is transferred in the public interest, or in the ordinary course of promotion or transfer, or on account of illness due to causes over which the officer has no control, the officer shall be reimbursed:

(a) The actual reasonable cost of conveyance of the officer and dependants.

(b) The actual cost (including insurance) of the conveyance of an officer's household furniture effects and appliances up to a maximum volume of 35 cubic metres, provided that a larger volume may be approved by the Employer in special cases.

(c) An allowance of $534.00 for accelerated depreciation and extra wear and tear on furniture, effects and appliances for each occasion that an officer is required to transport his or her furniture, effects and appliances provided that the Employer is satisfied that the value of household furniture, effects and appliances moved by the officer is at least $3,199.00.

(d) Reimbursement of reasonable expenses in kennelling and transporting of domestic pet or pets up to a maximum amount of $169.00.

Pets are defined as dogs, cats, birds or other domestic animals kept by the officer or the officer's dependants for the purpose of household enjoyment.

Pets do not include domesticated livestock, native animals or equine animals.

4. Clause 51. – Removal Allowance: Delete subclause (6) of this clause and insert the following in lieu thereof:

(6) Where an officer is transferred to government owned or private rental accommodation, where furniture is provided, and as a consequence the officer is obliged to store furniture, the officer shall be reimbursed the actual cost of such storage up to a maximum allowance of $992.00 per annum. Actual cost is deemed to include the premium for adequate insurance coverage for the value of the furniture stored. An allowance under this subclause shall not be paid for a period in excess of four years without the approval of the employer.

5. Schedule H. – Overtime Allowance: Delete this Schedule and insert the following in lieu thereof:

PART I - OUT OF HOURS CONTACT

(Operative on and from 30 July 2004)

Standby	$6.89 per hour
On Call	$3.45 per hour
Availability	$1.72 per hour

Clause 65(2) of the award defines salary for calculation purposes.

PART II - MEALS

(Operative from the first pay period commencing on or from 15 October 2007)

Breakfast	$9.00 per meal
Lunch	$11.05 per meal
Evening Meal	$13.25 per meal
Supper	$9.00 per meal

AWARDS/AGREEMENTS—Variation of—

2007 WAIRC 01181

FAST FOOD OUTLETS AWARD 1990

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA
	APPLICANT
	-v-
	AUSTRALIAN FAST FOODS PTY LTD AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S WOOD
DATE	THURSDAY, 18 OCTOBER 2007
FILE NO	APPL 112 OF 2007
CITATION NO.	2007 WAIRC 01181

Result	Award varied
Representation	
Applicant	Mr T Pope
Respondents	No appearance

Order

HAVING heard Mr T Pope on behalf of the applicant and there being no appearance on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Fast Food Outlets Award 1990 as varied, be further varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the date of this order.

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

SCHEDULE

1. Clause 13. – Meal Money: Delete this clause and insert the following in lieu thereof:

13. - MEAL MONEY

Any employee who is required to work overtime for more than two hours on any day, without being notified on the previous day or earlier, that he or she will be required to work such overtime, will either be supplied with a meal by the employer or be paid $10.50 meal money.

The meal money amount prescribed in this Clause was established by way of nexus with the Shop and Warehouse (Wholesale and Retail Establishments) State Award 1971 in application 1928 of 2002.

2. Clause 20. – Wages : Delete subclause (2) of this clause and insert the following in lieu thereof:

(2) Leading Hands -

An employee who is appointed and placed in charge of other employees by the employer shall be paid the following rates in addition to the employee's normal wage per week -

		$
(a)	If placed in charge of less than 6 employees	7.80
(b)	If placed in charge of 6 to 10 employees	10.65
(c)	If placed in charge of 11 to 20 employees	12.55
(d)	If placed in charge of more than 20 employees	20.75

3. Clause 22. – Bar Work : Delete this clause and insert the following in lieu thereof:

22. - BAR WORK

Any employee, other than a Bar Attendant, who in addition to his or her normal duties is required to dispense liquor from a bar, shall be paid a flat rate of one dollar per day in addition to the rate prescribed for such normal duties.

4. Clause 24. – Uniforms and Laundering : Delete this clause and insert the following in lieu thereof:

24. - UNIFORMS AND LAUNDERING

Where uniforms are required by the employer to be worn they shall be supplied, laundered and/or dry cleaned by the employer and remain the property of the employer, provided that in lieu of the employer laundering and/or dry cleaning same, the employee shall be paid the following laundry allowance per week -

Class of Employee	Allowance per Week$
Employees employed on a casual basis	1.55
Employees employed on a part time basis	1.95
Employees employed on a full time basis	2.35

Provided that any employee employed as a full time Cook shall be paid $2.85 per week for laundry and/or dry cleaning. Provided further that the provisions of this clause may be altered by written agreement between the union and the employer.

5. Clause 25. – Protective Clothing : Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) Employees who are required to wash dishes, clean toilets or otherwise handle detergents, acids, soaps or any injurious substances shall be supplied, free of charge by the employer, with rubber gloves or be paid an allowance of $1.55 per week in lieu.

2007 WAIRC 01178

LICENSED ESTABLISHMENTS (RETAIL AND WHOLESALE) AWARD 1979

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA

APPLICANT

-v-

COMO LIQUOR STORE AND OTHERS

RESPONDENTS

CORAM COMMISSIONER S WOOD

DATE THURSDAY, 18 OCTOBER 2007

FILE NO APPL 84 OF 2007

CITATION NO. 2007 WAIRC 01178

Result Award varied

Representation

Applicant Mr T Pope

Respondents No appearance

Order

HAVING heard Mr T Pope on behalf of the applicant and there being no appearance on behalf of the respondents, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Licensed Establishments (Retail and Wholesale) Award 1979 as varied, be further varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the date of this order.

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

SCHEDULE

1. Clause 10. – Meal Times and Meal Allowance:

A. Delete subclause (2) of Part I of this clause and insert the following in lieu thereof:

(2) When an employee is required to continue working after the usual finishing time for more than one hour he/she shall be paid $10.50 for the purchase of any meal required.

B. Delete subclause (3) of Part II of this clause and insert the following in lieu thereof:

(3) When an employee is required to continue working after the usual finishing time for more than one hour he/she shall be paid $10.50 for the purchase of any meal required.

2. Clause 21. – Wages: Delete Part IV of this clause and insert the following in lieu thereof:

PART IV - ADDITIONAL PAYMENTS

In addition to the rates prescribed elsewhere in this clause the following allowances and rates shall be paid to a worker where applicable.

(1) (a) An employee required to operate a ride-on power operated tow motor, a ride-on power operated pallet truck or a walk beside power operated high lift stacker in the performance of his/her duties shall be paid an additional 51 cents per hour whilst so engaged.

(b) An employee required to operate a ride-on operated fork lift, high lift stacker or high lift stock picker or a power operated overhead traversing hoist in the performance of his/her duties shall be paid an additional 71 cents per hour whilst so engaged.

(c) The allowances prescribed by this subclause shall not be payable to an employee engaged, and paid, as a "Storeman Operator Grade I" or a "Storeman Operator Grade II".

(2) (a) A worker shall receive an additional payment for every hour of which he spends 20 minutes or more in a cold chamber in accordance with the following:

In a cold chamber in which the temperature is:

(i) Below 0 degrees Celsius to - 20 degrees Celsius 76 cents per hour.

(ii) Below - 20 degrees Celsius to - 25 degrees Celsius 89 cents per hour

(iii) Below - 25 degrees Celsius, $1.02 per hour.

(b) Employees required to work in temperatures less than - 18.9 degrees Celsius shall be medically examined at the employer's expense.

3. Clause 22. – Motor Vehicle Allowance: Delete this clause and insert the following in lieu thereof:

Where a worker maintains a motor vehicle and is authorised by the employer to use the vehicle in the performance of his duties, he shall be paid in accordance with the following schedule:

AREA AND DETAILS	ENGINE DISPLACEMENT (IN CUBIC CENTIMETRES) RATE PER KILOMETRE (CENTS)		
Distance Travelled Each Year on Employer's Business	Over 2600cc	Over1600cc - 2600cc	1600cc & Under
Metropolitan Area	73.7	66.0	57.4
South West Land Division	75.4	67.7	58.9
North of 23.5 Degree South Latitude	82.9	74.7	64.9
Rest of the State	78.0	69.8	60.7
Motor Cycle (in all areas)	25.4 cents per kilometre		

2007 WAIRC 01209

METAL TRADES (GENERAL) AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS' UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH
	APPLICANT
	-v-
	ANODISERS WA AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S WOOD
DATE	FRIDAY, 2 NOVEMBER 2007
FILE NO	APPL 111 OF 2007
CITATION NO.	2007 WAIRC 01209

Result	Award varied
Representation	
Applicant	Mr L Edmonds
Respondents	Ms J Price on behalf of AJ Baker & Sons Pty Ltd

Order

HAVING heard Mr L Edmonds on behalf of the applicant and Ms J Price on behalf of AJ Baker & Sons Pty Ltd, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Metal Trades (General) Award, as varied, be further varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the date of this order.

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

SCHEDULE

1. Clause 3.2. – Overtime: Delete 3.2.3(6) of this clause and insert the following in lieu thereof:

(6) Subject to the provisions of 3.2.3(7), an employee required to work overtime for more than two (2) hours shall be supplied with a meal by the employer or be paid $10.30 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required, the employee shall be supplied with each such meal by the employer or be paid $7.00 for each meal so required.

2. Clause 4.8 – Wages and Supplementary Payments:

A. Delete 4.8.2(1) and insert the following in lieu thereof:

4.8.2 (1) Leading Hands:

In addition to the appropriate total wage prescribed in this clause, a leading hand shall be paid per week –

		$
(a)	if placed in charge of not less than three (3) and not more than ten (10) other employees	24.90
(b)	if placed in charge of more than ten (10) and not more than twenty (20) other employees	38.00
(c)	if placed in charge of more than twenty (20) other employees	49.20

B. Delete 4.8.6(1) and insert the following in lieu thereof:

(1) Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of work as a tradesperson or as an apprentice the employer shall pay a tool allowance of:

(a) $13.70 per week to such tradesperson; or

(b) in the case of an apprentice a percentage of $13.70 being the percentage which appears against the year of apprenticeship in 4.8.3;

for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of work as a tradesperson or apprentice.

C. Delete 4.8.7 and insert the following in lieu thereof:

4.8.7 An employee employed in rock quarries, limestone quarries or sand pits shall be paid an allowance of $22.20 per week to compensate for dust and climatic conditions when working in the open and for deficiencies in general amenities and facilities, but an employee so employed for not more than three days shall be paid on a pro rata basis.

This subclause shall not apply to employees employed by Cockburn Cement Limited.

3. Clause 5.2. – Special Rates and Facilities: Delete this clause and insert the following in lieu thereof:

5.2 - SPECIAL ALLOWANCES AND FACILITIES

5.2.1 Height Money:

An employee shall be paid an allowance of $2.30 for each day on which the employee works at a height of 15.5 metres or more above the nearest horizontal plane, but this provision does not apply to linespeople nor to riggers and splicers on ships and buildings.

5.2.2 Dirt Money:

An employee shall be paid an allowance of 49 cents per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.

5.2.3 Grain Dust:

Where any dispute arises at a bulk grain handling installation due to the presence of grain dust in the atmosphere and the Board of Reference determines that employees employed under this Award are unduly affected by that dust, the Board may, subject to such conditions as it deems fit to impose, fix an allowance or allowances not exceeding 82 cents per hour.

5.2.4 Confined Space:

An employee shall be paid an allowance of 58 cents per hour when, because of the dimensions of the compartment or space in which the employee is working, the employee is required to work in a stooped or otherwise cramped position, or without proper ventilation.

5.2.5 Diesel Engine Ships:

The provisions of 5.2.2 and 5.2.4 do not apply to an employee when the employee is engaged on work below the floor plates in diesel engine ships, but the employee shall be paid an allowance of 82 cents per hour whilst so engaged.

5.2.6 Boiler Work:

An employee required to work in a boiler which has not been cooled down shall be paid at the rate of time and one-half for each hour or part of an hour so worked in addition to any allowance to which the employee may be entitled under 5.2.2 and 5.2.4.

5.2.7 Hot Work:

An employee shall be paid an allowance of 49 cents per hour when the employee works in the shade in any place where the temperature is raised by artificial means to between 46.1 degrees and 54.4 degrees Celsius.

5.2.8 (1) Where, in the opinion of the Board of Reference, the conditions under which work is to be performed are, by reason of excessive heat, exceptionally oppressive, the Board may -

(a) fix an allowance, or allowances, not exceeding the equivalent of half the ordinary rate;

(b) fix the period (including a minimum period) during which any allowance so fixed is to be paid; and

(c) prescribe such other conditions, relating to the provision of protective clothing or equipment and the granting of rest periods, as the Board sees fit.

(2) The provisions of 5.2.8(1) do not apply unless the temperature in the shade at the place of work has been raised by artificial means beyond 54.4 degrees Celsius.

(3) An allowance fixed pursuant to paragraph 5.2.8(1) includes any other allowance which would otherwise be payable under this clause.

5.2.9 Tarring Pipes:

The provisions of 5.2.2 and 5.2.4 do not apply to an employee engaged in tarring pipes in the Cast Pipe Section but the employee shall, in lieu thereof, be paid an allowance of 78 cents per day whilst so engaged.

5.2.10 Percussion Tools:

An employee shall be paid an allowance of 28 cents per hour when working a pneumatic riveter of the percussion type and other pneumatic tools of the percussion type.

5.2.11 Chemical, Artificial Manure and Cement Works:

An employee, other than a general labourer, in chemical, artificial manure and cement works, in respect of all work done in and around the plant outside the machine shop, shall be paid an allowance calculated at the rate of $12.10 per week. This allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this clause.

5.2.12 Abattoirs and Tallow Rendering Works:

An employee, employed in and about an abattoir or in a rendering section of a tallow works shall be paid an allowance calculated at the rate of $15.90 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to receive any other allowance under this clause.

5.2.13 An employee who is employed at a timber sawmill or is sent to work at a timber sawmill shall be paid for the time there engaged a disability allowance equivalent to what the majority of the employees at the mill receive under the appropriate Award. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to receive any other allowance under this clause with the exception of that prescribed in 5.2.1 - Height Money.

5.2.14 Phosphate Ships:

An employee shall be paid an allowance of 70 cents for each hour the employee works in the holds or 'tween decks of ships which, immediately prior to such work, have carried phosphatic rock, but this subclause only applies if and for as long as the holds and 'tween decks are not cleaned down.

5.2.15 An employee who is sent to work on any gold mine shall be paid an allowance of such amount as will afford the employee a wage not less than he or she would be entitled to receive pursuant to the Award which would apply if such employee was employed in the gold mine concerned.

5.2.16 An employee who is required to work from a ladder shall be provided with an assistant on the ground where it is reasonably necessary for the employee's safety.

5.2.17 The work of an electrical fitter shall not be tested by an employee of a lower grade.

5.2.18 Special Rates Not Cumulative:

Where more than one of the disabilities entitling an employee to extra rates exists on the same job, the employer shall be bound to pay only one rate, namely - the highest for the disabilities prevailing. Provided that this subclause shall not apply to confined space, dirt money, height money, or hot work, the rates for which are cumulative.

5.2.19 Protective Equipment:

(1) An employer shall have available a sufficient supply of protective equipment as, for example, goggles (including anti-flash goggles), glasses, gloves, mitts, aprons, sleeves, leggings, gumboots, ear protectors, helmets, or other efficient substitutes thereof) for use by employees when engaged on work for which some protective equipment is reasonably necessary.

(2) An employee shall sign an acknowledgement when issued with any article of protective equipment and shall return that article to the employer when finished using it or on leaving employment.

(3) An employee to whom an article of protective equipment has been issued shall not lend that article to another employee and if the employee does, both employees shall be deemed guilty of wilful misconduct.

(4) An article of protective equipment which has been used by an employee shall not be issued by the employer to another employee until it has been effectively sterilised but this paragraph only applies where sterilisation of the article is practicable and is reasonably necessary.

(5) Adequate safety gear (including insulating gloves, mats and/or shields where necessary) shall be provided by employers for employees required to work on live electrical equipment.

5.2.20 (1) Subject to the provisions of this clause, an employee whilst employed on foundry work shall be paid a disability allowance of 34 cents for each hour worked to compensate for all disagreeable features associated with foundry work including heat, fumes, atmospheric conditions, sparks, dampness, confined spaces, and noise.

(2) The foundry allowance herein prescribed shall also apply to apprentices and unapprenticed juniors employed in foundries; provided that where an apprentice is, for a period of half a day or longer, away from the foundry for the purpose of receiving tuition, the amount of foundry allowance paid to the employee shall be decreased proportionately.

(3) The foundry allowance herein prescribed shall be in lieu of any payment otherwise due under this clause and does not in any way limit an employer's obligations to comply with all relevant requirements of Acts and Regulations relative to conditions in foundries.

(4) For the purpose of this subclause 'foundry work' shall mean -

(a) Any operation in the production of castings by casting metal in moulds made of sand, loam, metal, moulding composition or other material or mixture of materials, or by shell moulding, centrifugal casting or continuous casting; and

(b) where carried on as an incidental process in connection with and in the course of production to which 5.2.20(4)(a) applies, the preparation of moulds and cores (but not in the making of patterns and dies in a separate room), knock out processes and dressing operations, but shall not include any operation performed in connection with -

(i) non-ferrous die casting (including gravity and pressure);

(ii) casting of billets and/or ingots in metal moulds;

(iii) continuous casting of metal into billets;

(iv) melting of metal for use in printing;

(v) refining of metal.

5.2.21 An employee, holding a Third Year First Aid Medallion of the St. John Ambulance Association or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties, shall be paid $9.50 per week in addition to the employee's ordinary rate.

5.2.22 An electronics tradesperson, an electrician - special class, an electrical fitter and/or armature winder or an electrical installer who holds and, in the course of employment may be required to use, a current "A" Grade or "B" Grade license issued pursuant to the relevant Regulation in force on the 28th day of February 1978 under the *Electricity Act 1945*, shall be paid an allowance of $19.70 per week.

4. Clause 5.3. – Car Allowance: Delete 5.3.3 of this clause and insert the following in lieu thereof:

5.3.3 A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.

RATES OF HIRE FOR USE OF EMPLOYEE'S

OWN VEHICLE ON EMPLOYER'S BUSINESS

MOTOR CAR

AREA AND DETAILS	ENGINE DISPLACEMENT (IN CUBIC CENTIMETRES)		
	RATE PER KILOMETRE (CENTS)		
Distance Travelled Each Year on Employer's Business	Over 2600cc	Over 1600cc - 2600cc	1600cc & Under
Metropolitan Area	73.8	66.1	57.5
South West Land Division	75.5	67.8	59.0
North of 23.5° South Latitude	83.1	74.8	65.0
Rest of the State	78.1	69.9	60.8
Motor Cycle (in all areas)	25.4 cents per kilometre		

5. Clause 5.5. – Distant Work: Delete 5.5.4 and 5.5.5 of this clause and insert the following in lieu thereof:

5.5.4 An employee, to whom the provisions of 5.5.1 apply, shall be paid an allowance of $31.30 for any weekend the employee returns home from the job, but only if -

(1) the employee advises the employer or the employer's agent of such intention not later than the Tuesday immediately preceding the weekend in which the employee so returns;

(2) the employee is not required for work during that weekend;

(3) the employee returns to the job on the first working day following the weekend; and

(4) the employer does not provide, or offer to provide, suitable transport.

5.5.5 Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job, the employee shall be provided with suitable transport to and from that job or be paid an allowance of $13.80 per day, provided that where the time actually spent in travelling either to or from the job exceeds twenty (20) minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

PART 2 – CONSTRUCTION WORK

6. Clause 13. – Wages: Delete subclauses 13.4, 13.5 and 13.6 of this clause and insert the following in lieu thereof:

13.4 Construction Allowance

(1) In addition to the appropriate rates of pay prescribed in this clause an employee shall be paid:

(a) $44.00 per week if the employee is engaged on the construction of a large industrial undertaking or any large civil engineering project.

(b) $39.60 per week if the employee is engaged on a multi-storeyed building, but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which such employee is required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.

(c) $23.20 per week if the employee is engaged otherwise on construction work falling within the definition of construction work in Clause 1.6 - Definitions and Classification Structure of PART 1 - GENERAL of this Award.

(2) Any dispute as to which of the aforesaid allowances apply to particular work shall be determined by the Board of Reference.

13.5 Leading Hands

In addition to the appropriate total wage prescribed in this clause a leading hand shall be paid:

		$
(1)	If placed in charge of not less than three (3) and not more than ten (10) other employees	24.90
(2)	If placed in charge of more than ten (10) and not more than twenty (20) other employees	38.00
(3)	If placed in charge of more than twenty (20) other employees	49.20

13.6 (1) Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of work as a tradesperson or as an apprentice, the employer shall pay a tool allowance of –

(a) $13.70 per week to such tradesperson; or

(b) in the case of an apprentice a percentage of $13.70 being the percentage which appears against his or her year of apprenticeship in 4.8.3 of Clause 4.8 – Wages and Supplementary Payments of PART 1 - GENERAL (subject to Clause 12.2 Apprentices of PART 2) of this Award,

for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of his or her work as a tradesperson or apprentice.

(2) Any tool allowance paid pursuant to 13.6(1) shall be included in, and form part of, the ordinary weekly wage prescribed in this clause.

(3) An employer shall provide for the use of tradespersons or apprentices all necessary power tools, special purpose tools and precision measuring instruments.

(4) A tradesperson or apprentice shall replace or pay for any tools supplied by his or her employer if lost through his or her negligence.

7. Clause 15.1 – Special Allowances and Provisions:

A. Delete 15.1.2(2) and insert the following in lieu thereof:

(2) Subject to 15.1.3 where the employee's tools or working clothes are lost by fire or breaking and entering whilst securely stored in the place provided by the employer under 15.1.2(1) the employer shall reimburse the employee for that loss but only up to a maximum of $754.15.

B. Delete 15.1.4 and insert the following in lieu thereof:

15.1.4 An Electronics Tradesperson, an Electrician Special Class, an Electrical Fitter and/or Armature Winder or an Electrical Installer who holds, and in the course of employment may be required to use, a current "A" Grade or "B" Grade license issued pursuant to the relevant regulation in force on the 28th day of February 1978 under the *Electricity Act 1945,* shall be paid an allowance of $19.70 per week.

8. Clause 15.2. – Allowance for Travelling and Employment in Construction Work: Delete 15.2.1(1), 15.2.1(2) and 15.2.1(3) and insert the following in lieu thereof:

(1) On places within a radius of 50 kilometres from the General Post Office, Perth - $15.30 per day.

(2) For each additional kilometre to a radius of 60 kilometres from the General Post Office, Perth - 81 cents per kilometre.

(3) Subject to provisions of 15.2.1(4), work performed at places beyond a 60 kilometre radius from the General Post Office, Perth shall be deemed to be distant work unless the employer and the employees, with the consent of the union, agree in any particular case that the travelling allowance for such work shall be paid under this clause, in which case an additional allowance of 81 cents per kilometre shall be paid for each kilometre in excess of the 60 kilometre radius.

9. Clause 15.3. – Distant Work: Delete 15.3.6 and 15.3.7 of this clause and insert the following in lieu thereof:

15.3.6 An employee, to whom the provisions of 15.3.1 apply, shall be paid an allowance of $31.30 for any weekend that the employee returns home for the job, but only if -

(1) the employee advises his or her employer or the employer's agent of his or her intention not later than the Tuesday immediately preceding the weekend in which he or she so returns.

(2) the employee is not required for work during that weekend;

(3) the employee returns to the job on the first working day following the weekend; and

(4) the employer does not provide, or offer to provide, suitable transport.

15.3.7 Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from the job or be paid an allowance of $13.80 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

10. Clause 15.4. – Special Provision – Western Power: Delete this clause and insert the following in lieu thereof:

15.4 - SPECIAL PROVISION - WESTERN POWER

15.4.1 This clause shall apply to any employee otherwise covered by this PART of the Award who is engaged on work being carried out for Western Power at Kwinana or Muja.

15.4.2 In addition to the wage otherwise payable to an employee pursuant to the provisions of PART 2 - CONSTRUCTION WORK of this Award, an employee (other than an apprentice) shall be paid -

(1) $1.96 per hour for each hour worked if employed at Muja;

(2) $1.16 per hour for each hour worked if employed at Kwinana;

(3) a safety footwear allowance of ten (10) cents per hour for each hour worked to compensate for the requirement to wear approved safety footwear which is to be maintained in sound condition by the employee. Failure to wear approved safety footwear or to maintain it in sound condition as determined by the employer shall render the employee liable to dismissal.

15.4.3 (1) An employee, to whom Clause 15.2 - Allowance for Travelling and Employment in Construction Work of this PART applies and who is engaged on construction work at Muja, shall be paid -

(a) an allowance of $15.30 per day if the employee resides within a radius of 50 kilometres from the Muja power station;

(b) an allowance of $40.35 per day if the employee resides outside that radius

in lieu of the allowance prescribed in the said clause.

(2) Where transport to and from the job is supplied by the employer from and to a place mutually agreed upon between the employer and the employee half the above rates shall be paid provided that the conveyance used for such transport is equipped with suitable seating and weather proof covering.

15.4.4 In addition to the allowance payable pursuant to subclause 15.3.6 of Clause 15.3 - Distant Work of this PART, an employee to whom that clause applies shall be paid $30.10 on each occasion upon which the employee returns home at the weekend, but only if -

(1) the employee has completed three months' continuous service with the employer;

(2) the employee is not required for work during the weekend;

(3) the employee returns to the job on the first working day following the weekend;

(4) the employer does not provide, or offer to provide, suitable transport;

and such payment shall be deemed to compensate for a periodical return home at the employer's expense.

15.4.5 An employee to whom Clause 15.3 - Distant Work of this PART applies and who proceeds to construction work at Muja from home where located within a radius of 50 kilometres from the General Post Office, Perth -

(1) shall be paid an amount of $70.80 and for three hours at ordinary rates in lieu of the expenses and payment prescribed in 15.3.3 of the said clause; and

(2) in lieu of the provisions of 15.3.4 of the said clause, shall be paid $70.80 and for three (3) hours at ordinary rates when the employee's services terminate, if the employee has completed three (3) months' continuous service,

and the provisions of 15.3.3 and 15.3.4 of Clause 15.3 - Distant Work of this PART shall not apply to such employee.

2007 WAIRC 01175

PARLIAMENTARY EMPLOYEES AWARD 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	THE GOVERNOR OF WESTERN AUSTRALIA IN COUNCIL AND OTHERS
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
DATE	TUESDAY, 16 OCTOBER 2007
FILE NO/S	P 8 OF 2007
CITATION NO.	2007 WAIRC 01175

Result Award varied

Order

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

THAT the Parliamentary Employees Award 1989 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 15th day of October 2007.

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

SCHEDULE

1. Clause 9. – Meal Allowance: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) An employee who is required to work overtime under Clause 7 of this Award and where such overtime extends beyond 5.00 p.m., a meal allowance shall be paid in accordance with the provisions of the Public Service Overtime Award No. 10 of 1978 Clause 8 as amended. Provided that where such overtime extends beyond 6.00 a.m. the following day, an allowance of $13.25 or the amount charged by the House, whichever is the higher, for such a three course meal shall be paid.

2007 WAIRC 01179

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA
	APPLICANT
	-v-
	AUDIOCLINIC NATIONAL HEARING AIDS AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S WOOD
DATE	THURSDAY, 18 OCTOBER 2007
FILE NO	APPL 85 OF 2007
CITATION NO.	2007 WAIRC 01179

Result	Award varied
Representation	
Applicant	Mr T Pope
Respondents	Mr C Farmer on behalf of Premier Hardware (East Cannington)

Order

HAVING heard Mr T Pope on behalf of the applicant and Mr C Farmer on behalf of Premier Hardware (East Cannington), the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977 as varied, be further varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the date of this order.

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

SCHEDULE

1. Clause 7A. – Nightfill Duty : Delete subclause (9) of this clause and insert the following in lieu thereof:

(9) (a) A full-time, part-time or casual worker employed in a "General Retail Shop" or "Special Retail Shop" pursuant to this clause shall be paid an additional loading as prescribed hereunder:

(i) Monday to Saturday prior to 7.00 am

(aa) Full-time and Part-time Workers

- a loading of $2.92 per hour in addition to the ordinary hourly rate of a full-time or part-time worker.

(bb) Casual Workers

- a loading of $2.92 per hour in addition to the ordinary casual rate as laid down in paragraph (a) of subclause (4) of Clause 7. - Casual Workers.

(ii) Saturday between 5.00 pm and Midnight

(aa) Full-time and Part-time Workers

- a loading of $4.15 per hour in addition to the ordinary hourly rate of a full-time worker as prescribed in column (i) of subclause (1) of Part I of Clause 28. - Wages.

(bb) Part-time Workers

- a loading of $9.03 per hour in addition to the ordinary hourly rate of a full-time shop assistant as prescribed in column (i) of subclause (1) of Part I of Clause 28. - Wages.

(cc) Casual Workers

- a loading of $10.81 per hour in addition to the ordinary casual rate as laid down in paragraph (a) of subclause (4) of Clause 7. - Casual Workers.

(b) Junior workers shall be paid the appropriate percentage as laid down in Part II of Clause 28. - Wages.

(c) The loadings referred to in (i) and (ii) above shall be paid for the purpose of superannuation calculations.

2. Clause 12. – Meal Money: Delete subclauses (1) and (2) of this clause and insert the following in lieu thereof:

(1) When a worker is required to continue working after the usual finishing time for more than one hour he/she shall be paid $10.65 for the purchase of any meal required.

(2) Late Night Trading Meal Allowance:

A worker who commences work at or prior to 1.00pm on the day of late night trading and is required to work beyond 7.00pm on that day shall be paid a meal allowance of $10.65.

3. Clause 28. – Wages : Delete Part III of this clause and insert the following in lieu thereof:

Part III –

In addition to the rates prescribed elsewhere in this clause the following allowances and rates shall be paid to a worker where applicable:

(1) (a) A worker required to operate a ride-on power operated tow motor, a ride-on power operated pallet truck or a walk beside power operated high lift stacker in the performance of his duties shall be paid an additional 63 cents per hour whilst so engaged.

(b) A worker required to operate a ride-on power operated fork lift, high lift stacker or high lift stock picker or a power operated overhead traversing hoist in the performance of his duties shall be paid an additional 70 cents per hour whilst so engaged.

(c) The allowances prescribed by this subclause shall not be payable to an employee engaged, and paid, as a "Storeman Operator Grade 1" or a "Storeman Operator Grade 2".

(2) Any workers, whether a junior or adult, employed as a canvasser and/or collector shall be paid the adult male wage.

(3) Where a canvasser provides his own bicycle he shall be paid an allowance of $1.34 per week.

(4) (a) A worker shall receive an additional payment for every hour of which he spends 20 minutes or more in a cold chamber in accordance with the following:

In a cold chamber in which the temperature is:

(i) Below 0º Celsius to -20° Celsius - 76 cents per hour

(ii) Below -20° Celsius to -25° Celsius - 90 cents per hour

(iii) Below -25° Celsius - $1.01 per hour.

(b) Workers required to work in temperatures less than -18.9° Celsius shall be medically examined at the employer's expense.

(5) (a) A worker (full time, part time or casual) who is required to work any of his or her ordinary hours between 6.00p.m. and 11.30p.m. Monday to Friday inclusive in a "small retail shop" as defined or a "special retail shop" (pharmacy) as defined shall be paid at a loading of 20% for each hour worked after 6.00p.m.

For casual workers such loading shall be paid in addition to the rates prescribed in Clause 7 (4) of this award.

(b) A worker (part time or casual) who is required to work any of his or her ordinary hours between 6.00p.m. and 11.30p.m. on Saturday in a "small retail shop" as defined or a "special retail shop" (pharmacy) as defined shall be paid at a loading of 20% for each hour worked after 6.00p.m.

(i) A casual worker employed under paragraph (b) of this subclause shall be paid the 20% loading as calculated on the rates as determined by subclause (5) of Clause 7. - Casual Workers.

(ii) A part time worker employed under paragraph (b) of this subclause shall be paid the 20% loading as calculated on the rates as determined by paragraph (b) of subclause (7) of Clause 8. - Part Time Workers.

(6) (a) An employee in a "Section 42 shop" as defined who is required to work any of his or her ordinary hours between 6.00pm and midnight Monday to Friday inclusive shall be paid a loading of 20% for each hour so worked.

Provided that for casual workers such loading shall be paid in addition to the rates prescribed in Clause 7. - Casual Workers subclause (4) of this award.

(b) An employee in a "Section 42 shop" as defined who is required to work any of his or her ordinary hours between 6.00pm and midnight on Saturday shall be paid a loading of 20% for each hour worked after 6.00pm.

(i) A casual employee employed under paragraph (b) of this subclause shall be paid the 20% loading as calculated on the rates as determined by subclause (5) of Clause 7. - Casual Workers.

(ii) A full or part-time employee employed under paragraph (b) of this subclause shall be paid the 20% loading as calculated on the rates as determined by paragraph (b) of subclause (7) of Clause 8. - Part-Time Workers.

(c) An employee in a "Section 42 shop" as defined who is required to work any of his or her ordinary hours before 7.00am on any day Monday to Saturday inclusive shall be paid a loading of 30% for each hour so worked.

Provided that for casual workers such loading shall be paid in addition to the rates prescribed in Clause 7. - Casual Workers subclause (4) of this award.

(7) An automotive spare parts or accessories salesman qualified (i.e. one who has passed the appropriate course of technical training) shall be paid the sum of $22.90 per week in addition to the rates prescribed herein.

4. Clause 28A. – Structural Efficiency Agreement – Cold Storage Industry : Delete this clause and insert the following in lieu thereof:

28A. - STRUCTURAL EFFICIENCY AGREEMENT - COLD STORAGE INDUSTRY

P. & O. Cold Stores and Clelands Cold Stores shall pay $22.90 per week in addition to the rates prescribed by Clause 28. - Wages of this award from the beginning of the first pay period commencing on or after 1 November 1989 and $3.80 in addition to the rates prescribed by Clause 28. - Wages of this award from the beginning of the first pay period commencing on or after 1 December 1989 on account of agreement reached for a structural efficiency package which the parties anticipate will result in the creation of a Cold Storage Award being negotiated in accordance with the objectives and content of the Structural Efficiency Principle.

5. Clause 32. – Motor Vehicle Allowance : Delete this clause and insert the following in lieu thereof:

32. - MOTOR VEHICLE ALLOWANCE

Where a worker maintains a motor vehicle and is authorised by the employer to use the vehicle in the performance of his duties, he shall be paid in accordance with the following schedule:

AREA AND DETAILS	ENGINE DISPLACEMENT (IN CUBIC CENTIMETRES) RATE PER KILOMETRE (CENTS)		
Distance Travelled Each Year on Employer's Business	Over 2600cc	Over1600cc - 2600cc	1600cc & Under
Metropolitan Area	73.7	66.0	57.4
South West Land Division	75.4	67.7	58.9
North of 23.5 Degree South Latitude	82.9	74.7	64.9
Rest of the State	78.0	69.8	60.7
Motor Cycle (in all areas)	25.4 cents per kilometre		

6. Clause 46. – First Aid Allowance : Delete this clause and insert the following in lieu thereof:

46. - FIRST AID ALLOWANCE

A worker holding either a Red Cross or St. John Senior First Aid Certificate of at least 'A' level who is appointed by the employer to perform first aid duties shall be paid $9.10 per week in addition to the worker's ordinary rate.

7. Clause 48. – Additional Loading for Late Night Trading Establishments : Delete subclauses (1) and (2) of this clause and insert the following in lieu thereof:

(1) A full-time or part-time worker employed in a "General Retail Shop" or "Special Retail Shop" who works ordinary hours between 6.00 p.m. and 9.00 p.m. on the day of late night trading shall be paid a loading of $3.66 per hour in addition to the ordinary hourly rate of a full-time or part-time worker.

(2) A casual worker employed in a "General Retail Shop" or "Special Retail Shop" who works ordinary hours between 6.00 p.m. and 9.00 p.m. on the day of late night trading shall be paid the amount of $3.66 per hour in addition to the ordinary casual rate as laid down in paragraph (a) of subclause (4) of Clause 7. - Casual Workers.

NOTICES—Award/Agreement matters—

2007 WAIRC 01218

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 62 of 2007

APPLICATION FOR A NEW AGREEMENT ENTITLED

"UNIONSWA ENTERPRISE AGREEMENT 2007"

NOTICE is given that an application was made to the Commission, on the 10 October 2007, by the Australian Municipal, Administrative, Clerical and Services Union of Employees, W.A. Clerical and Administrative Branch, under the Industrial Relations Act 1979, for registration of the above named Agreement.

As far as relevant, those parts of the proposed Agreement which relate to area of operation or scope are published hereunder.

3 SCOPE

This agreement shall apply to all employees employed by UnionsWA and the Australian Municipal, Administrative, Clerical and Services Union of Employees, W.A. Clerical and Administrative Branch.

5 DEFINITIONS

Union will mean "The Australian Municipal, Administrative, Clerical and Services Union of Employees, W.A. Clerical and Administrative Branch

Employer will mean Trades and Labor Council, known as UnionsWA.

Employee will mean a person employed by UnionsWA, with the exception of sessional training employees.

The Parties will mean the Union and the Employer.

The Commission will mean the Western Australian Industrial Relations Commission.

The Secretary will mean the Secretary of UnionsWA

A copy of the proposed Agreement may be inspected at my office at 111 St. Georges Terrace, Perth.

J.A SPURLING

Registrar

2 November 2007

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2007 WAIRC 01199

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHARLENE BYSOUTH
	APPLICANT
	-v-
	CARMELO BORRELLO AND MARGARET JEAN BORRELLO BOTH AS TRUSTEE FOR THE C & M J BORRELLO FAMILY TRUST TRADING AS DONNELLY RIVER WINES
	RESPONDENTS
CORAM	SENIOR COMMISSIONER J H SMITH
HEARD	WEDNESDAY, 26 SEPTEMBER 2007
DELIVERED	WEDNESDAY, 31 OCTOBER 2007
FILE NO.	B 92 OF 2007
CITATION NO.	2007 WAIRC 01199

CatchWords	Contractual benefits claim - Entitlements under a contract of employment - Claim for education expenses - Application granted in part - *Industral Relations Act 1979* (WA) s 29(1)(b)(ii).
Result	Declaration and orders made
Representation	
Applicant	In person
Respondents	Mr S Heathcote (of counsel)

Reasons for Decision

1 Sharlene Bysouth ("the Applicant") makes a claim under s 29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act"). The Applicant claims that she has been denied contractual benefits by Carmelo Borrello and Margaret Jean Borrello both as trustee for The C & M J Borrello Family Trust trading as Donnelly River Wines ("the Respondents"), namely an amount of $3,016.77 for university fees, airfares and accommodation costs to attend a university residential course in the first semester and second semester university fees for the year 2007. At all material times the Applicant was employed by the Respondents as an assistant winemaker.

2 The Respondents deny that the Applicant is entitled to any of the sums claimed. They contend that it was not a contractual term of her employment that she be entitled to payment of any expenses associated with her studies as a winemaker.

Background

3 The Applicant was employed by the Respondents from 15 December 2003 as an assistant winemaker until 12 April 2007. Prior to the Applicant being employed by the Respondents she had been employed at the winery trading as Donnelly River Wines from 1 December 2001. In particular, from 1 December 2001 until 8 April 2003, the Applicant was employed by Donyette Pty Ltd trading as Donnelly River Wines. On 8 April 2003, Donnelly River Wines was purchased by Toplodge Nominees Pty Ltd and the Applicant was employed by Toplodge Nominees Pty Ltd as an assistant winemaker from 8 April 2003 until employed by the Respondents in December 2003.

4 When the Applicant was employed by Donyette Pty Ltd she entered into an agreement with the directors of Donyette Pty Ltd to pay all of the costs associated with her studies at the Charles Sturt University in New South Wales for a degree in winemaking. The Applicant contends that this agreement was entered into because she was paid an annual salary and did not

receive payment for additional hours worked during vintage. The Applicant also says that she entered into an agreement on the same terms with Toplodge Nominees Pty Ltd and that when she became employed by the Respondents, she entered into an agreement with Mr Carmelo Borrello that she would be entitled to payment of all education expenses on the basis that she would not be remunerated for extra hours worked during vintage.

5 At all material times until the end of 2006 the Applicant's educational expenses were either directly paid or reimbursed to her by Donyette Pty Ltd, Toplodge Nominees Pty Ltd and by the Respondents. In early 2007 the Applicant presented accounts for university fees and for airfares for the first semester in 2007 and these expenses were paid by the Respondents to the Applicant. When the Applicant's employment ceased on 12 April 2007, the amounts paid for these expenses were deducted from her final pay. The Applicant says she was entitled to be repaid for these expenses together with payment of all fees and expenses associated with her degree for both semesters in the year 2007 as she had worked additional hours during the 2007 vintage season for the Respondents prior to her employment with the Respondents coming to an end in April 2007.

The Applicant's Evidence

6 When the Applicant commenced employment with Donyette Pty Ltd she was employed as a cellar sales manager for a period of approximately six months. In about April 2002, the Applicant approached her parents who were the directors of Donyette Pty Ltd and told them that she wished to undertake a science degree in winemaking with a view to becoming the assistant winemaker to Blair Meiklejohn who was employed as the winemaker for Donnelly River Wines. In a statement made by the Applicant's mother, Ms Lynette Joy Karlovsky-Bridger, Ms Karlovsky-Bridger states:

> "13. On the advice of Mr Meiklejohn, it was agreed Sharlene should enrol with Charles Stuart [sic] University in Wagga Wagga, NSW, as Mr Meiklejohn believed that to be the best University in Australia for a Wine Science Degree.
>
> 14. In (or about) May 2002, Sharlene successfully enrolled with Charles Stuart [sic] University as a part-time, external student, to commence her studies with the July intake of students.
>
> 15. Sharlene was informed by the University she would need to travel to Wagga Wagga twice every year for approximately two weeks, over a period of at least six (6) years.
>
> 16. As the Directors of Donyette, my Husband and I agreed the Company was morally obligated to pay any – and all – expenses Sharlene my [sic] incur during her studies, because, despite her being paid a fixed salary, she regularly and consistently worked additional hours – particularly during vintage.
>
> 17. Sharlene regularly worked additional hours over weekends in the Cellar Sales Rooms, and during vintage, it was not unusual for Sharlene to work 18 to 20 hours every day – including weekends – for a number of weeks.
>
> 18. As the Directors of Donyette, my Husband and I decided the Company would be responsible for ALL costs associated with Sharlene's studies, as her studies would ultimately be for the benefit of the business and the Company.
>
> 19. It was agreed Donyette would be responsible for ALL University fees, ALL airfares to and from Wagga Wagga, ALL accommodation costs and ALL other expenses she may encounter.
>
> 20. Donyette continued to pay for all Sharlene's expenses associated with her studies in the Science Degree (Winemaking), until 8th April 2003.
>
> 21. On 8th April 2003, the DRW business was taken over by Toplodge Nominees Pty Ltd (Toplodge).
>
> 22. On 8th April 2003, Sharlene's employment was transferred to Toplodge, and she continued to work as the Assistant Winemaker at DRW.
>
> 23. The Directors of Toplodge assured my Husband and me they would continue to honour Donyette's commitment to pay all Sharlene's study expenses.
>
> 24. To the best of my knowledge, Toplodge did honour their commitment, and paid all expenses associated with Sharlene's study, including all University Fees, all airfares to and from Wagga Wagga, all accommodation costs and all other expenses associated with Sharlene's study."
>
> (Exhibit Applicant 1(34))

7 When Toplodge Nominees Pty Ltd took over the winery, the Applicant was provided with a contract of employment which set out her terms and conditions of employment. In a letter dated 5 August 2003, Matt Harsley on behalf of Toplodge Nominees Pty Ltd stated those conditions as follows:

> "Sharlene
>
> | | |
> |---|---|
> | Position: | Assistant Winemaker |
> | Salary: | $32,760 per annum |
> | Annual Leave: | 4 weeks per year |
> | Contract Period: | Six (6) months |
>
> In addition to the above your housing plus utilities will be provided excluding telephone. Your education expenses relating to Winemaking and Viticulture will be reimbursed at cost.

> We will review the situation at the end of the six (6) month period, if both parties agree we will continue the relationship under the same terms and conditions."
>
> (Exhibit Applicant 1(5))

8 When the winery was purchased by the Respondents, the Applicant met with Mr Carmelo Borrello at the Pemberton office of the winery sometime between 15 December 2003 and Christmas 2003. He asked her what were her conditions of employment. She showed him a copy of the letter from Toplodge Nominees Pty Ltd (Exhibit Applicant 1(5)). She observed him read the two page document and she assumed that he had read it. She says that they discussed that the work was seasonal and a lot more than 40 hours a week of work was required during vintage and that instead of being paid for additional hours of work her university expenses were paid. She says that Mr Borrello said very little to her during this conversation other than to say that nothing would change. In fact nothing did change because after she commenced employment with the Respondents she continued to be paid the same wage as before and her education expenses continued to be paid.

9 When cross-examined the Applicant conceded that she contends that the agreement she reached with Mr Borrello was on the same terms as the terms set out by Toplodge Nominees Pty Ltd in their letter to her dated 5 August 2003 (Exhibit Applicant 1(5)).

10 In 2007, vintage commenced at the end of January 2007 and finished in February 2007. In February 2007, the Applicant submitted the cost of airfares for payment by the Respondents for her attendance at a residential course for the first semester (Exhibit Applicant 1(7)) as she had booked and paid for flights on Qantas to leave Perth on 30 June 2007 and return on 8 July 2007 (Exhibit Applicant 1(6)). An amount of $840.77 (the cost of the Applicant's airfares) was paid to her by the Respondents by direct credit as part of her wages on 23 February 2007. The Applicant also received an account from Charles Sturt University for fees for the first semester for an amount of $1,136.00 which was due as at 7 March 2007 (Exhibit Applicant 1(9)). This amount was paid to her by the Respondents on 9 March 2007 by direct credit as part of her wages (Exhibit Applicant 1(10)). When the Applicant resigned the amounts paid for the university fees and the Qantas airfares were deducted from her final pay (Exhibit Applicant 1(4)). Sometime after the Applicant ceased employment with the Respondents she received an account from Charles Sturt University for the cost of residential accommodation for the first semester residential course in July 2007. This account was due as at 12 June 2007 and is for an amount of $472.00 (Exhibit Applicant 1(11)). The Applicant claims that she is also owed second semester fees in the amount of $568.00 which became due to Charles Sturt University as at 13 August 2007 (Exhibit Applicant 1(12)).

The Respondents' Evidence

11 Carmelo Borrello testified that he purchased the business of Donnelly River Wines in 2003. In the contract entered into between Toplodge Nominees Pty Ltd and the Respondents, the parties expressly agreed pursuant to clause 19.1 of the contract (Exhibit A) that the Respondents were under no obligation to make any offer of employment to any of the employees of Toplodge Nominees Pty Ltd and that all employee entitlements would be adjusted pro-rata up to settlement. Pursuant to clause 19.2 of the contract (Exhibit A) the Respondents were able to offer employment to all or any of Toplodge Nominees Pty Ltd staff. In fact, Mr Borrello offered employment to all of Toplodge Nominees Pty Ltd employees as he had no experience in the business and he wanted it to run smoothly.

12 Mr Borrello testified that he had general discussions with the Applicant sometime in December 2003 or early January 2004 about her work conditions. He said he could not recall specifically what was discussed. He testified, however, that the Applicant's contract of employment with Toplodge Nominees Pty Ltd was not shown to him by the Applicant (Exhibit Applicant 1(5)) but that the contract was shown to him by Matt Harsley sometime prior to 1 December 2003. Mr Borrello testified that he did not recall any specific discussion with the Applicant about payment of education expenses in lieu of working overtime, that he left the hours of work to the winemaker and the book-keeper in the beginning, as he regarded himself as "like a caretaker of the business". When asked when he first learnt of the Applicant's arrangements in respect of the education expenses he said he did not recall but it was not his intention to change anything and that he left the arrangements how they were, as he did not want to lose staff. When questioned further he said he thought that the fact that the Applicant's education expenses had been paid by his business was brought to his attention by his book-keeper when the Applicant went to Charles Sturt University in mid-2004. When asked whether he authorised the payment of the expenses he said that he did not recall authorising them, that he just let it go and that he did not check everything as he trusted the book-keeper. Mr Borrello also testified, however, he was aware that the Applicant was studying winemaking as they had general discussions about her study commitments and going away from time to time.

13 The Applicant worked longer hours than the winemaker employed by the Respondents, as the winemaker was only on site three days a week off-season. The winemaker had trained the Applicant in his methods. In September 2006, Mr Borrello says he offered to pay the Applicant for each hour she worked when she complained about how hard she worked and the hours she worked. He told her that the fairest way was for her to fill in a time sheet as he wanted to keep track of the times she worked, but she refused. He said he just let it go as he could not afford to lose an assistant winemaker who knew how to make their wine and the recipes of the winemaker. He testified he did not believe in paying in lieu of overtime as the business would have to pay fringe benefits tax. He said he was not happy about the payment of the educational expenses but he let it go as he did not want the Applicant to leave her employment. In his opinion, the employees were "all together, like a force" and if the Applicant left he would also have lost the winemaker who had told him that he could not carry out the winemaking without the Applicant. The winemaker was a semi-retired person whose health was not the best.

14 When asked whether he could recall at any time during the Applicant's employment that he agreed to pay her educational expenses he said, "Yes … as part of her training so she could learn the winemaking, but not in lieu of wages." When asked was there a time when he agreed with her that the study expenses would be part of her employment conditions he said that he did not recall any specific discussion about it.

15 When asked in cross-examination why were the education expenses paid in 2004, Mr Borrello said he did not say that the meeting in December 2003 did not occur but he just let it go, that he did not want to "upset the apple cart", he was just learning the game and he went along with it.

Submissions

16 The Respondents' counsel points out that the matter turns on its facts. The Respondents say there is conflicting evidence as to whether an agreement was reached that the Respondents pay the Applicant's educational expenses. Further if the Commission concludes an agreement was reached it must be determined whether the agreement reflected what was set out in the Applicant's contract of employment with Toplodge Nominees Pty Ltd (Exhibit Applicant 1(5)). The Respondents say that some discussions of a general nature took place about study expenses but Mr Borrello proceeded on the basis that he was going to leave the way the business was run under Toplodge Nominees Pty Ltd undisturbed. The Respondents also point out the Commission must decide whether it was a term of the Applicant's contract of employment that the educational expenses would be paid and, if so, what precisely that term of contract was and whether that term was breached.

17 The Respondents say the evidence about what was the term of contract is conflicting. The Respondents contend that the evidence of Mr Borrello was that he could not recall having agreed to meet these expenses as part of the Applicant's employment conditions. They claim that a decision not to disturb the existing arrangements, at law, does not amount to contractual right to payment. He had a valued employee so he was content to have those payments made. Alternatively, it is open to find that as he became aware of them he was content not to complain of them. Finally, the Respondents say that even if there was a contractual term and right to payment, that the right was limited to payments in respect of study undertaken whilst the Applicant was employed by the Respondents.

18 The Respondents also say there could not have been an agreement to pay educational expenses beyond the time she was an employee. It is also pointed out that the Applicant bears the onus of proof and that she contends the terms of her contract of employment are set out in her employment contract with Toplodge Nominees Pty Ltd which is an entitlement to reimbursement of expenses only. The Respondents say no receipts for educational expenses incurred by her in 2007 have been produced and in any event the invoices produced relate to a period of time that she was not employed by the Respondents. For these reasons the Respondents say the Applicant's application should be dismissed.

19 The Applicant contends that an agreement was reached with Mr Borrello that in lieu of being paid for additional hours worked at vintage her educational expenses would be paid for the academic year. In particular she says that as she had worked additional hours during the time of the vintage in early 2007 she is entitled to have paid or be reimbursed for all of her educational expenses for the first and second semesters of 2007. She says that the terms of the agreement were the same as the contractual arrangements entered into with Toplodge Nominees Pty Ltd and Donyette Pty Ltd.

Credibility and Conclusion

20 I have heard the evidence given by the Applicant and Mr Borrello and have considered their evidence carefully. I found the Applicant to be a reliable, credible and honest witness. Her recollection of events was clear and consistent. On the other hand, Mr Borrello's recollection of events is very vague. His evidence that he was a "caretaker" of his business is at best unusual. For these reasons I prefer the evidence given by the Applicant to the evidence given by Mr Borrello where their evidence departs.

21 The Respondents argue that in making the payments of study expenses and by deciding not to change arrangements put in place by Toplodge Nominees Pty Ltd no contractual term was entered into for payment of these expenses as there was no intention to enter into a legal relationship in respect of those expenses. Even when regard is had solely to Mr Borrello's evidence I do not accept that argument can be made out. Mr Borrello was aware that it was an express term of the Applicant's contract of employment that she was entitled to payment of education expenses when she was employed by Toplodge Nominees Pty Ltd. When regard is had to his version of events it is clear that he saw a copy of the Applicant's contract of employment with Toplodge Nominees Pty Ltd some time prior to speaking to the Applicant. In addition, I accept that the Applicant showed him a copy when she spoke to him. I also accept that when he met with her in December 2003 they discussed her conditions of employment with Toplodge Nominees Pty Ltd and that he told her that nothing would change. Further, Mr Borrello stated in his evidence that he agreed to pay her educational expenses as part of her training to learn winemaking. This arrangement gave rise to a binding contract which included all of the terms of contract set out in Exhibit Applicant 1(5). It is clear that the terms of the contract were performed, the Applicant commenced work, her annual salary remained unchanged and her education expenses were paid by the Respondents in 2004, 2005 and 2006.

22 As to the content and extent of the contractual term for the payment of educational expenses, the Applicant says that the terms of each contract that she entered into with each owner of the business of Donnelly River Wines from 2002 were the same. In particular she says that the expenses were agreed to be paid for each academic year on consideration of her working additional hours of work during vintage. She also says that the Respondents owe her for all fees and expenses incurred by her for the whole of the academic year in 2007 as she worked the additional hours during the 2007 vintage prior to her employment with the Respondents ceasing in April 2007. These contentions are in part contradicted by the Applicant's evidence that the terms of her entitlement to educational expenses is set out in Exhibit Applicant 1(5). There is nothing in that document that states that an entitlement to payment of expenses incurred after her employment came to an end arises. Further, the statement made by

the Applicant's mother (Exhibit Applicant 1(34)) evidences that when the Applicant's employment with Donyette Pty Ltd ceased on 8 April 2003 Toplodge Nominees Pty Ltd became contractually bound to pay the Applicant's educational expenses. It appears from Exhibit Applicant 1(34) that when the Applicant's employment with Donyette Pty Ltd ceased in April 2003, Donyette Pty Ltd ceased to make payments in respect of the Applicant's education expenses. When regard is had to these facts and the fact that the Applicant's mother states in her statement that the consideration for making the payments was additional hours worked not only during vintage but throughout the year; and the submission made by the Applicant that her entitlement to payment of education expenses remained unchanged from 2003 to 2007; I am of the opinion that the Applicant only had a contractual entitlement to reimbursement of expenses incurred during her employment with the Respondents. This finding is consistent with the nature of an employment contract. On termination of an employment contract all obligations cease except where entitlements have accrued prior to or as at the date of termination such as entitlements to commission on goods sold prior to termination or other entitlements such as accrued annual leave.

23 The next question that arises is whether the expenses claimed by the Applicant in this matter were incurred whilst she was employed by the Respondents. Exhibit Applicant 1(9) shows that fees for the first semester at Charles Sturt University were entered on 2 March 2007 and payable by 16 March 2007 to receive the discount for HECS- HELP fees paid upfront and were for a current enrolment in the Autumn Semester 2007. Exhibit Applicant 1(6) shows that on 22 February 2007 the Applicant booked and paid for flights from Perth to Wagga Wagga on 30 June 2007 and return on 8 July 2007.

24 After the Applicant's employment contract was terminated she received an invoice from Charles Sturt University for first semester residential accommodation. The account was generated on 8 June 2007 and was payable by 12 June 2007 (Exhibit Applicant 1(11)). The Applicant later received an invoice from Charles Sturt University for fees entered on 27 June 2007 payable by 17 August 2007 to receive the discount for HECS- HELP fees paid upfront for current enrolment for the Spring Semester 2007 (Exhibit Applicant 1(12)).

25 Whilst the Applicant was employed by the Respondents she had an entitlement to have any education expenses due and owing during her employment reimbursed to her following payment. At the beginning of the first semester of the 2007 academic year she was employed by the Respondents and having enrolled for the first semester she was entitled pursuant to the express terms of the contract of employment to have the first semester expenses reimbursed which she had incurred prior to the termination of her employment. These expenses are the first semester fees and the cost of the first semester airfares. The Applicant bears the burden of proving on the balance of probabilities that the expenses claimed were incurred whilst she was employed by the Respondents. I am not satisfied, however, on the evidence before me that whilst employed by the Respondents the Applicant had incurred a liability for payment for the first semester residential accommodation or the second semester fees. The account for the first semester residential accommodation was not generated until June 2007. Consequently, I am not satisfied that the Applicant had incurred this expense prior to the termination of her employment contract. In relation to the second semester fees, Exhibits Applicant 1(9) and Applicant 1(12) appear to indicate enrolment for each semester may have occurred separately as the second semester fees were not entered until 27 June 2007.

26 Whilst I agree that the Applicant only has an entitlement for reimbursement of expenses, I do not agree that her claims should fail on the basis that receipts for payment have not been provided. However, I accept that the Applicant is not entitled to payment of the expenses for the first semester fees or the airfares until she produces to the Respondents receipts showing that the amounts claimed for those items have been paid.

27 For these reasons I will make a declaration that upon production of receipts for the payment of the first semester fees and for the payment of the first semester airfares to travel from Perth to Wagga Wagga and return the Respondents owe the Applicant contractual benefits in the sums of $1,136.00 and $840.77 and I will make an order that the Respondents are to pay the Applicant $1,976.77 within seven days of the date the Applicant serves the Respondents with copies of the receipts. I will also make an order that the application is hereby and is otherwise dismissed.

2007 WAIRC 01210

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHARLENE BYSOUTH
	APPLICANT
	-v-
	CARMELO BORRELLO AND MARGARET JEAN BORRELLO BOTH AS TRUSTEE FOR THE C & M J BORRELLO FAMILY TRUST TRADING AS DONNELLY RIVER WINES
	RESPONDENTS
CORAM	SENIOR COMMISSIONER J H SMITH
DATE	FRIDAY, 2 NOVEMBER 2007
FILE NO/S	B 92 OF 2007
CITATION NO.	2007 WAIRC 01210

Result	Declaration and orders made
Representation	
Applicant	In person
Respondents	Mr S Heathcote (of counsel)

Declaration and Orders

HAVING heard the Applicant in person and Mr S Heathcote as counsel on behalf of the Respondents, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby —

1. DECLARES that upon production by the Applicant of receipts for the payment of the first semester fees and for the payment of the first semester airfares to travel from Perth to Wagga Wagga and return, the Respondents owe the Applicant contractual benefits in the sums of $1,136.00 and $840.77; and
2. ORDERS that the Respondents pay the Applicant the sum of $1,976.77 within seven (7) days of the date the Applicant serves the Respondents with copies of the receipts; and
3. ORDERS that the application is hereby and is otherwise dismissed.

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

2007 WAIRC 01159

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JACQUELINE ANN BYSTERVELD
	APPLICANT
	-v-
	SHIRE OF CUE
	RESPONDENT
CORAM	SENIOR COMMISSIONER J H SMITH
HEARD	THURSDAY, 13 SEPTEMBER 2007
DELIVERED	FRIDAY, 12 OCTOBER 2007
FILE NO.	U 1 OF 2007
CITATION NO.	2007 WAIRC 01159

CatchWords	Termination of employment – Harsh, oppressive and unfair dismissal – Duty of mutual trust and confidence – Employee breached duty – Employer failed to assess Applicant's duties – Applicant unfairly dismissed – *Industrial Relations Act 1979* (WA) s 29(1)(b)(i); *Workplace Relations Act 1996* (Cth) s 4; *Minimum Conditions of Employment 1993* (WA) s 10.
Result	Declarations and order made
Representation	
Applicant	In person
Respondent	Mr S White (as agent)

Reasons for Decision

1 Jacqueline Ann Bysterveld ("the Applicant") filed an application in the Western Australian Industrial Relations Commission ("the Commission") on 4 January 2007, under s 29(1)(b)(i) of the *Industrial Relations Act 1979* claiming that she had been unfairly dismissed on 23 December 2006 by the Shire of Cue ("the Respondent").

2 The Applicant was employed by the Respondent as a caravan park manager from 6 November 2006 until 23 December 2006. The Respondent in its notice of answer and counter-proposal claimed that the Commission did not have jurisdiction to hear and determine the Applicant's claim as the Respondent is a constitutional corporation as defined in s 4 of the *Workplace Relations Act 1996* (Cth). The Commission heard and determined the jurisdictional issue and delivered its decision on 20 July 2007. The Commission in its reasons for decision given on 20 July 2007 [2007] WAIRC 00941 found that during the period the

Applicant was employed by the Respondent, the Respondent was not a trading corporation. The Commission heard the substantive merits of the Applicant's claim on 13 September 2007.

3 As set out in the reasons for decision given on 20 July 2007, the Shire of Cue is a very small remote community located 649 kms from Perth. As part of the facilities the Respondent provides to the community, the Respondent owns and manages a caravan park.

The Applicant's Evidence

4 In late last year, the Applicant saw an advertisement in the newspaper for a caravan park manager in Cue. The advertisement stated as follows:

> "The Shire of Cue is seeking applications from either a single person or a couple to run the Caravan Park on a permanent part time basis.
>
> The Shire will provide housing and pay the power, electricity, and gas along with a small remuneration on return for general running of the Caravan Park, including daily cleaning of the ablution blocks; closing and opening of the public toilets; and receipting of money. Some gardening will also be required."

(Exhibit A)

5 The Applicant sent a copy of her résumé and a letter applying for the position to the Respondent. In her letter dated 24 September 2006 the Applicant stated that she was a self-employed professional remedial massage therapist with a part-time practice. She also stated that she was a former senior bookkeeper/accountant and was able to keep accounts for a small office. She also said she was looking for a change in the direction of her life and a new start. Her résumé shows that from 1988 to 2006 she worked in various office positions and as a security officer and since the year 2000 she had been self-employed as a massage therapist. Her résumé also shows that she had achieved qualifications in holistic medicine and had almost completed a Bachelor of Business and Accountancy at Curtin University.

6 After the Applicant submitted her application for the position she received a telephone call from Mr Brian Seale, the Chief Executive Officer of the Respondent, to discuss her position in relation to relocation. Mr Seale asked the Applicant questions such as whether she had a house to sell and how much notice she would have to give to her employer. The Applicant informed Mr Seale that she could relocate quickly because it would only take her two weeks to vacate the house she was renting and a couple of weeks to close her massage business. She discussed the duties of the position with Mr Seale who told her that there would be some general cleaning of the toilet blocks, receipting of money and some gardening duties. In particular Mr Seale told her that some lawn mowing and watering would be required and she told him that she could do mowing.

7 The Applicant was later offered the position by Mr Seale. When he offered her the position she told him that she did not have the funds to relocate and she asked whether the Shire would pay her relocation expenses. Mr Seale agreed and arrangements were made for the Applicant to move to Cue. The cost for her furniture and personal effects to be relocated was $2,600.

8 The Applicant had a discussion (at some stage prior to being offered the position) about opening a business in the town of Cue to provide remedial massage services. The Applicant says that because she was a professional remedial massage therapist this was one of the reasons why she was employed. She said that Mr Seale told her he was keen to put forward a proposal for her to start her business in Cue.

9 The Applicant was aware prior to going to Cue that she would be paid $100 a week and she would be provided with a house and electricity, gas and telephone expenses would be paid by the Respondent. Prior to leaving Perth the Applicant asked Mr Seale to send to her in Perth a contract of employment for her to sign. She testified that Mr Seale told her he would not send a contract to Perth for her to view and that she was required to undertake a medical examination when she arrived in Cue. Prior to her arrival in Cue, she did not discuss with Mr Seale the hours of work that she would be required to work each week. Yet the Applicant stated when she gave evidence that prior to leaving Perth she was told by Mr Seale that the $100 a week that she would be paid would be open to negotiation if she found the job required her to work more hours and she could put a proposal to Council to address those hours. When it was put to her in cross-examination that Mr Seale had not informed her that the position was open for negotiation she said that he gave her the impression that he was open to negotiation when in fact he was not.

10 When the Applicant arrived in Cue she was provided with what she described as "part of the contract" which was a letter stating her terms and conditions of employment. The letter stated as follows:

> "Council acknowledge with much thanks your application for the above position and pleased to advise your application was successful subject to the following conditions:

1.	Start date:	November 6th, 2006
2.	Salary:	$5,200 p.a. & $320 location allowance
3.	Award:	M.E.W. – Level 2-1
4.	Hours of duty:	6.75 hours per week
5.	Statutory documentation:	As attached
6.	Pre-placement medical:	To be addressed by a physician of your choice, at Shire expense.
7.	Housing:	Rental free accommodation is provided onsite.
8.	Position description:	As enclosed.

Accordingly, we forward a note of congratulations to you for this selection and we look forward to a mutually satisfying association with you for a long time to come."

(Exhibit 1)

11 When the Applicant received the letter of appointment she did not question the number of hours to be worked. When asked why, she said that she had never managed a caravan park before and did not know how busy it is during the tourist season or the off-season.

12 The Applicant said her first duty was to clean the Manager's house at the caravan park, as it was in an appalling state and bearably liveable. She said it took her three weeks to clean it and she worked 16 hours a day cleaning. She did not start her caravan park duties immediately because the keys to the toilets and the cleaning rooms, books and cash tin were not provided to her until one and a half weeks or two weeks after she started work. Her duties required her to clean the toilet blocks and to water the grounds. There were two ablution blocks to be cleaned. She had six sprinklers to move and some hand watering. She was also required to empty and receipt money from the washing machines and to provide receipts to people staying overnight at the park. The Applicant agreed when cross-examined that when she arrived in Cue she received a document titled "Caravan Park Duties" which stated:

"**CARAVAN PARK DUTIES**

CHARGING FOR A SITE

- There are two ways a payment must be recorded.
- First in the receipt book, giving the customer the white copy.
- Second on the takings sheets supplied to you by the Shire.
- Do not worry about the GST component of the takings sheet.
- When a customer comes to the office to pay for a site –
    1. Ask them if they have a Senior/Pensioner card. We accept WA, interstate and international cards.
    2. Take down their registration number.
    3. In the address section record the receipt number.
    4. Charge them accordingly, as per the price list.

BANKING

- You can bank when the receipt book is full or when you feel there is enough money.
- Empty the money from the washing machines every couple of weeks. If you know you have been quite busy it may need to be done every couple of days.
- Add up all the money and/or cheques to be banked and make a note of it for the Customer Service Officer at the Shire.
- Bring the receipt book, sheets and money into the shire office.
- The Customer Service Officer will add all the takings up and write you a receipt.
- They will also photocopy the takings sheets and give you back a copy. This process may take a little while especially if the office is busy, you may need to return ½ an hour to 1 hour.

GENERAL DUTIES

- There is a sign that can be put up if you are not available at the front office while you do other duties, such as;
- Clean the toilets every day.
- Pick up any rubbish.
- The Outside crew take care of larger gardening duties, it is you [sic] responsibility to help out and do a bit of weeding.
- It has been observed that 4pm is usually the busy time of the day. Try and be back at the front office by then.

OTHER THINGS TO REMEMBER

- Dogs are allowed but they must be on a lead at all times and the owners are responsible for picking up the mess.
- There are 32 sites. Behind the jail is one of the more popular spots.
- Most people cannot back up their vans into a site; they may ask you to do it for them.
- Extra copies of any mud maps or Cue information books that you sell can be obtained from the Shire.
- Extra toilet roll and hand towels are kept at the shire depot. The number is 9963 1500. One of the Outside Crew will drop them off.
- Anything that needs to be ordered for the caravan park can be done through the Finance Officer.
- If you have and [sic] questions at all do not hesitate to call the Shire on 9963 1041 or come in to the office."

(Exhibit C)

When she received a copy of Exhibit C she did not seek any additional information as the required duties seemed straightforward.

13 The Respondent contends that Exhibit C was part of a document titled "Shire of Cue, Position Description, Caravan Park Caretaker (Part Time)" (Exhibit F). The Applicant however denied that she was provided with a copy of Exhibit F until shortly prior to the hearing of this matter.

14 During the period the Applicant was employed there were only five residents of the park. She said that of the five there was one couple who left in late December 2006, there was one permanent resident who resided in the pensioner huts and another couple who was there when she arrived and left three weeks later. In addition a few people came to the park and stayed overnight.

15 Shortly after the Applicant commenced employment with the Respondent she concluded that the position was a 24 hours a day, 7 days a week job. She spoke to Mr Seale and told him that it was a full-time job. The Applicant claimed when she gave evidence that she was misled by Mr Seale. She testified that prior to arriving in Cue she had no idea of the size of the park or the extent of the duties. She said that 6.75 hours per week only allowed her enough time to water the lawns. He suggested to her that she put her concerns and a proposal for a review of her position in writing including her proposal to set up a business as a professional remedial massage therapist and he would put it to the Council to consider.

16 Sometime shortly after the Applicant arrived she had a medical. At that medical she disclosed to the medical practitioner that in the past she had herniated a disc in her back. She says that if she had been given the opportunity of attending a medical in Perth her back condition would have been revealed and she would not have been employed if Mr Seale was insistent that mowing be part of the caravan park duties.

17 The Applicant testified that during the entire period of her employment the Parks and Gardens Department of the Shire of Cue carried out the mowing and she did not do any mowing at all. However, it was stated in the advertisement that such duties were required and she did discuss the matter with Mr Seale prior to leaving Perth and taking up the position in Cue. At that time Mr Seale asked her whether she was able to carry out mowing duties and she said that she was. She testified however she can only mow a small patch of ground and she did not know prior to leaving Perth the extent of the areas to be mowed. When asked why she did not tell Mr Seale before she accepted the position that she had limitations on her physical capacity to carry out the work, she said she did not do so because she had not been given a scaled map of the caravan park and she did not know the scale of the lawns at that time. She also testified that she was aware that the outside crew carried out the larger gardening duties but that it was her responsibility to help and do a bit of weeding.

18 The Applicant put her position in writing on 21 November 2006 after a request from Mr Seale that she do so. In a letter to Mr Seale the Applicant stated:

> "The Shire of Cue is under the MISTAKEN belief that the position of Caretaker of the Caravan Park is a part time position. It is NOT a part time position. It is a 24 hour a day, 7 day a week position and it should be paid accordingly. The person/people live on site and are accessable [sic] 24/7. They have no time off, no privacy, no relative social life and no freedom. Of course, the person in the position has to set up boundaries and factor in time for shopping, outings, etc, but for the most part the position calls for being at the beck and call of the tourist population.
>
> As such, the package that has been set up for me is TOTALLY inadequate and inappropriate. The following is my proposal for the position:-
>
> Salary - at least $50,000.00 p.a. to compensate for the total lack of privacy and the 24/7 accessability [sic] that people have to you.
>
> Extras - Full time employment status with ALL the benefits included – ie.
>
> 4 weeks paid annual leave
>
> long service leave
>
> 10 working days pa sick leave
>
> bereavement leave
>
> superannuation
>
> If applicable, remote location allowances and medical benefits for remote location.
>
> On site housing free of rental, plus power, gas, electricity and water paid for by the Shire.
>
> Whilst I am a fairly capable person, I will not undertake such maintenance duties that require specialist services such as electrical work, or heavy lifting. Furthermore the maintenance of the lawns (ie. mowing) is the responsibility of the parks and gardens department of the Shire. I will, also, not be resonsible [sic] for weed and pest control of the park as it requires handling toxic chemicals of which I have no knowledge and which are dangerous to mine and my dog's health.
>
> I was, also, awarded the position on the premise that due to the fact that I am a professional remedial massage therapist, I could set up a business here in Cue and offer a medical service to the Community of Cue which is sadly lacking. I would still be prepared to do that on a very limited basis using the caretaker's house as a base. There is one bedroom/office which is relatively set apart from the rest of the house which could be turned into a therapy room. It is now the bookings office and houses the phone/fax. However, that can be moved and a desk set up in the kitchen area for bookings. I would be prepared to offer ONE 1 hour appointment per weekday – Monday to Friday – and a three hour block from 9am to 12nn on Saturday mornings every week. The weekday appointments will have to be booked for before 4pm.

> Whilst the Shire of Cue is considering this proposal, I will be working ONLY 6.75 hours per week which I have been contracted to do for $100.00 per week. This ONLY allows me to clean one set of toilets and laundry per day. It DOES NOT allow for any other duties. I am very sorry to have to take such drastic action but I feel as if I have been cheated, duped and taken advantage of. I have closed a profitable business in Perth and totally ended a life in Perth to come here. My dog and I have endured the trauma of re-location and having to spend 100 hours cleaning a house which made the pollution of the Ganges and Thames Rivers seem like pristine health spas in comparison and we won't tolerate being taken advantage of."
>
> (Exhibit 2)

19 When she gave her evidence she was asked what did she intend to achieve by sending this letter and she said she wanted some kind of definition as to her duties, the times they were to be performed and the boundaries she could set up to be able to take time off for shopping and socialising.

20 After Mr Seale received the letter he told her he would not consider the proposal she had put, that she had to perform all of the duties in the time allocated and "she would not be listened to". Her response was to write a second letter to Mr Seale and to hand the receipt book and the keys to the Council office. In a letter dated 15 December 2006 the Applicant stated:

> "It is very evident to me by your silence that the council is hoping that I will continue being a full-time employee for the Caravan Park without proper remuneration or recognition of the position being full-time. This is not true and it is with regret that I am handing over all the keys and takings box for the Caravan Park. I WILL work 6.75 hours a week on the caravan park premises as per my employment contract. This time will be spent hand watering the pots and watering the grassed areas of the park by sprinkler. The rest of the duties of the caravan park will fall back to the Shire of Cue until such time as the Shire of Cue recognises that the position of Caretaker is a full time position and pays for it accordingly.
>
> I will be working elsewhere in my spare time and I will not be starting up a remedial massage business in Cue as my experience of the honesty and goodwill of the Shire and its councillors leads me to question the honesty and goodwill of the possible customer base in Cue. I will not risk my professional reputation and my insurance.
>
> It grieves me that I came up here in all goodwill and trust and that has been very much used and abused. You wouldn't even send employment papaers [sic] down to Perth for me to peruse and sign before coming to Cue. So much for honesty?"
>
> (Exhibit 3)

21 The Applicant decided that she would not start up a remedial massage business in Cue. She said it was because she would not risk her professional reputation. I understand by that, that she did not want her business to be associated with the Council. She did however intend that she would perform the six and three-quarter hours a week in the park and find work elsewhere in Cue as she was required by Centrelink to find other work. During the period the Applicant was employed by the Respondent she was in receipt of payments from Centrelink.

22 The Applicant claims the caravan park manager's job is a full-time position. In cross-examination it was put to her whether she could carry out her duties in 20 hours per week on the basis that the total value of the cost of providing the house would be valued at $15,000 per annum. The Applicant said, "No." It was also put to the Applicant that the remuneration package was in compensation for the inconvenience of irregular hours and additional hours over and above what is sometimes necessary and the Applicant said that the work should be remunerated.

23 On 20 December 2006, Mr Seale wrote to the Applicant in response to the Applicant's letter dated 15 December 2006. In his letter he stated:

> "I acknowledge receipt of your disturbing letter dated 15 December 2006, which is acknowledged with serious concern.
>
> This letter is provided as an opportunity for you to collect the keys and booking sheets etc. that you delivered on Friday with the advice that you need to collect these with immediate effect and undertake the duties that were provided for you; for which one days notice is provided for you to attend.
>
> Should you have not collected the keys and bookings sheets, etc. from this Office by Friday 22 December 2006, you will be regarded as having breached your employment conditions which has serious ramifications and a potential that your employment may have to be terminated with this Shire.
>
> Accordingly you are encouraged to undertake the tasks for which you were engaged and contact me with the object of visiting my Office before 5pm on Friday 22 December 2006 with the object of resolving the issue that appear [sic] to exist.
>
> We request you reconsider your position carefully and notify me of your revised position without delay where failure to do so will be seen as a breach of your employment conditions and alternative arrangements may have to be entered in to."
>
> (Exhibit 4)

24 The Applicant did not meet with Mr Seale. In her opinion Mr Seale was not attempting to resolve the issue. Instead she wrote a further letter in response and sent the letter by facsimile to Mr Seale. In a letter dated 22 December 2006 she stated:

> "I am NOT in breach of my contract as I am working 6.75 hours per week as stated on my contract of employment. The Shire of Cue have been notified that the management of the caravan park is a full time position and NOT A part time position. However, the Shire of Cue doesn't want to acknowledge this because of the convenience of the past where

retirees have managed the park and don't want to earn a lot due to interference with their pension. I have made it very clear to the Shire that I am NOT a retiree and until such time as a full time wage is paid for my position and all the benefits that go with full time employment status are granted to me (ie. paid annual leave; long service leave; bereavement leave; sick pay; superannuation; etc.) then I will work as per my contract.

If the Shire of Cue want to draw up a full time contract with the appropriate wage and benefits, I will consider it. However I am not willing to work a full time job and only be paid a part time salary. If the Shire of Cue are going to take the position that a full time salary is not entitled to me and that by working to contract, I have breached my contract and dismiss me then I will be forced to seek legal advice for breach of contract by the Shire of Cue. I, also, enclose a fax from the Wageline stating that I am entitled to be paid for every hour I work.

Furthermore, the Shire of Cue need to redraw up their contract and put it to me in writing. Until such time as this is done, I will be working as per my original contract of 6.75 hours per week. I am not breaching my contract but the Shire of Cue is."

(Exhibit 5)

25 The attachment referred to as a fax from Wageline was a copy of s 10 of the *Minimum Conditions of Employment Act 1993* which states that: "An employee is entitled to be paid, for each hour worked by the employee in a week, the minimum weekly rate of pay applicable to the employee under section 12, 13, 14 or 15, divided by 38."

26 On 23 December 2006 at approximately 6:00pm the Applicant was at home when she heard Mr Seale banging on the glass door of the Manager's house. Mr Seale handed her a letter of termination. She testified that he was in "no mood for negotiation". She told him that she would "see him in court". The letter of termination stated as follows:

"I regret to advise the conduct of your behaviour on Tuesday, December 12th, displays an unusual lack of awareness of your employment conditions, whereupon you undertook to agree to provide Managerial support of the Caravan Park consistent with the position description as provided and as described to you at the interview.

Your determined denial of these conditions by refusing to obey the fundamental obligations, by refusing (for example) to unlock the ablution and reluctantly agreeing by your demand that you won't clean the ablution and returning the keys and booking accounts to the Shire demanding that you won't attend the duties until it is recognised as a full time position, is quite unacceptable conduct.

You were again afforded further opportunity to address the "employment conditions" issue by my letter dated December 20th, by visiting my office by 5.00 p.m. on Friday, December 22, which you failed to attend.

Given that the Shire requires controlled management of the Caravan Park on a daily basis and that you have refused to carry out the management as evidenced by the dying lawns and the delivery to the Shire of the keys and cleaning gloves the situation is now untenable.

Given that the Shire of Cue have been supportive and co-operative throughout your engagement and you have responded with objection, disobedience, and obstruction, you leave me no alternative other than to advise that your employment is terminated with immediate effect.

You are afforded the opportunity of two weeks notice to vacate the premises. Please do so without delay and return all house keys and Shire effects to this Office forthwith.

In the interim, the Shire will assume management of the Caravan Park and you are instructed not to address any of the issues, the management, or the clients of the caravan park, although as a gesture of goodwill you will be paid for the next two weeks.

As advices are to hand that the refrigerator is now missing from the common room as reported on December 22nd, your views in this matter are requested without delay.

Should you require assistance in relocation to alternate accommodation I will entertain consideration in that regard"

(Exhibit 7)

27 After receipt of the termination letter the Applicant made arrangements to leave Cue and return to Perth. The Respondent agreed to pay the Applicant's removalists costs if she agreed to repay the money over time. The Applicant entered into an agreement on 8 January 2007 in which she agreed to pay the transport cost to Cue and return in sum of $4,618.18 at $5.00 per week. The Applicant's property was removed to Perth on Tuesday, 9 January 2007.

28 When the Applicant returned to Perth she was unemployed for four weeks. She then worked as a remedial massage therapist for two months. During that period of time after deduction of business expenses she earned approximately $200.00 per week. She was then unemployed until the beginning of July 2007. In July 2007 she worked for 2½ weeks in an administration position and earnt $1,700.00 gross. The Applicant has been unemployed since then and has been looking for work. She intends to study in the year 2008 and obtain veterinary nursing and acupuncture qualifications.

29 The Applicant testified that her opinion is that the Respondent tried to "trap her into" the position in Cue by not sending her a copy of the contract prior to her departure from Perth and by not providing her with a map which indicated the size of the caravan park. She also is of the opinion that because Cue is in an extremely remote location the Respondent would gain a bonus in that they would have someone in the town who could provide professional massage therapy services. She says Mr Seale took the attitude that traditionally caravan park managers have been happy to receive $100.00 per week as they are

retirees and they do not want their pension arrangements disturbed. She said that when this was raised she told him that she was 43 years old and not a retiree.

The Respondent's Evidence

30 Mr Brian Seale testified that the caravan park in Cue is like all caravan parks. It is three acres in area and 90 per cent of the area is occupied by bays for caravans, with a small portion set aside for car parking and an even smaller area for people to camp in a tent. Mr Seale said that historically people do not take up residency in the Cue caravan park from October to March as it is far too hot. During the other six months of the year the number of residents rise. At the time he gave evidence on 13 September 2007, 48 people were staying in the park.

31 Mr Seale says that the position of caravan park manager has been a very part-time role for many years. Prior to the Applicant taking up the position the incumbent resigned and left to go live in another town. At that time one of the residents of the park informed the Respondent that they were happy to carry out the job of caravan park manager until a new person was recruited. Consequently the Respondent was not under any pressure to recruit someone quickly. After the position was advertised, the Respondent received five applications. He regarded the Applicant as a suitable person to carry out the work because of her intention to commence a business in the town and because she wanted a lifestyle change. In particular, he regarded the development of a new business as strategically valuable for the town of Cue. When he first spoke to the Applicant he told her that it is extremely hot in Cue in January, February and March of each year as on some days the temperature reaches 50°. She told him she was familiar with living in isolated locations. He also spoke to her about the fact that lawn mowing was required. She told him that was not an issue because she had "done it in Perth" and she made no mention that she had a herniated disc. He says that if she had done so he would have regarded her as unsuitable for the position. When it was put to Mr Seale in cross-examination that he did not explain to the Applicant whilst she was in Perth the area of the park, the terrain, or the equipment to be used, he said that everything in Cue is flat, it was an established lawn and there was no need to explain. When asked what type of gardening duties were required Mr Seale said there were general basic gardening duties which included weeding and mowing of lawns.

32 Mr Seale said that all employees of the Respondent who work as caravan park managers are provided with a standard package of documents on commencement and that includes a job description form (Exhibit F).

33 Mr Seale testified that it is customary for the Shire to engage people prior to their arrival in the town and without providing them with a formal contract of employment. Mr Seale said when he offered the Applicant the position she said she was happy with the remuneration which was offered. He also testified that the terms of the appointment were not put to the Applicant on the basis that they were negotiable. To the contrary the Applicant told him she was happy with the "reduced income and the lawn mowing aspect". Mr Seale testified that the value of the house provided to the Applicant would be at least $200 a week or $10,000 per annum and provision of water, power, gas and repairs to the residence was worth about $5,000 per annum.

34 Three weeks after the Applicant commenced work the duties were too much for her and she wanted to re-assess her position. He says that they could not do much in response other than to try and discuss the issues but all attempts to discuss the Applicant's concerns with her were unsuccessful. When she first complained he told her to put a submission in writing so he could address it and determine its validity. He received the letter dated 21 November 2006 (Exhibit 2).

35 On 30 November 2006, Mr Seale received a complaint from one of the tenants in the caravan park who resided in the pensioner huts. The complaint was that the ablution block near the pensioner huts was locked. Mr Seale thought it had been locked by mistake. He telephoned the Applicant who told him that she had locked it deliberately as there was no need for it. She told Mr Seale that she would not open the ablution block but then when Mr Seale directed her to do so she said that she would open it but she would not clean it. He then told her to come and see him and that they would work through why she had concerns over this. When cross-examined by the Applicant she put to him that the reason that she had locked the ablution block was because a contractor had carried out work nearby and had burst a main. Mr Seale said he was not aware that that was case as he did not get involved in any repairs. He then said that the Applicant did not inform him of that fact at the time he spoke to her but simply said that there was no need for the ablution block to be open and if it was the case that a main had burst she should have explained that to him.

36 After Mr Seale spoke to the Applicant about the ablution block, he arranged a meeting with the Applicant. However she was ill and unable to attend a meeting until 12 December 2006. Mr Seale testified that he kept a contemporaneous record of the conversations that he had with the Applicant. These diary notes were kept in a diary (Exhibit G).

37 Mr Seale testified that at the meeting on 12 December 2006 the Applicant explained that in her view the position of manager of the caravan park was a 24 hour position and warranted an annual salary of $50,000.00 per annum. They also discussed her refusal to mow the lawn. By that time Mr Seale had received a medical certificate from a surgeon stating that because she had a herniated disc she could not mow the lawn. This was of concern to Mr Seale as lawn mowing was required and she had indicated to him when he spoke to her when she was in Perth that lawn mowing was not a problem as she had done lawn mowing in Perth. Mr Seale said at the meeting on 15 December 2006 the Applicant stated three times that in her opinion the job was a full-time position and justified a $50,000.00 per annum salary and that if they did not agree to pay her that amount she would hand back the keys and refuse to carry out all duties. He explained to her that they have engaged many managers in the past and that all had coped well. He said the Applicant asked why was a pensioner not appointed. He said that there were retirees who were suitable but she was seen as the best candidate for the position and she wanted to commence a business. He offered to provide her assistance with gardening. She refused and said the job was full-time. He also told her she should put a sign on the door to indicate the hours she was available so she could go to the shops, commence a business or a social life but

she refused and said that clients would still wake her up at 2.00am. Mr Seale told her that her letter for increased remuneration would be put to Council.

38 Mr Seale put the Applicant's letter dated 22 November 2006 to the Respondent's Council and the Council gave instructions that he was to deal with the issue. On 15 December 2006 the Applicant returned to the Shire office the float, the booking sheets, cleaning gloves and the keys and said that she would not attend to other duties until the Respondent recognised that it was a full-time position. At that point in time the Applicant was refusing to carry out any duties except for hand watering.

39 When asked why did he not discuss with the Applicant a safe way of carrying out her job when he found out that she had a previous existing medical condition, Mr Seale said he did not do so as he was expecting the Applicant to determine the duties and circumstances and put forward a proposal that he could work with, but that was not forthcoming. He also said that he tried to identify with the Applicant what it was that she needed to make it (the job) work but her position was simply that she wanted to be paid $50,000 per annum.

40 After the meeting on 12 December 2006 the Applicant refused to meet with him again. He said it was plain to him that she did not want to work cooperatively towards an outcome. He said he was placed "in a corner" by the Applicant. In response he sent her the letter dated 20 December 2006 (Exhibit 4) in which he requested the Applicant to collect the keys and booking sheets and other items, to undertake her duties and to contact him before Friday, 22 December 2006 to discuss the issue.

41 Mr Seale said the Applicant did not contact him but he received a letter from her in which she reiterated her demands (Exhibit 5). Mr Seale testified that he would have been prepared to some moderate modifications of her duties but on receipt of this letter he saw that there was no reasonable solution so he prepared the letter of termination (Exhibit 7). However, Mr Seale in his evidence claimed that at that point of time he still wished to give the Applicant another opportunity to explain her position and he wanted to negotiate with her. Yet when he visited the caravan park on 23 December 2006 he explained to her that her employment was in doubt and as a result of her failure to attend the office he had no choice but to give her the termination letter. In his view he had tried to negotiate with her and at that time he had no other vacancies to offer her and accordingly he handed her the termination letter and brought the Applicant's employment to an end.

42 Mr Seale said that the Respondent is not in a position to reinstate the Applicant in the event a finding of unfair dismissal was made, as the position for caravan park manager has been filled and there are no other vacant positions available.

43 When cross-examined Mr Seale reiterated his opinion that the duties required of the Applicant could be carried out in the time allocated in the contract of employment. He said the present incumbent and past managers who have held the position had not complained that there was insufficient time to carry out the duties.

Legal Principles and Conclusion

44 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 and 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).

45 The Applicant was summarily dismissed by the Respondent. Where an employee is summarily dismissed, the onus is on the employee to demonstrate that the dismissal was unfair on the balance of probabilities. However, there is an evidential onus upon the employer to prove that summary dismissal is justified (*Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers* (1988) 68 WAIG 677 at 679).

46 The onus of proof rests upon the Respondent to establish that it had the right to terminate the Applicant's employment without proper notice (see *Blyth Chemicals Limited v Bushnell* (1933) 49 CLR 66 at 83). There is no rule of law that defines the degree of misconduct which would justify dismissal without notice. In *Clouston & Co Ltd v Corry* [1906] AC 122, the Privy Council at 129 stated:

> "… the sufficiency of the justification depended upon the extent of misconduct. There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal."

47 Wilful disobedience at law may constitute grounds for summary dismissal (see Macken, O'Grady, Sappideen and Warburton, *Law of Employment* (5th ed) at 204). A single act of disobedience will rarely justify summary dismissal except where disobedience has the quality that is wilful; in other words, the conduct connotes a deliberate flouting of the essential contractual conditions (see *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 1 WLR 698 per Lord Evershed MR at 701).

48 The only substantial issue in dispute in this matter is whether the Applicant's claim that the hours allocated for the work were insufficient for her carry out the duties of the position. I have heard the evidence given by both witnesses and observed them carefully. There is very little in dispute between them as to the facts of the matter. I accept that the Applicant gave her evidence truthfully in the sense that she said what she believed to be true. That does not mean that I accept her contention that the hours of work were insufficient for her to carry out her duties each week during the period she was employed. During that period five people resided in the caravan park and some people stayed overnight. It can be inferred by this evidence that

leaving aside the gardening duties the volume of work required of her, ie to collect money from the washing machines, receipt all income and clean the ablutions, was very low. I do however accept that she was required to clean the toilets each day (see Exhibit C). Even in relation to her gardening duties, it appears that watering required only hand watering and the moving of six sprinklers. What was involved in her duty to mow the lawn is not clear as it seems that during the entire period of her employment that the lawns were mowed by the Respondent's Parks and Gardens Department. Whilst it may be the case that six and three-quarter hours of work a week may have been insufficient for the Applicant to perform all of the duties of the position whilst she was employed, there is insufficient evidence before the Commission on which such a conclusion could be drawn. I accept, however, that during the tourist season the time allocated for duties each week is likely to be insufficient.

49 I accept the Respondent's contention that the Applicant put Mr Seale under pressure to accede to her demands. The Applicant made it plain to the Respondent that she was not prepared to work in accordance with the terms of her contract unless she was paid a full-time salary. In addition she did not perform all of the duties required of her. She was offered assistance but she refused. Both the Applicant and the Respondent were bound by the duty of mutual trust and confidence. Pursuant to that duty the Applicant had a duty to cooperate (see the discussion by Macken, O'Grady, Sappideen and Warburton in *Law of Employment* (5th ed) at 113 to 116).

50 In my opinion the Applicant failed the duty of mutual trust and confidence. The Applicant breached the duty by failing to disclose the fact that she had a back condition and by demanding she be remunerated for 24 hours a day, 7 days a week by a full-time salary of $50,000 per annum without justifying her position. Whilst a modern contract of employment is not a contract requiring disclosure to the degree of upmost good faith (*Britax Rainsfords Pty Ltd v Jones* (2001) 109 IR 381 at [55]), the principles applicable to an 'employee's disclosure at interview are as suggested by Professor McCarry in "The Employee's Right to Silence" (1983) 57 ALJ 607 at 612 wherein he stated:

> "The prospective employee is not obliged to disclose past faults or derelictions unasked. However, failure to disclose some factor which may amount to a lack of fitness for the position applied for may justify subsequent dismissal, but not for failure to disclose per se; dismissal in that circumstance would be justified on the basis of incompetence or breach of the employee's implied warranty of skill."

When she made the demand for the full-time salary the demand was made on the basis that she would not carry out lawn mowing. Even on 22 November 2006 she did not disclose that she was limited in the work that she could do on the basis of her back condition. This was not disclosed by her until she underwent a medical and it was raised with her at the meeting with Mr Seale on 12 December 2006. The Respondent through the actions of Mr Seale says he sought to resolve the issue with the Applicant yet he did not conduct any assessment of the time it took to perform the duties and simply relied upon the fact that no person who had previously held the position had complained the time allocated for the duties was insufficient. The Respondent was placed in a difficult position because the Applicant was medically unfit to carry out lawn mowing. Mr Seale however did offer the Applicant assistance to carry out gardening but when she refused he did not take any steps to make any assessment of the extent of the duties she could not perform and the length of time it should take to perform all of the required duties. By failing to do so I find that the dismissal was unfair.

51 The parties agree that reinstatement is impractical. In any event even if not agreed I would not order reinstatement as I am not satisfied that even if Mr Seale had taken steps to properly assess the Applicant's duties, and make arrangements for payment of additional hours of work that could be objectively and properly justified, I am not satisfied that the Applicant would have retreated from her demand that she be paid a salary of $50,000. She steadfastly maintains that the position was full-time. I am not satisfied that it was. An examination of the duties in Exhibit C, her evidence about the extent of watering and the numbers of people staying at the caravan park during the period she was employed make it plain that the position was not full-time. However, the dismissal was unfair because the time taken to perform her duties during the off-season and the tourist season should have been objectively assessed and proper arrangements made for payment of additional hours and/or assistance if needed. In my opinion an assessment was not complicated and could have been completed in two weeks. I assess the loss caused by the dismissal as a loss of being employed for two additional weeks whilst the review was completed. I accept that the value of the Applicant's remuneration was $20,520 per annum. Consequently, in my opinion, the loss incurred by the Applicant is two weeks' remuneration which is $789.23. I will make a declaration that the Applicant was unfairly dismissed. I will not make an order that the Respondent pay the Applicant $789.23 as it is agreed by the parties that any amount of loss found by the Commission should be deducted from the amount owing by the Applicant to the Respondent for relocation expenses. Instead, I will make a declaration that the Respondent owes the Applicant $789.23 and order that this amount be deducted from the amount she owes the Respondent for relocation expenses.

2007 WAIRC 01182

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JACQUELINE ANN BYSTERVELD
	APPLICANT
	-v-
	SHIRE OF CUE
	RESPONDENT
CORAM	SENIOR COMMISSIONER J H SMITH
DATE	FRIDAY, 19 OCTOBER 2007
FILE NO/S	U 1 OF 2007
CITATION NO.	2007 WAIRC 01182

Result	Declarations and order made
Representation	
Applicant	In person
Respondent	Mr S White (as agent)

Order

HAVING heard the Applicant in person and Mr S White as agent 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 unfairly dismissed;
2. DECLARES that the Respondent owes the Applicant the amount of $789.23; and
3. ORDERS the Respondent to deduct the amount of $789.23 from the amount the Applicant owes the Respondent for relocation expenses.

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

2007 WAIRC 01207

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERTA CROKE
	APPLICANT
	-v-
	CORPORATE CHOICE COMMMUNICATIONS AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 1 NOVEMBER 2007
FILE NO/S	B 155 OF 2007
CITATION NO.	2007 WAIRC 01207

Result	Discontinued

Order

WHEREAS this is an application pursuant to section 29(1)(b)(ii) of the *Industrial Relations Act 1979*; and

WHEREAS the Commission set down a conference on 5 November 2007 for the purpose of conciliating between the parties; and

WHEREAS on 27 October 2007 the applicant advised the Commission that she did not wish to proceed with the matter; and

WHEREAS on 1 November 2007 the applicant filed a Notice of Discontinuance in respect of the application; and

WHEREAS on 1 November 2007 the respondent consented to the matter being discontinued;

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

THAT this application be, and is hereby discontinued.

(Sgd.) J L HARRISON,
[L.S.] Commissioner.

2007 WAIRC 01176

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AARON DOSUALDO
	APPLICANT
	-v-
	COMPUTERCORP
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	THURSDAY, 18 OCTOBER 2007
FILE NO	B 73 OF 2007
CITATION NO.	2007 WAIRC 01176

Result	Application discontinued
Representation	
Applicant	Mr D Dosualdo as agent
Respondent	Ms K Browne

Order

WHEREAS this is an application pursuant to section 29(1)(b)(ii) of the Industrial Relations Act 1979; and

WHEREAS the matter came on for hearing on 20 August 2007 and the respondent sought an adjournment from the Commission which was granted; and

WHEREAS the applicant advised the Commission on 2 October 2007 that the matter was resolved and he wanted to discontinue the application; and

WHEREAS the parties have waived their rights to speak to the Minutes of Proposed Order pursuant to s.35(4) of the Industrial Relations Act 1979;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders –

THAT the application be and is hereby discontinued.

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

2007 WAIRC 00417

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MALCOLM STANLEY LANE
	APPLICANT
	-v-
	MR M.WEIDERMANN T/A GUARDIAN INDUSTRIES
	RESPONDENT
CORAM	SENIOR COMMISSIONER J H SMITH
DATE	MONDAY, 7 MAY 2007
FILE NO/S	U 420 OF 2006
CITATION NO.	2007 WAIRC 00417

Result	Order issued to amend the name of the Respondent
Representation	
Applicant	Mr K Trainer (as agent)
Respondent	Ms L Horwood (of counsel)

Order

Having heard Mr K Trainer as agent on behalf of the Applicant and Ms L Horwood 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, Martin Wiedermann t/a Guardian Industries.

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

2007 WAIRC 01213

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KYLIE LINDLEY
	APPLICANT
	-v-
	RED TOMATO
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 7 NOVEMBER 2007
FILE NO/S	U 116 OF 2007
CITATION NO.	2007 WAIRC 01213

Result	Application discontinued
Representation	
Applicant	Ms K Lindley
Respondent	Mr L Thompson

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*;

AND WHEREAS on 7 September 2007 the Commission convened a conference for the purpose of conciliating between the parties;

AND WHEREAS at the conclusion of the conference agreement was reached between the parties;

AND WHEREAS on 22 October 2007 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2007 WAIRC 01155

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BIANCA MASON
	APPLICANT
	-v-
	CHRISTIE WHYTE MOORE
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	TUESDAY, 9 OCTOBER 2007
FILE NO	U 131 OF 2007
CITATION NO.	2007 WAIRC 01155

Result	Application discontinued

Order

WHEREAS this is an application pursuant to section 29(1)(b)(i) of the Industrial Relations Act 1979; and

WHEREAS the applicant advised the Commission on 10 September 2007 that she wanted to discontinue the application; and

WHEREAS the parties have waived their rights to speak to the Minutes of Proposed Order pursuant to s.35(4) of the Industrial Relations Act 1979;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders -

THAT the application be and is hereby discontinued.

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

2007 WAIRC 00940

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NORM PHILLIPS
	APPLICANT
	-v-
	BELMINCO PTY LTD T/A WEST END STEELWORKS
	RESPONDENT
CORAM	COMMISSIONER S WOOD
HEARD	THURSDAY, 14 JUNE 2007
DELIVERED	THURSDAY, 19 JULY 2007
FILE NO.	B 75 OF 2007
CITATION NO.	2007 WAIRC 00940

CatchWords	Contractual benefits claim – Whether applicant dismissed – Reasonable notice – Federal Work Choices legislation – *Industrial Relations Act* 1979, s 29(1)(b)(ii)
Result	Notice payable, jurisdiction to be determined
Representation	
Applicant	Mr N Phillips
Respondent	Mr J Adizes

Reasons for Decision

1 This is an application made pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act"). The claim is for four weeks notice at the rate of $1020 gross per week. Mr Phillips says that he was dismissed without notice on 19 February 2007. He says that his claim represents reasonable notice having regard for his length of service with the business, s 661 of the Federal *Workplace Relations Act* 1996, and the decision of the Commission in *Antonio Carlo Tarozzi v The Secretary of the Italian Club (Inc)* 71 WAIG 2499. It is common ground that no written employment contract existed.

2 The claim relies on a finding that the applicant was in fact dismissed from his employment on 19 February 2007 by Mr Jacques Adizes, the owner of the business. Mr Phillips says that he had a senior role in the company as the accounts or administration manager. Mr Phillips says he was directed to teach Mrs Adizes certain administrative roles in the company. Clearly from his evidence Mr Phillips was concerned about teaching Mrs Adizes these tasks in that it might impact upon his job, and the future of his job. Then on 19 February 2007 Mr Phillips, after some consideration and discussion with work colleagues, told Mr Adizes that he would not teach Mrs Adizes how to cost jobs. He proposed an alternative plan.

3 Mr Phillips says that Mr Adizes in response said, "Well, that's it then". Mr Phillips replied, "That's it?", and Mr Adizes said, "Yes". Mr Phillips left Mr Adizes' office and as he did so Mr Adizes called out, "So you are going now?". Mr Phillips says that he was stunned and replied, "Yeah, it looks like that way". Mr Phillips says he considered he had been dismissed. He attended at work two days later to try to sort out the problem and says that he found a box which had been packed with his personal belongings. He discovered that work colleagues had not packed the box, so he thought that was it and he left the respondent's premises. Later that day he received a letter from Mr Adizes which said that he accepted Mr Phillips' resignation. There was some further correspondence between the two men and Mr Adizes confirmed that he considered Mr Phillips had resigned.

4 Under cross-examination Mr Phillips denied that he said, "I'm leaving". He re-emphasised that Mr Adizes had said, "That's it".

5 Mr Adizes gave evidence that Mr Phillips came into his office about 1pm on 19 February 2007 and said that he was not prepared to teach Mrs Adizes how to do costing and invoicing. Mr Adizes insisted that his wife know the administration across the board. Mr Phillips replied, "Well, I'm not prepared to do this". Mr Adizes says that Mr Phillips was quite flustered and excited. Mr Adizes says that Mr Phillips then said, "I'm not prepared to do this thing; I'm leaving". As Mr Phillips left Mr Adizes asked, "Norm, are you leaving now?' and Mr Phillips replied, "Yes". Mr Adizes says that one day later he wrote to Mr Phillips saying that he accepted his resignation. He next received a letter from Mr Phillips asking for his entitlements. Mr Adizes says that Mr Phillips' personal belongings might have been packed up a few weeks after 19 February 2007.

6 In closing, Mr Adizes submitted that he would never dismiss an employee on the spot. He had run a company for 20 years and he always paid generous notice. Mr Phillips, in closing, submitted that he had been dismissed and was entitled to reasonable notice.

7 I have had the benefit of seeing both parties give evidence and have assessed directly their differing versions of what transpired on 19 February 2007. Although I cannot be sure that this matter is not simply a question of two persons having perceived the same exchange differently, I would favour the evidence of Mr Phillips over that of Mr Adizes. This necessarily then leads me to the conclusion that Mr Phillips was in fact dismissed on 19 February 2007 and hence would be entitled to the payment of reasonable notice.

8 I would add that on Mr Adizes' evidence Mr Phillips was flustered and excited. It was open to Mr Adizes to query with Mr Phillips whether he wished to think about his decision to resign, if in fact he had resigned, which is not the conclusion I have reached. However, Mr Adizes on his own evidence wrote the next day to Mr Phillips and said, "I unreservedly accept your resignation". This was challenged by Mr Phillips who indicated that he had not resigned. It was open to Mr Adizes to simply correct the misunderstanding and invite Mr Phillips back to work. He did not; he simply re-iterated that he accepted Mr Phillips' resignation.

9 The question then is what is reasonable notice in the absence of any expressed contractual provision? Section 661 of the *Federal Workplace Relations Act* 1996 provides the guide. It stipulates that notice of at least 4 weeks be paid where the employment has been for more than 5 years, and an additional week where the employee is over 45 years old and has completed at least 2 years of service with the employer. Mr Phillips falls within these provisions. The length of Mr Phillips' employment with Mr Adizes is contested. However, Mr Adizes' evidence in response to questions from the Commission is that he purchased the business, retained the employees and their benefits continued at time of transmission of the business. Therefore the period of reasonable notice is 5 weeks.

10 The claim sought by the applicant though and defended by the respondent is for four weeks notice and I would limit the period granted to the extent of the claim, i.e. four weeks. This is an amount of $4,080 gross, less normal taxation payable to the Commissioner for Taxation.

11 A further issue arose in my consideration of this matter post-hearing. The issue of whether the Commission has jurisdiction to deal with the claim by virtue of the introduction of the Federal Work Choices legislation needs to be addressed. Having heard Mr Adizes' evidence it may be that the respondent company can be said to be a trading corporation. This issue was not raised by either party, but it may affect the Commission's ability to issue the order granting the payment of four weeks notice.

12 The Full Bench in *The Liquor, Hospitality and Miscellaneous Union, Western Australian Branch v The Roman Catholic Bishop of Bunbury Chancery Office and Others* (unreported 2007 WAIRC 00559) stated at [14] [15]:

"14 It is apparent that neither party nor the Commissioner at the first instance addressed the present jurisdictional issue. This does not of course mean that it is an issue which the Full Bench can overlook. Issues of jurisdiction are fundamental to the hearing and determination of applications.

15 In *SGS Australia Pty Ltd v Taylor* (1993) 73 WAIG 1760 at 1762 the Full Bench confirmed that jurisdiction cannot be waived, given by consent or conferred when non existent. In *Murcia and Associates (A Firm) v Grey* (2001) 25 WAR 209 Steytler J (with whom Wallwork J agreed) said at [14] that even where no jurisdictional point was taken at first instance this cannot "*create jurisdiction"*. As his Honour said it is the duty of a judicial officer to satisfy themselves that they have jurisdiction and an appeal court "*is obliged itself to take notice of the fact of that absence of jurisdiction*". (See also *Crown Scientific Pty Ltd v Clarke* (2007) 87 WAIG 598 at [96]-[97])."

13 The issue of jurisdiction in claims pursuant to s 29(1)(b)(ii) of the Act has been addressed in three decisions of the Commission. They are *Gwenda May Smith v Albany Esplanade Pty Ltd T/AS The Esplanade Hotel* (2007) 87 WAIG 508, *John Ralph Forster v Australia Imperial Financial Services Pty Ltd* (unreported 2007 WAIRC 00450) and *Gary Phillips v TR 7 Pty Ltd* (2006) 86 WAIG 2646. I will have my Associate write to the parties and provide this decision along with the three decisions just mentioned. The parties will have until 4pm on 9 August 2007 to make any submissions in writing on the issue of jurisdiction which they may wish to make. Beyond this date submissions will not be accepted.

14 Following this opportunity to make submissions on jurisdiction the Commission will further consider the matter and issue an appropriate order. That is unless of course the parties have been able to settle the matter in the interim. The above decision may be of some assistance in that regard.

2007 WAIRC 01188

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NORM PHILLIPS
	APPLICANT
	-v-
	BELMINCO PTY LTD T/A WEST END STEELWORKS
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	TUESDAY, 23 OCTOBER 2007
FILE NO.	B 75 OF 2007
CITATION NO.	2007 WAIRC 01188

Catchwords	Denied contractual benefits - Notice on termination- Jurisdiction - Post Work Choices not within jurisdiction - Industrial Relations Act 1979 (WA) s26, s29(1)(b)(ii) – Workplace Relations Act 1996 (Cth) s4, s5, and s16(1)
Result	Application dismissed for want of jurisdiction
Representation	
Applicant	Mr N Phillips
Respondent	Mr J Adizes

Supplementary Reasons for Decision

1 This is a claim for a denied contractual benefit pursuant to s29(1)(b)(ii) of the Industrial Relations Act 1979 ("the Act"). The applicant claims that he was denied the payment of five weeks notice. The merits of this claim were heard on 14 June 2007 and a decision issued on 19 July 2007. However, during the hearing Mr Adizes for the respondent gave evidence which led the Commission to seek further submission from the parties as to whether the Commission has jurisdiction to hear the claim by virtue of the Federal Workplace Relations Act 1996 ("the Federal Act"). The parties were provided with copies of recent decisions of members of the Commission on this issue.

2 Mr Adizes forwarded a letter and attached a Certificate of Registration of a Company. The Certificate displayed that the respondent is a proprietary company, limited by shares, which was registered under the Corporations Law on 21 March 1994 and changed its name on 23 December 1994. Mr Adizes attached also to this letter a copy of a document which is said to have been taken from a speech given by the Chief Commissioner on 4 April 2006. The latter document covers the implications of the Federal Act generally. It has no application for deciding this matter.

3 The applicant made extensive submissions as to the constitutional coverage of the Federal Act. I will return to these, however, the applicant also submitted that:

"Further and in the alternative, whether or not the Respondent is a constitutional corporation is a matter of fact and degree. *R v Judges of the Federal Court of Australia and Another; Ex parte The Western Australian National Football League (Inc) and Another* (1979) 143 CLR 190 ("*Adamson*"); *Crown Scientific Pty Ltd v Clarke* (2007) 87 WAIG 598 ("*Clarke*"); *Aboriginal Legal Services of Western Australia Incorporated v Lawrence* 87 WAIG 856 ("*Lawrence*").

There is no sufficient evidence before the Commission that the Respondent is a trading corporation within the meaning of section 51 (xx) of the Constitution and in the absence of evidence sufficient to ground such a finding the Commission should not presume that it is. A suspicion that it might be is not sufficient to refuse to exercise jurisdiction."

4 As to the question of whether the respondent is a trading corporation, the Commission raised the matter of jurisdiction. I am mindful that there are two self-represented parties before the Commission; albeit it would seem that the applicant has properly been able to obtain some assistance in drafting his submissions on jurisdiction. The evidence is limited. The latter material submitted by the respondent was not provided at hearing, and hence has not been subjected to challenge under cross-examination. However, that is the process adopted by the Commission having regard for the fact that the parties had already appeared at hearing, and my obligations under s26 of the Act. No party sought to be heard further in person on these matters. The applicant chose not to bring forward any further evidence. I am left then to weigh the evidence at the first hearing and the additional material provided by the respondent.

5 In *Aboriginal Legal Services of Western Australia v Lawrence* 87 WAIG 856 the Full Bench considered the requirements for determining whether an entity could be considered to be a trading corporation, and hence subject to the Federal Act. They reviewed the case law on trading corporations and concluded as follows:

"286. A summary of points about "*trading*" emerging from the authorities, together with our observations about them is as follows:-

(a) The word is of wide import (Murphy J in *Adamson* at 239; Deane J in *Ku-ring-gai* at 648-649; The Full Federal Court in *Bevanere* at 330).

(b) Although "*buying and selling*" may be the clearest example of trading, it is not restricted to this (Stephen J in *St George County Council* at 569-570; Barwick CJ in *Adamson* at 209; Mason J in *Fontana Films* at 203; Toohey J in *Hughes* principle 7 at 20 (FCR), 672 (ALR); Carr J in *Quickenden* at [101]; Deane J in *Ku-ring-gai* at 649; Dixon J in *Bank of NSW* at 381). The appellant's counsel's submissions, tended to focus on clauses of the contract that referred to "*purchase*" and "*sale*". We did not however take his submissions to be to the effect that it was for only this reason that the entering into and performance under the contract was trading. Nor on the authorities, would so restrictive an approach be required.

(c) Although the desire to earn profit may ordinarily be part or an element of trading, trading does not always require the attainment of profit (Barwick CJ in *St George County Council* at 539; Stephen J in *St George County Council* at 569; O'Callaghan SDP in *Pellow* at [28]; Deane J in *Ku-ring-gai* at 649). For example, a person who sells his or her shares at a loss, is nevertheless engaging in trading.

(d) In our opinion, with respect, the most apt general description of trading is that succinctly stated in principle 7 at 20 (FCR), 672 (ALR) by Toohey J in *Hughes*: the activity of providing, for reward, goods or services. This does not mean we regard this as an all encompassing definition. To so describe what Toohey J has said would ignore point (a) above. The description of Toohey J is supported by Bowen CJ in *Ku-Ring-gai* at 625, as cited with approval by the Full Federal Court in *Bevanere* at 330. It is also consistent with the Macquarie Dictionary, 4th edition, 2005 definition of trading as "*exchange for reward*". The word "*reward*" in this context means "*something given or received in return or recompense* …". (Macquarie Dictionary, 4th edition, 2005). In the present context an appropriate synonym would be "*for value*". Therefore broadly speaking in our opinion trading generally involves an exchange, or the provision of goods or services, for value. Both the provider and the receiver of the goods or services will, when this occurs, be trading. Barter, referred to earlier, could therefore be trading. There is an exchange of goods where the "*value*" is represented by the receipt of the goods from the other.

(e) Some of the authorities refer to "*commerciality*". (Barwick CJ in *Adamson* at 209; Bowen CJ in *Ku-ring-gai* at 625 and the Full Federal Court in *Bevanere* at 330). Carr J in *Quickenden* at [101] referred to the earning of "*revenue*" and O'Callaghan SDP in *Pellow* at [28] to the earning of "*income*". We have considered whether commerciality is a separate requirement for trading to occur. In our opinion it is not. This stems from a consideration of what was precisely said in the High Court and Federal Court authorities just cited, the relevant passages of which were earlier quoted. (We have deliberately excluded *Pellow* from this because of our respectful opinion about the weaknesses in the analysis). Also, in our opinion, if there is an exchange of goods or services for value this is in itself trading without the necessity of considering if there is an independent element of commerciality about the transaction. For example, a private purchase and sale of a car advertised in a newspaper is trading even though it is essentially a domestic arrangement. There is an exchange of personal property for value. The requirement of an exchange for value of itself supplies any requirement for commerciality in the arrangement for it to constitute trading.

(f) Wilcox J in *Australian Red Cross* and O'Callaghan SDP in *Pellow* suggest that the gratuitous provision of a public welfare service, where the money to engage in the service is supplied by government funding, is not trading. In our opinion, and with respect, so broad a proposition is not supported by the decisions of the High Court or the other authorities cited above which discuss the meaning of "*trade*" or "*trading*". In a situation where there is in effect, a tripartite arrangement involving the government it is necessary to look at the basis on which the money is received to provide services to ascertain if any or all of this constitutes trading. This approach is not inconsistent with the authorities, which establish the relevant principles. There is no reason in principle why a tripartite arrangement may not constitute trading. The fact that government funds are used for a public welfare service, does not necessarily have the effect that the means by which the funds were received, or the arrangement overall, is not trading. The correct approach in our opinion is to carefully consider, on a fact specific basis, the means by which the government funds are provided to a corporation, to see if it is trading. Accordingly, the provision of funds by government to a corporation may or may not constitute trading. Furthermore, as we will explain more fully later, even if it is trading this does not necessarily mean the corporation is a trading corporation. In our view, to determine if it is, a holistic appraisal must be made of the activities of the corporation. This will allow a conclusion to be made about whether the trading component of its activities are sufficient to lead to characterisation as a trading corporation."

6 The applicant's assertion is simply that there is insufficient evidence upon which the Commission could make a finding. The respondent's evidence includes, as stated, the certificate of registration of the company. Mr Adizes also gave evidence at hearing that Belminco Pty Ltd is the parent company and West End Steelworks is the trading name. The company, "does structural steelwork for mainly commercial objects", and is, "basically a consultant to the mineral processing industry". Mr Phillips gave evidence that his previous employer is a, "structural steel fabrication company". He also gave evidence that in his job he was responsible for the accounts payable and receivable, for BAS statements and the costing of jobs. Clearly from this evidence the respondent is a registered company which fabricates steel products and sells these products commercially. I have no information as to the profitability of the respondent's business. However, from this limited evidence it can be concluded that the respondent is a company registered for the purpose of making and selling goods. Based on the criteria outlined above in the *ALS* case, the respondent's business falls within point (b) above (at least), and most probably within points (c), (d) and (e) as well. I find that the respondent is a trading corporation and hence falls under the provisions of the Federal Act.

7 As to the coverage of the Federal Act, the applicant submitted as follows. In relation to s.16 of the Federal Act, "Sections 16(2) and 16(3) are not an exhaustive list of matters where the IR Act continues to have operation despite the apparently sweeping nature of section 16(1)". The Federal Act can only invalidate the State Act to the extent of any inconsistency. Section 14 of the Federal Act requires that Act to be read down so as not to exceed Commonwealth legislative power. In a denied contractual benefits claim the Commission acts judicially and is a court. Judicial power of the Commonwealth must be vested in a court. The applicant then stated:

> "There is nothing in the WR Act conferring on any court – or any other body – the ability to deal with contractual entitlements alleged not to have been given by an employer that is a corporation. There is nothing express in the WR Act which denies the ability of any State court to deal with a contractual entitlement claim."

8 The applicant then went on to state why in his view, the decision of Smith SC in *Gwenda May Smith v Albany Esplanade Pty Ltd t/a The Esplanade Hotel* 87 WAIG 509 should not be followed. I quote the relevant passages of that decision for completeness:

> "122. The validity of s 16(1) was recently considered by the High Court in *New South Wales v The Commonwealth* (2006) 156 IR 1. One of the issues raised by the State of Western Australia in that matter was that s 16(1) was invalid because it sought to exclude the operation of State laws on matters in relation to which the Commonwealth had not attempted to legislate. One example of matters Western Australia identified as a matter that the WR Act does not regulate is the enforcement of contractual entitlements. At [367] of the judgement of Gleeson CJ, Gummow, Hayne, Haydon and Crennan JJ, their Honours set out the argument as follows:
>
> > "Western Australia also contended that in numerous respects s 16 attempts to invalidate State laws despite having failed to enact any corresponding federal law. Western Australia said, for example, that s 16(1)(d) provides that the new Act is intended to apply to the exclusion of a State or Territory law providing for the variation or setting aside of rights and obligations arising under a contract of, or arrangement for, employment that a court or tribunal finds to be unfair. The only provisions in the new Act dealing with unfair contracts are ss 832-834, and they only deal with contracts binding on independent contractors, not employees. Hence s 16(1)(d) applies to the exclusion of Pt 9 of Ch 2 of the Industrial Relations Act 1996 (NSW), dealing with unfair contracts of employment. The State law is excluded, but no federal law applies. Western Australia contended that there were various other examples of this. One was said to relate to s 16(1)(e) which, read with s 16(3)(c), indicates an intention to apply the new Act to the exclusion of State laws dealing with the exercise of rights by a representative of any trade union to enter premises for any purpose other than occupational health and safety; yet the new Act only deals with the exercise of rights of entry pursuant to Divs 4, 5 and 6 of Pt 15 by officials of organisations registered under the new Act for certain purposes. Attention was drawn to the fact that 'trade union' is defined in s 4(1) to include organisations of employees whether

> or not registered under the new Act. Another example related to State Acts of the kind referred to in par (b) of the definition of State or Territory industrial law in s 4(1), so far as they deal with matters for purposes other than one of the 'main purposes' specified in that part of the definition. Western Australia submitted that those State Acts are excluded by s 16(1)(a) without any substantive regulation of the subject in the new Act itself. Other examples, developed in considerable detail, related to the making of regulations under s 16(4) in relation to discrimination legislation, matters listed in s 16(3), redundancy provisions, and the enforcement of contractual entitlements."

123. The majority of the High Court then went on to consider the arguments put on behalf of the Commonwealth at [369] where they stated:

> "The Commonwealth's arguments. The Commonwealth specifically declined to contend that if a Commonwealth law simply sought to exclude State law in a field and made no provision whatever on the same subject-matter it was within power. The Commonwealth contended rather that it was open to the Commonwealth Parliament to indicate the relevant field it intended to cover to the exclusion of State law, that s 109 would then operate even though the Commonwealth had not made its own detailed provisions about every matter within that field which State law dealt with, and that it sufficed for the Commonwealth to have some provisions dealing with aspects of the field, leaving others unregulated. The Commonwealth submitted that the relevant field was to be identified, not by reference to the areas regulated by State law, but by reference to the terms of the Commonwealth law. It was concluded above that the Commonwealth has power to regulate the relationships between employees and employers as defined in ss 5(1) and 6(1) by reliance on the heads of power referred to in paras (a), (e) and (f) of the definition of 'employer' in s 6(1). The Commonwealth submitted that it was open to the Parliament to identify the rights and obligations arising out of those relationships of employees and employers as a field, and to indicate an intention to cover that field (or, as here, part of it, because of the limitations to s 16(1) and the operation of s 16(2) and (3)). On the construction of s 16(1) accepted above, (at [353]-[359]) the Commonwealth chose to exclude State law only in respect of the relations of employees and employers as defined in ss 5(1) and 6(1)."

124. The majority then held at [370] that the Commonwealth submissions were to be preferred and that the Commonwealth was not precluded from defining a field of relationships between s 5(1) employees and s 6(1) employers, and only occupying parts of that field. The effect of the decision of the High Court is that it determined that s 16(1) was a valid law of the Commonwealth.

125. The Court, however, did not expressly make any findings about what aspects of the field created by s 16 were occupied and whether there were any parts of the relationship between an employee and an employer who is a constitutional corporation that were left unregulated. It is clear that s 16(2) expressly provides for parts of the employment relationship that are unregulated but the question arises whether there is any part of the field within s 16(1) itself and in particular s 16(1)(a) that restricts the field of employment relationships between employers and employees to that which is not regulated by the provisions of the WR Act. The rules that govern statutory interpretation may provide some assistance in resolving this question. One well established principle of statutory construction is that all words in a statute must be given meaning and effect (see DC Pearce and RS Geddes, Statutory Interpretation in Australia (6th ed) at [2.22] and the cases cited therein). The opening words of s 16(1) of the WR Act are "This Act is intended to apply to the exclusion of all the following laws …" By the use of the words "This Act" it could be argued that the provisions of the following laws which include the provisions of the IR Act that are excluded are those restricted to the subject matters found in the provisions of the WR Act which are outside s 16 itself as s 16(1) of WR Act does not say "The provisions of the following laws of a State … are excluded." The difficulty with that argument is that s 16(1)(d) of the WR Act squarely raises a statutory area of an employment relationship that exists in New South Wales in respect of the setting aside of unfair contracts which is otherwise unregulated by the WR Act. If it is the case that the ousted subject matter is to be construed as outside s 16(1) generally, s 16(1)(d) of the WR Act would have no scope for operation.

126. For these reasons it is my opinion that s 16(1)(a) of the WR Act excludes the jurisdiction of the Commission to deal with claims for contractual benefits as the provisions of the IR Act have been rendered inoperative in respect of persons employed by constitutional corporations by the operation of s16(1).”

9 The applicant canvassed the reasoning in the *Smith* decision concerning the import of s16(1)(d) and went on to conclude:

> “19. A proper construction of section 16(1)(d) is that the Commonwealth has expressly legislated to delineate a subject matter upon which it intends to cover the field, in addition to any exclusion caught by section 16(1)(a). Section 16(1)(d) of the WR Act simply delineates a particular subject matter that is intended to be excluded from State regulation.
>
> 20. A corollary to that construction is that if the Commonwealth found it necessary or desirable to expressly delineate a particular subject matter as being within its exclusive jurisdiction but in respect of which it did not intend to substantively legislate, then the Commonwealth cannot have intended section 16(1) of the WR Act to have the broad effect contended.

21. It follows that as the Commonwealth has not made similar provision in respect of contractual entitlements (or other matters not expressly or by necessary implication dealt with in the WR Act) the jurisdiction of the State Commission acting as a court is not defeated.

22. The Commonwealth must have intended that the WR Act was to apply only where State legislation covered a particular subject matter within the WR Act or where the WR Act evinced an intention that any State legislation was not to apply but no substantive Commonwealth legislation on that subject matter was to apply.

23. As the Commonwealth has not in the WR Act dealt with the subject matter of employment related contractual benefit claims and not evinced any intention that such claims should not be dealt with anywhere, a proper conclusion is that the Commission is not excluded from having jurisdiction when exercising its judicial power to determine such claims.

24. This construction is supported by the decision of the Full Federal Court in *Tristar Steering and Suspension Limited v Industrial Relations Commission of New South Wales* [2007] FCAFC 50 where the Court held that *the field created by section l6(1) extended to laws prescribing the industrial rights and obligations of corporations and their employees and the means by which they are to conduct their industrial relations and that by occupying this field the provisions of the NSW Industrial Relations Act are excluded where the employer is a constitutional corporation (see Kiefel J at [10] to [11] and [15] to [16]; Gyles J at [21] to [22] and Buchanan J at [45] to [48])*" — per Smith SC in *Forster -v- Australia Imperial Financial Services Pty Ltd* at [9]. Proceedings pursuant to section 29(1)(b)(ii) of the IR Act are exactly analogous to ordinary civil court proceedings and are not *laws prescribing the industrial rights and obligations of corporations and their employees and the means by which they are to conduct their industrial relations* and hence section 16(1) of the WR Act does not operate to exclude the Commission from exercising jurisdiction.

25. Further and in the alternative, the exercise of judicial functions by court of the State is a necessary adjunct to the ability of the State to function as a government and there is an implied prohibition on the exercise of Commonwealth legislative powers which will interfere with or curtail the government functions of the State or with the State's capacity to function as a government."

10 In *Christopher Monaghan v Monadelphous Engineering Associates* 87 WAIG 2628 I adopted the reasoning of Smith SC in the *Smith* case on the issue of whether there is a constitutional clash between the Federal and State industrial Acts. For the reasons expressed I differed from the learned Senior Commissioner as to whether the Federal Regulations provided some limited jurisdictional preservation of contractual benefits claims before this Commission. I do not need to repeat that reasoning here as the applicant does not seek to argue that the Federal Regulations preserve this claim.

11 In short, the argument which the applicant seeks to make has already been answered comprehensively by the High Court in the passages quoted by Smith SC in the *Smith* Case. Except for paragraph 25, there is nothing new which has not already been answered by that reasoning; and nothing which persuades me to a different view. In my respectful view the learned Senior Commissioner's reasons address fully the points made by the applicant, in particular at paragraphs 125-126. The only remaining submission then is that at paragraph 25 which suggests that somehow the Federal Act curtails the ability of the State Government to function. This argument was put to the High Court in *New South Wales v The Commonwealth* (2006) 156 IR 1 and is recognised, at [350] and [374]. The majority judgement states as follows:

"374. *Curtailment of, or interference with, the capacity of States to function.* Western Australia pleaded its third challenge as being that s 16 was invalid because it impermissibly curtails, or interferes with, the capacity of the States to function as governments. The conclusion that s 16 does not represent a bare attempt to limit or exclude State legislative power would make any argument in support of this challenge very difficult to maintain. No argument was in fact advanced in support of the challenge. The inference that the challenge was abandoned is supported by its omission from an agreed statement prepared after the end of the hearing by the parties setting out the issues in dispute."

I conclude therefore that this submission of the applicant has no merit.

12 Accordingly, I find that the Commission does not have jurisdiction to decide this claim. I would order that the application be dismissed for want of jurisdiction.

2007 WAIRC 01189

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NORM PHILLIPS
	APPLICANT
	-v-
	BELMINCO PTY LTD T/A WEST END STEELWORKS
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	TUESDAY, 23 OCTOBER 2007
FILE NO/S	B 75 OF 2007
CITATION NO.	2007 WAIRC 01189

Result	Application dismissed for want of jurisdiction
Representation	
Applicant	Mr N Phillips
Respondent	Mr J Adizes

Order

HAVING heard Mr N Phillips on his own behalf and Mr J Adizes on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the application be and is hereby dismissed for want of jurisdiction.

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

2007 WAIRC 00045

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THOMAS QUINN
	APPLICANT
	-v-
	KALGOORLIE CONSOLIDATED GOLD MINES PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 30 JANUARY 2007
FILE NO/S	U 260 OF 2005
CITATION NO.	2007 WAIRC 00045

Result	Order issued

Order

WHEREAS this is an application pursuant to s29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act"); and

WHEREAS on 27 September 2006 this application was set down for hearing and determination on 30 and 31 January 2007; and

WHEREAS on 25 January 2007 the respondent's representative sought an adjournment of the hearing as one of the respondent's key witnesses was unable to attend the hearing because of significant and unexpected medical issues; and

WHEREAS the respondent argues that the evidence to be given by this witness is critical to the respondent's case; and

FURTHER the respondent argues that it will incur additional costs for air fares to Kalgoorlie as well as accommodation expenses if the evidence of this witnesses is heard at a later date; and

WHEREAS the applicant consents to the adjournment of the hearing as the applicant concurs with the respondent that the evidence of this witness is critical to the outcome of this application; and

FURTHER the applicant argues that if the hearing is not adjourned he will be disadvantaged by also incurring costs by having to travel to Kalgoorlie twice; and

WHEREAS after hearing from the parties and in deciding whether the Commission should exercise its discretion to grant the adjournment and whether a refusal to adjourn would result in a serious injustice to one party (*Myers v Myers* (1969) WAR 19) and when taking into account equity and fairness the Commission is of the view that an adjournment should be granted; and

WHEREAS the Commission accepts that the parties will suffer some disadvantage if the evidence of a key witnesses is not adduced and that the parties will also incur additional travel costs and accommodation expenses if the matter is listed for further hearing to enable this witness to give her evidence;

NOW THEREFORE the Commission pursuant to the powers conferred on it under the Act, and in particular s27(1), hereby orders:

THAT the hearing of application U 260 of 2005 scheduled for 30 and 31 January 2007 is adjourned to a date to be fixed.

(Sgd.) J L HARRISON,
[L.S.] Commissioner.

2007 WAIRC 01112

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THOMAS QUINN
	APPLICANT
	-v-
	KALGOORLIE CONSOLIDATED GOLD MINES PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
HEARD	9 MAY 2007, 10 MAY 2007, 25 JUNE 2007, FURTHER WRITTEN SUBMISSIONS 5 JULY 2007
DELIVERED	FRIDAY, 21 SEPTEMBER 2007
FILE NO.	U 260 OF 2005
CITATION NO.	2007 WAIRC 01112

Catchwords	Termination of employment - Harsh, oppressive and unfair dismissal - Whether dismissal was summary - Applicant alleged to have mishandled incident reports - Procedural fairness considered - Principles applied - Applicant unfairly dismissed - Order made for reinstatement - Industrial Relations Act 1979 (WA) s 29(1)(b)(i)
Result	Upheld and Order Issued
Representation	
Applicant	Mr G McCorry (as agent)
Respondent	Mr A Cameron (as agent)

Reasons for Decision

1 On 7 December 2005 Thomas Quinn ("the applicant") lodged an application pursuant to s29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act") against Kalgoorlie Consolidated Gold Mines Pty Ltd ("the respondent") ("KCGM") claiming that he was unfairly terminated on 11 November 2005. The respondent denies that the applicant was unfairly terminated.

Background

2 The following was not in dispute between the parties. The applicant worked on a continuous basis at the respondent's Super Pit mine site in Kalgoorlie from 1994 until his termination. The applicant was initially employed by Roche Mining, a contractor to the respondent, and on 1 October 1999 the applicant became directly employed by the respondent. The respondent promoted the applicant to the position of shift supervisor in July 2003 and in this role he supervised approximately 55 employees. The applicant worked a rotating seven night and seven day shift of 12 to 13 hours duration. At termination the applicant was earning a salary of $127,280 per annum.

3 The respondent maintains that the applicant was terminated because he committed a number of safety breaches but the applicant argues that prior to these alleged breaches coming to light events occurred from 5 September 2005 onwards which contributed to the respondent's decision to terminate him.

Applicant's evidence

4 The applicant gave evidence that when his day shift started at 4.30am he completed a handover with the night shift supervisor and the applicant then held a pre-shift information meeting ("PSI") with his crew at around 5.05am which lasted approximately

3 to 5 minutes. At these meetings pit changes, incidents and any outstanding corrective actions and general information was passed on to the crew. At the end of this meeting machine drivers commenced their duties and the applicant took some of the operators down to the pit and he then undertook a pit inspection. The applicant stated that when he started the night shift at 4.30pm the same process took place. The applicant gave evidence that at the end of seven days he handed over to the night shift supervisor who then handed over to his replacement.

5 The applicant stated that when he returned to work after taking three days leave on 2, 3 and 4 September 2005 an employee complained to him about other employees in mine vehicles burping and farting over the two-way radios during his absence and the applicant stated that his relieving shift supervisor, Mr Grant King, had done nothing about this issue because he was waiting for the applicant to return to work. The applicant stated that at the PSI meeting held at the beginning of the shift which commenced on 5 September 2005 he informed crew members that the behaviour complained about was unacceptable and childish and that if it occurred again the persons responsible would be stood down and would be subject to an investigation. The applicant also told shovel operators to avoid contact with trucks as Mr King had told the applicant about a minor incident which had occurred the previous night when a shovel had made contact with a truck which resulted in a worker being given first aid. The applicant stated that he did not tell anyone at this meeting that they would be terminated as he had no authority to do so and the applicant maintained that he did not humiliate and abuse any crew members at this meeting nor did he mention the names of employees involved in the incident the previous night. The applicant stated that he could not recall if he swore during the PSI meeting but he stated that it was not unusual for swearing to occur at PSI meetings.

6 The applicant stated that when he commenced shift the following day the Mine Superintendent Mr Dan Fogarty told him that a complaint had been made about him and he was being stood down for swearing at the PSI meeting held on 5 September 2005. The applicant then attended a meeting with Mr Fogarty and the respondent's Human Resources Manager, Mr Gerry Quartermaine on 7 September 2005 and was advised that the respondent had four witness statements confirming that the applicant had sworn at crew members at the PSI meeting held on 5 September 2005 and the applicant had threatened to terminate some employees. The applicant stated that he was not given any details about these allegations nor was he shown copies of any witness statements. The applicant stated that he was then told to see a counsellor because of the way he had conducted himself at the PSI meeting. The applicant stated that he saw the counsellor, Mr Peter Maiden, that day and he advised him that he would tell the respondent to 'go easy on him'.

7 The applicant attended another meeting with Mr Fogarty and Mr Quartermaine on 8 September 2005 and he was told that he needed to have a break and to take annual leave which the applicant agreed to. The applicant then asked what would happen when he returned from leave and he was advised that the respondent had not yet made a decision. Mr Fogarty then raised an 'Incident, Hazard or Near Miss Report' ("incident report") that the respondent claimed the applicant had not taken any action over and the applicant denied that this incident, which involved a loader and a shovel and which was raised by a truck driver Ms Fiona Halma, had been raised with him via an incident report. The applicant stated that Ms Halma raised this issue with him verbally and he investigated the situation and was satisfied that the loader was not near the shovel operator as claimed by Ms Halma and the applicant told the respondent that he then spoke to Ms Halma about his views on the matter and he believed the issue had been dealt with. The applicant gave evidence that the respondent did not mention any other incident reports at this meeting. The applicant was then advised that on his return from annual leave on 1 November 2005 he would no longer hold the position of shift supervisor but would be demoted to the position of shovel operator and he was told that he would be used as a fill in supervisor from time to time. The applicant stated that before he commenced seven weeks annual leave he was told to clean out his office which he did and he returned his keys to the respondent.

8 The applicant stated that he was not happy about being demoted and he sought advice about his situation whilst on annual leave. After doing so the applicant wrote to the respondent's General Manager Mr Cobb Johnstone invoking the respondent's grievance policy and he told Mr Johnstone that he wanted his demotion overturned or for the respondent to provide him with good reason for the treatment he had received. The applicant also told Mr Johnstone that he had not been given particulars of the alleged swearing at the PSI meeting held on 5 September 2005, he believed that the punishment he had been given was out of all proportion to the offence if he had sworn and he claimed that he could not be held responsible for not logging an incident report onto the respondent's computer system if it had not been given to him. The applicant stated that he did not receive a response to this letter.

9 The applicant stated that several days before he was to re-commence work on 1 November 2005 he received a call from the office of the Manager of Mining, Mr Philip Welten and was told to report to Mr Welten on his first day back at work. The applicant stated that he was not told of the purpose of this meeting.

10 The applicant recounted what took place at this meeting with Mr Welten which took place on 2 November 2005. The applicant stated that the respondent raised the issue of a dispute between two employees on his shift who shared a house and had a falling out in their domestic arrangement which spilt over into work and the applicant stated that because of this altercation one of the women came to work upset and as she had had little sleep the applicant believed she was unfit to work so he told her to go home. The applicant gave evidence that when the woman she shared the house with found out about this she was worried that she would destroy her unit and she left work to speak to the other woman. The applicant stated that he felt let down by Mr Mick Harvey the respondent's General Foreman as he told the applicant the following day that it was not appropriate for employees to take time off for a non-work related incident yet when the applicant told one of the females concerned that she could not take sick leave when the issue re-surfaced as it was not work related Mr Harvey then overrode the applicant and gave her the night off. The applicant was then advised by Mr Welten that the respondent had reviewed the issues and allegations surrounding his demotion but subsequent information had come to the respondent's attention which the respondent did not believe was consistent with the applicant's role as a supervisor, specifically the applicant had not logged a

number of incident reports onto the respondent's computer system. Mr Welten told the applicant that 47 incident reports had been found in his office and 23 of them were not logged onto the respondent's system and the applicant said he was surprised that these 23 incident reports were found in his office and had not been actioned because he had cleaned out his office and lockers prior to going on annual leave. The applicant told Mr Welten that he dealt with all incident reports that were given to him and he stated that if he was given an incident report he would log it on the respondent's computer system and put the report on the personal file of the employee who had made the report for future assessment purposes. The applicant claimed that the 23 incident reports may have been unlogged because he shared his office with two leading hands and a safety representative and his office was not locked. The applicant confirmed that he was shown three incident reports at this meeting, two from Ms Halma and one from Mr Kennedy which the respondent claimed had not been logged onto the respondent's system. The applicant stated that at the end of the meeting he was told to think about his situation and another meeting was convened for 4 November 2005.

11 At the next meeting, which took place on 4 November 2005, the applicant told Mr Welten that he was unable to respond to the respondent's claims about the incident reports and his behaviour at the PSI meeting because he had not seen the incident reports to which Mr Welten was referring on 2 November 2005 or the witness statements from employees who attended the PSI meeting.

12 After this meeting Mr Welten wrote to the applicant on 9 November 2005 with, it appears, the unlogged incident reports as an attachment to the letter. On 11 November 2005 the applicant provided a written response to Mr Welten's letter dated 9 November 2005 (Exhibits A5 and A7). These letters are as follows (formal parts omitted).

Letter from Mr Welten to the applicant dated 9 November 2005:

"**Disciplinary Proceedings**

I refer to our meeting of 4th November 2005 and note that I was required to contact you regarding the further progression of the matters currently under investigation.

I have subsequently reviewed the progress of this investigation and have noted that in reality there are two separate and distinct matters that have become intertwined in the process.

Initially you were under investigation for behaving inappropriately towards your crew at the PSI meeting prior to the night shift on Monday 5 September 2005. Matters under investigation included you acting in a threatening manner towards your crew, swearing at them, threatening them with termination of employment and publicly humiliating one of your crew members.

During this process it was agreed you should take a period of annual leave, and during your leave a further exceptionally serious matter came to light; namely your apparent failure to process a number of Incident, Hazard or Near Miss Reports and a failure to comply with the requirements of this system.

This additional safety issue then became part of the investigation that was already underway. With the benefit of hindsight I have decided that it should not have done so. In reality it is a separate and distinct issue, and accordingly I have decided that it will proceed as a separate and distinct investigation.

While I certainly do not regard abusive behaviour directed towards your crew as a minor matter at all, it nevertheless remains the fact that matters of safety are our first and most fundamental priority. In accordance with this I have determined that the completion of the abusive behaviour investigation will be held in abeyance, and the investigation into safety breaches will now proceed. One consequence of this is that your proposed demotion to the role of Shovel Operator will not occur at this time, and I confirm my advice given to you verbally during our meeting on 4 November 2005 that your salary has not been reduced, and we will continue to pay you at your current supervisory salary while you are under suspension during this investigation.

Attached are copies of the Incident, Hazard or Near Miss reports relevant to the safety investigation.

Can you please make yourself available at 1100 hours on Friday 11th in my office to discuss these issues."

(Exhibit A5)

Letter from the applicant to Mr Welten dated 11 November 2005:

"I refer to your letter of 9 November 2005 and my alleged failure to log the hazard reports onto ARIS.

Firstly I have not seen these hazard reports before and I have no idea where they came from. Presumably from somewhere in the supervisors' office. As you will be aware, that office is shared by 9 supervisors or leading hands.

I cannot be held responsible for not logging hazard reports that are not provided to me. I log all hazard reports that I receive. (You should note that hazard report 33030 is not even a hazard report – it is a complaint about how George ran the Wenco on a particular occasion). Having my name on the bottom of the hazard report does not mean I received it.

That this should be quite apparent is obvious from the fact that of the hazard reports I am accused of not having logged, three of them (33028, 33029 and 33081) were made on days when I was absent from work on compassionate leave. How can I possibly be held responsible for not logging these reports?

You should also note that the most serious of these hazard reports (34378, 34379 and 34380) are suspicious to say the least. Fiona did not provide me with any hazard report about the incident (the bucket moving over the truck) but told me verbally what she had seen. When I investigated, it became apparent that there was no hazard – it merely seemed to be a

hazard because of the angle of view. These hazard reports I have never seen and they do not make sense. Why are there replacement hazard reports – 34378 relates to August – 34379 is said to replace 34377 which relates to May and 34380 in August is said to replace 34378 which relates to August.

The process for hazard reports is that they are completed and are supposed to be handed to the supervisor at or before the end of the shift. Sometimes this doesn't happen and they are handed to the leading hand or even the supervisor of the next shift. When I receive a hazard report from a previous shift, I log it. What other supervisors do I do not know.

The system is also faulty in that there is no routine audit of the hazard reports written, compared with those logged on ARIS. KCGM has no way of identifying whether or not a particular hazard report has been logged on ARIS. There is no procedure in place to check ARIS entries against the hazard reports and so far as I know, the hazard reports going to the supervisors and the safety rep (sic) are disposed of once logged. I place a copy on the reporting employee's file in order to provide feedback at the performance review of the employee.

Audits are something that KCGM should be looking into. I would suggest that at least once a month a random comparison of employee hazard books be checked against ARIS entries, that ARIS be modified to record the number of the hazard report and that the reporting employee be required to obtain a signature on the hazard report from the supervisor it is handed to. That way these unfounded allegations will not arise in the future.

I look forward to returning to work in my position as supervisor."

(Exhibit A7)

13 The applicant gave evidence that the following letter was sent on behalf of the applicant by Mr Graham McCorry, the applicant's representative, to Mr Welten on or about 9 or 10 November 2005:

"We act for Mr Quinn.

We have to hand your letter to Mr Quinn of 9 November 2005, the tape recording of the meeting with him on 4 November 2005 and have today spoken to Andrew Cameron of the Australian Mines and Metals Association about your actions in respect of Mr Quinn.

Please be advised that we take strong exception to the escalation in the nature of the allegations that have been made against our client. In September our client was alleged simply to have sworn at a PSI meeting. By 4 November 2005 this had escalated to swearing at other employees. It has now escalated to alleging that our client acted in a threatening manner, threatened to terminate the employment of persons – which I am advised he has no power to do – was abusive and publicly humiliated one employee. At this rate, by Christmas he will be being accused of participating in a banned terrorist organization pledged to destroy civilization as we know it.

This escalation in the nature of the allegations made against our client gives rise to a reasonable apprehension of bias in the investigation of these matters and is defamatory of our client.

Our client categorically denies having threatened, sworn at, abused or publicly humiliated any employee or that anything that he said or did could be reasonably construed as amounting to having done so.

Our client reserves all legal rights if such allegations are repeated to any other person.

Our client also requires that you provide him with copies of the statements that KCGM relies upon to assert any impropriety in his dealings with other employees on the night in question."

(Exhibit A6)

14 The applicant stated that he had a further meeting with Mr Welten on 11 November 2005 and the applicant's letter dated 11 November 2005 was briefly discussed and after this discussion and a brief adjournment the respondent terminated his employment and he was paid five weeks' pay in lieu of notice.

15 The applicant stated that immediately after he was terminated he worked in a number of jobs including working as a farm hand in Esperance, he was employed by Integrated Group Ltd at Mt Whaleback in Newman and the applicant worked as a supervisor for six weeks for Harmony Gold in Kalgoorlie. The applicant is currently a supervisor at Tom Price with Pilbara Iron Company (Services) Pty Ltd, a position he has held since October 2006 and in this position he is currently earning a salary of $97,425 plus superannuation.

16 The applicant commented on the respondent's incident report system. The applicant stated that incident reports are generated by an employee filling out a report, which has three copies, in an incident report book. The white copy is normally given to the employee's supervisor, the blue copy is given to the safety representative and the yellow copy remains in the incident report book and the books are kept at various places for employees to access. The applicant stated that no record of the allocation of specific books to individual employees is kept by the respondent. The applicant stated that once incident books were completed they were thrown away and he stated that there was no auditing of these completed books. The applicant said that after he was given an incident report he logged it into the respondent's computer system and the applicant stated that the number of the incident report was not recorded on the system but the name of the employee who generated the incident report was entered into the system and the white copy of the incident report was then placed on that employee's file. The applicant stated that if an incident was reported twice and rectified the second incident report was not logged and if a report was serious, for example, a near miss or injury a job would be stopped immediately and the safety representative would be called in to investigate the incident. The applicant stated that in some instances an incident report was not always generated but the incident was logged.

17 The applicant commented on a number of the incident reports that the respondent maintained were found in his office after he went on leave that were not logged onto the respondent's system. The applicant stated that on the dates some of the reports were generated he was not at work and they were not handed to him, for example two reports dated 15 July 2005 was on a day when he was on compassionate leave. Some incident reports were signed as being "Done" by an acting supervisor, Mr Nick Williams and the applicant again maintained that the two reports generated by Ms Halma were not given to him. The applicant claimed that one of the complaints did not constitute a hazard and one of the incident reports named Mr King and not him as the supervisor. The applicant stated that he was positive that he had not been given the 23 incident reports that the respondent maintained were unlogged and he re-iterated that if he was given the incident reports he would have logged them onto the respondent's system as he normally did. The applicant maintained that it was possible that reports which had not been logged were put in lockers belonging to other employees who also used his office for example the lockers belonging to the leading hands and the safety representative.

18 The applicant maintained that Mr Kennedy, who was on his shift, came to work when he felt like it and after being late to work on nine occasions the applicant gave him a written warning on 25 April 2005 as confirmed in his diary entry dated 29 April 2005. The applicant also spoke to Mr Kennedy on 20 February 2005 about his abrupt manner over the radio. The applicant stated that Ms Halma became upset with him in June 2005 when she blamed the applicant for not qualifying to become part of the mine's rescue team and the applicant stated that he explained to Ms Halma at the time that this was not his decision.

19 Under cross-examination the applicant agreed that he was terminated because he failed to process a number of incident reports and not because of his behaviour at the PSI meeting held on 5 September 2005 and the applicant also agreed that during his meeting with Mr Fogarty and Mr Quartermaine on 8 September 2005 he was shown a letter of complaint from Ms Halma plus photocopies of incident reports written by her which she maintains she gave to the applicant (Exhibit R2). The applicant agreed that at the meeting held on 2 November 2005 he was advised that the respondent had 47 incident reports 23 of which were unlogged and he was told that all of them had not been filed but the applicant disputed that he was told at the time where they were found in his office. The applicant was unsure who had logged the 24 logged incident reports that were logged on the respondent's system and the applicant disagreed that it was his responsibility as supervisor to check that incident reports generated by employees whilst he was on leave were logged and actioned when he returned from leave. The applicant confirmed that he knew how to enter incident reports onto the respondent's system and he knew that it was important to do so but the applicant reiterated that he had not been given the 23 incident reports that had not been logged onto the respondent's system. The applicant also disputed that when Mr King was his leading hand that he would always pass incident reports on to the applicant.

20 The applicant agreed that he was given an opportunity to discuss the incident reports at the meetings he attended prior to being terminated and the applicant agreed that he was on notice from 2 November 2005 that the issue of not logging incident reports onto the respondent's system was important.

21 The applicant again stated that he logged all incident reports onto the respondent's system that were given to him and he stated that sometimes the second or third person in charge of a shift logs incident reports onto the system. The applicant agreed that the vast majority of incident reports from employees on his shift were entered into the system by him and the applicant claimed that if he or a leading hand was not in his office there was nothing to stop an employee putting incident reports into lockers in his office as his office was used by two leading hands and the safety representative who also had a locker. The applicant maintained that he cleaned out his locker when he left to undertake annual leave and he stated that he did not take any work related files or any incident reports with him. The applicant agreed that it would be unlikely that any unlogged incident reports would be with a group of logged ones. The applicant stated that he logged a number of incident reports each week onto the respondent's system and he stated that he was given approximately three or four each day over a seven day roster. The applicant stated that Ms Halma handed in about one incident report a week and he stated that not all incidents raised with him by her were detailed in an incident report.

Respondent's evidence

22 Mr King is currently employed by the respondent as a shift supervisor and he has held this role since late November 2005. Prior to being appointed to this position he was employed as a leading hand. Mr King acted as the relieving shift supervisor when the applicant was absent for three days prior to 5 September 2005.

23 Mr King stated that when he took over as the shift supervisor of the applicant's crew the applicant's office was in disarray and he arranged to have a person clean out the filing cabinets in his office. Mr King stated the following:

> "And as a result of that, did you find any incident, hazard or near-miss reports, that we've been calling for convenience, incident reports?---Yes, we found a bag full of them. I'm not quite sure how many there was - quite a few, quite a few dozen at least, in one plastic bag that we found.
>
> Do you recall where it was that they were found, specifically?---Yes, I found one plastic bag full, that used to be in a filing cabinet that was occupied by Tom. A second lot we found were in the filing cabinet where the safety reps keep their gear."

(Transcript p 71)

24 Mr King stated that some of the incident reports looked as though they had not been entered into the system as the white and blue copies were together and Mr King stated that when he contacted Mr Harvey about the incident reports he was told to take them to Mr Quartermaine's office. Mr King stated that each bundle was taken down on separate occasions and they were left as is "jammed in a plastic bag". Mr King stated he then had no further role in the investigation.

25 Mr King stated that if an incident report was handed to him he would pass it on to the applicant and Mr King stated that incident reports were usually given to him in his role as a supervisor but sometimes they were given to the leading hands. Mr King stated that as the shift supervisor he would eventually get an incident report generated by employees on his crew either directly or indirectly. Mr King could not recall receiving the unlogged incident report with his name on it but he said that he would have handed it to the applicant as the applicant entered incident reports onto the system.

26 Under cross-examination Mr King stated that if he was given an incident report when he was relieving for the applicant he did not log it on the system as he was new to the job and unaware of the respondent's system. Mr King stated that he passed incident reports onto the applicant and that the applicant entered most of the incident reports onto the respondent's system. Mr King could not recall being given any incident reports when he had been acting supervisor in the three days prior to 5 September 2005.

27 Mr King stated that when he was on duty on 5 September 2005 he told the applicant that a bucket had touched a truck the previous night and he told the applicant that there had been a complaint about some workers burping and farting over the two way radio.

28 Mr King stated that the applicant's office was cleaned up shortly after he commenced as shift supervisor and he stated that as part of this process the filing cabinets used by the applicant and the safety representative were cleaned out. Mr King stated that the first lot of incident reports was found in an A4 size plastic bag in a file in a filing cabinet which had the applicant's name on it one to two weeks after the applicant went on leave. Mr King stated that a second bundle was found a day or two later in the safety representative's filing cabinet. Mr King stated that the second bundle were not in a bag "they were just found loosely … [and] the white and blue copies were together" (transcript p 77). Mr King stated that he did not know if these incident reports had been logged onto the system.

29 Mr King stated that the safety representative did not normally log an incident report onto the respondent's system and he stated that the white copy of the incident report would normally come to him as supervisor. Mr King stated that some leading hands who relieve as supervisors when he is on leave log reports onto the respondent's system and some leave the logging of reports until he returns as they are not sure how to deal with or log incident reports. Mr King agreed that he could not be responsible for an incident report if he did not know about it.

30 Mr Welten was the respondent's Mine Manager at the end of 2005 and Mr Welten is currently the Managing Director of Indo Mines Ltd a position he has held since January 2007.

31 Mr Welten said that it was during the process of reviewing other matters relating to the applicant's employment with the respondent in September 2005 that another supervisor advised Mr Welten that an incident report given to the applicant had not been acted upon or had not been entered into the respondent's computer system. Mr Welten stated that this was a serious matter as the respondent had a good safety focus. Mr Welten stated that after the respondent became aware that a number of incident reports had not been logged onto its system by the applicant he was interviewed on 2, 4 and 11 November 2005. Mr Welten stated that these meetings were recorded and transcribed (Exhibits A2, A2-1 A3, A8 and A9).

32 Mr Welten gave evidence that he and Mr Quartermaine checked the respondent's computer system to confirm whether or not the incident reports found in the applicant's office had been entered onto the system. Mr Welten stated that when he was checking to see whether or not these reports had been logged onto the system he found that most of the logged incident reports had been entered onto the system by the applicant (see Exhibit A5). Mr Welten stated that the incident reports were jumbled up when they were given to him:

> "Could you describe how the entered ones related to the unentered ones? In other words, were there two separate and discrete piles that came to you or were they all mingled?---No, they were all jumbled up.
>
> Sorry?---They were all jumbled up."
>
> (Transcript p 88)

33 Mr Welten stated that as at 9 September 2005 the respondent had completed its investigation into whether or not the applicant should be demoted and Mr Welten stated that he found out about the unlogged incident reports a couple of days before checking them at the end of October 2005.

34 Mr Welten stated that the applicant was terminated because of the number of incident reports that had not been entered into the system and he stated that this omission was inappropriate behaviour for a supervisor.

35 Mr Welten gave evidence that on 11 November 2005 he had an initial meeting with the applicant and the meeting was then adjourned so that he could have a discussion with Mr Johnstone about the applicant and they discussed the applicant not having a defence for not logging the incident reports into the respondent's system. Mr Welten stated that the applicant provided no proof that he had acted on the safety matters and Mr Welten stated that they both agreed that the offences committed by the applicant were serious because the applicant had committed a significant breach of the respondent's safety policy and procedures. Mr Welten stated that the respondent then decided that the applicant should be terminated.

36 Mr Welten maintained that 47 incident reports had been poorly handled by the applicant and Mr Welten stated that it was up to the applicant to prove his innocence and he claimed that he had been given the opportunity to do this.

37 Mr Welten stated that he considered Ms Halma's evidence to be more reliable than the applicant's evidence about the incident reports she gave to the applicant as she gave the respondent evidence that she had previously given these reports to the applicant. Mr Welten stated that he considered the possibility that Ms Halma may not have given the incident reports to the

applicant but Mr Welten then stated that the main issue was the seriousness of the issues raised in the incident reports and the frequency and timeframe of the incident reports that had not been logged by the applicant. Mr Welten stated that he took into account that the applicant was on compassionate leave on one of the days that three incident reports were not logged onto the respondent's system and Mr Welten maintained that the applicant's eleven years good service at the Super Pit was not relevant given the seriousness of the applicant's actions.

38 When Mr Welten was asked how many of the employees he had interviewed who had written the incident reports that had not been logged, he stated "I don't know. Probably half a dozen" (transcript p 93). Mr Welten then stated that he could not remember the names of these employees: "I can't remember - can't recollect" (transcript p 93). Mr Welten then said that he had statements from two employees about the incident reports, Mr Kennedy and Ms Halma and then Mr Welten stated that he thought only one employee, Mr Kennedy had "put his name to paper" (transcript p 93). Mr Welten stated that he did not interview any witnesses named in the incident reports which had not been logged onto the system as he did not think it was necessary at the time to do so (transcript pp 93/94). Mr Welten also stated that he did not look at the yellow copies of the incident reports which remained in the incident report books and he confirmed that the used incident report books are not audited.

39 Mr Welten was unaware why there was a delay in checking whether or not the 47 incident reports had been logged onto the respondent's system if the incident reports were given by Mr King to Mr Quartermaine in mid September 2005.

40 Mr Welten said he was aware that the applicant shared an office with other employees and he could not explain why some of the incident reports generated by the safety representative Mr Laurie Thornton still had the blue copy attached. Mr Welten maintained that the applicant was responsible for the incident report with Mr King's name on it and Mr Welten maintained that he spoke to Mr King about this report and he told him that he gave this incident report to the applicant the day after the incident. Mr Welten stated that he would be surprised if Mr King did not get any incident reports in the three days the applicant was away in early September 2005 and he stated that there is usually "a few a day". Mr Welten stated that he was unaware how many incident reports the applicant had logged prior to his termination.

41 Mr Welten stated that the applicant was responsible for the 23 incident reports which were not logged and which covered a significant timeframe and he claimed that all of the 47 incident reports had not been filed properly by the applicant. Mr Welten stated that this demonstrated contempt for the respondent's processes and procedures of which the applicant was aware. Mr Welten maintained that as the 47 incident reports were found in the applicant's desk in his office he would have been aware of them and Mr Welten maintained that the incident reports must have been handed to the applicant because they were found in his work location.

42 Mr Welten stated that the person who the respondent claimed had been humiliated by the applicant at the PSI meeting on 5 September 2005 did not want to make a statement about the applicant and Mr Welten stated that he did not respond to a letter written on behalf of the applicant to him on or about 10 November 2005 as he "didn't think it was worthwhile" (transcript p 102) (Exhibit A6).

43 Mr Welten stated that he did not interview Ms Halma with respect to her complaint about the applicant dated 7 September 2005 and he did not know how Ms Halma knew that the incident report she had given to the applicant had not been logged onto the respondent's system. Mr Welten was also not aware why she did not complain about the applicant until September 2005 given she had completed one of the incident reports in May 2005. When asked whether or not he took into account information contained in the applicant's letter which he provided at the interview on 11 November 2005 responding to Ms Halma's complaint Mr Welten stated that the issues she raised were investigated by someone else and he stated that no further investigations were then undertaken about this matter.

44 Mr Welten agreed that he did not conduct a full and proper investigation into all the anomalies raised by the applicant about the incident reports but he did not believe he was being negligent in not doing so and Mr Welten maintained that he did not look for an excuse to terminate the applicant after the applicant challenged the fairness of his demotion.

45 Under re-examination Mr Welten maintained that the applicant would have been demoted if he had not invoked the grievance procedure.

Submissions

Applicant

46 The applicant claims that his dismissal was harsh, oppressive and unfair. The applicant argues that he did not commit the safety breaches as claimed by the respondent and the applicant argues that the respondent failed to conduct an adequate investigation into whether he committed the alleged safety breaches. The applicant also argues that the respondent made a decision to terminate his employment without giving him any reasonable opportunity to rebut the allegations against him and the applicant claims that the respondent took into consideration matters that it expressly represented to him that it would not when deciding to terminate him. The applicant maintains that if he was at fault in any way the penalty of dismissal after 11 years of unblemished service was inordinately excessive. The applicant is seeking reinstatement to his former position and compensation for the loss and damage suffered by his dismissal.

47 The applicant claims that he was summarily terminated when he received a payment in lieu of notice and argues that only in exceptional circumstances is an employer entitled to dismiss an employee summarily and the applicant rejects the respondent's claim that the applicant's contract of employment expressly provided for a payment in lieu of notice to the applicant at termination and argues that there was no evidence given with respect to the termination provisions applying to the applicant. The applicant therefore argues that there is an evidentiary onus on the respondent to justify his termination (see *Concut Pty Ltd*

v Worrell (2000) HCA 64; *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66; *FMWU v Cat Welfare Society Inc* [1991] 71 WAIG 2014).

48 The applicant argues that the respondent's investigation into the incident reports was flawed. Mr Welten admitted that he did not conduct a full and proper investigation into all of the anomalies in the incident reports that were raised and the respondent should have given some weight to the fact that the incident reports were found in various areas in the applicant's office which was used by other employees. At a minimum the respondent was required to interview employees who had written the incident reports in question and ask them who they gave the incident reports to particularly when the applicant was absent from work. The respondent should have interviewed the safety representative about the incident reports he had written and also employees involved in some of the incidents referred to in the incident reports. Mr King should have been interviewed to find out if he had been given the incident report with his name on it, the person who found the incident reports should have been interviewed by the respondent to ascertain the precise location where they were found and persons other than the applicant who had logged some of the incident reports found in his office should have also been interviewed and an investigation into the anomalies in Ms Halma's reports should have also been conducted.

49 The applicant maintains that the respondent did not give sufficient weight to the fact that some reports were generated on a day when the applicant was not at work, one had a different supervisor's name on it, a further five incident reports occurred on a day when the applicant was not undertaking his role as shift supervisor and one of the reports was so serious that if it was not logged onto the system it could not have escaped being logged on the next shift. The applicant claims that some of the incident reports that the applicant was accused of not logging onto the respondent's system were unusual and suspicious particularly the incident reports generated by Ms Halma. There was evidence that the safety representative on the applicant's shift maintained a file of incident reports and some incident reports that had been logged onto the respondent's system had been written up by the safety representative and when they were found they had both the blue and white copies, when only the blue copy was required to be given to the safety representative.

50 The applicant maintains that he was not given a reasonable opportunity to respond to the allegations against him as he was not told in the letter from Mr Welten dated 9 November 2005 that he needed to provide a defence to any allegation of wrongdoing and the applicant was required by the respondent to prove his innocence yet he was not given the 23 incident reports relied upon by the respondent until two days before he was terminated.

51 The applicant claims that the respondent is ultimately responsible for ensuring that a safe system of work is in place and claims that the respondent's incident reporting system over which the applicant had no control was defective as it did not permit incident reports to be effectively dealt with and the respondent admitted that its incident reporting system was defective. This therefore meant that the applicant did not breach his duty of care. Even though some incident reports were not logged and some white copies of the incident reports that were logged were not found in the relevant employee's personnel files the applicant argues that this does not by itself constitute negligence on the part of the applicant.

52 The applicant maintains that Mr Welten was evasive and imprecise whilst giving evidence to the point of being obstructive and argues that the evidence given by Mr King should therefore be preferred where there is any conflict. The applicant also argues that an adverse inference should be drawn because of the respondent's failure to call Ms Halma and Mr Kennedy as witnesses (see *Jones v Dunkel & Anor* (1959) 101 CLR 298).

53 The applicant maintains that the respondent's decision to terminate him was excessive in all of the circumstances as he had given 11 years of good service at the Super Pit and the applicant argues that even if he was in any way responsible for the failure to log the incident reports there were no significant consequences for not doing so as nobody was hurt or exposed to risk, nothing was damaged or exposed to risk of damage and there was no loss of production. The applicant is seeking reinstatement to his position as supervisor without loss of continuity of service and asks that the respondent be ordered to pay compensation to the applicant of an amount to be agreed or to be determined by the Commission if agreement cannot be reached.

Respondent

54 The respondent submits that the applicant was not summarily dismissed. The respondent relies on *SA Ishmael v Turk Ellis Pty Ltd of Elverston Nominees* (1990) 70 WAIG 3532 and *Metal and Engineering Workers' Union - Western Australia v Hamersley Iron Pty Limited* (1993) 73 WAIG 1088 and the comments made by Fielding C, (as he then was) at 1090. There was also no dispute that the applicant was paid five weeks' pay in lieu of notice. The respondent also relies on *Dawn Elizabeth Harley v Jasgold Holdings T/A Ringcraft Jewellers* (2002) 82 WAIG 761 which demonstrates that a failure to give notice is of itself not sufficient to render a dismissal summary in the legal sense and the respondent relies on Clause 9 of the applicant's contract of employment which provides that termination may be effected by payment or forfeiture in lieu of notice.

55 The respondent maintains that even if the applicant was summarily terminated it was justified (see *V Peluso v Cadbury Schweppes Limited* [Print Q0665] AIRC 8 May 1998 and *Australian Workers' Union West Australian Branch Industrial Union of Workers v Hamersley Iron Pty Limited* (1981) 61 WAIG 791). The respondent maintains that the applicant did not deal properly with the incident reports in question when he failed to enter them onto the respondent's accident reporting system. The respondent argues that Mr Welten gave evidence that incident reports were important documents and the failure to log them over a significant period of time was serious and as the applicant was a supervisor occupying a position of responsibility and trust his accountability is even higher and therefore his summary termination was warranted.

56 The respondent argues that the applicant was aware of the existence of the 47 incident reports. The respondent maintains that there was evidence that a majority of the incident reports were found in the applicant's locker (filing cabinet) and there was also evidence that the applicant had entered some of the reports found among the bundles in his office. As there was evidence

that the majority of the incident reports were found in the applicant's locker bearing his name and as these bundles comprised entered and un-entered reports mingled together and the vast majority of these had been entered by the applicant for the applicant to claim that the incident reports that had not been logged had not been given to him must be rejected. Furthermore, as the applicant dealt with the majority of the entered incident reports it follows that the applicant was responsible for placing them where they were.

57 The respondent maintains that the applicant demonstrated disregard for the respondent's requirement that incident reports be logged onto its system and the white copy of the incident reports were required to be placed by him on the individual's personal file for their performance review, which did not occur. Mr King stated that he handed one of the incident reports to the applicant when he was his supervisor which was the correct procedure and the respondent maintains that ordinarily incident reports were handed to the supervisor and would only go to someone else in exceptional circumstances. The respondent therefore argues on the balance of probabilities that the report with Mr King's name on it was handed to the applicant and he has failed to enter it into the system.

58 The respondent maintains that a breach of safety policy is serious and relies on comments made by Kenner C in *Andrew Kenneth Blay v BHP Billiton, Nickel West, Kalgoorlie Nickel Smelter and Concentrator* (2006) 86 WAIG 3231 at 3234 he states:

> "The applicant, as with the respondent and all other employees and those working on the respondent's site, have duties both at common law and under statute to ensure as far as practicable, that the workplace is safe. Based on the evidence and the findings of fact that the Commission has made, I am satisfied on the balance of probabilities that the applicant clearly breached the Policy and prescribed testing procedures in permitting the Emergency Response and Security Officer concerned to return to work without a negative urine test result and a management plan prepared in conjunction with the Occupational Safety and Health Nurse."

59 The respondent denies that the applicant was unfairly dismissed as issues relevant to the incident reports had been put before the applicant and the un-entered incident reports had been provided to him and the respondent maintains that the applicant was given an adequate opportunity to put his side of the story as demonstrated by the transcripts of the meetings held with the applicant in early November 2005. There was no evidence to confirm the applicant's claim that he was dismissed because he refused to accept a demotion and the respondent claims that no adverse inference should be drawn by the failure to call Ms Halma and Mr Kennedy as the applicant's misconduct was established without their evidence.

60 The respondent argues that the applicant's reinstatement is inappropriate because the applicant and the respondent would be in dispute over the respondent's decision to demote the applicant if he was to return to work.

61 In conclusion the respondent submits that the applicant's dismissal was not summary in the legal sense whereby an onus of proof would be imposed on the respondent but even if this was not the case summary dismissal was warranted in this instance. The respondent therefore submits that this application be dismissed.

Findings and Conclusions

Credibility

62 I listened carefully to the evidence given by each witness and closely observed each witness. I found the applicant to be a credible witness. In my view the applicant gave his evidence honestly and to the best of his recollection and his evidence was in the main consistent. I also find that he had a detailed recollection about relevant events. I therefore accept the evidence given by the applicant.

63 I have concerns about some of the evidence given by Mr Welten. Mr Welten gave conflicting evidence at times and some of his evidence was vague and unconvincing. For example, Mr Welten gave contradictory evidence about whether or not he preferred Ms Halma's version of events about an incident report she claimed she handed to the applicant in preference to the applicant's recollection about this incident. In my view Mr Welten was unconvincing when giving evidence about his investigation into the incident reports. Mr Welten was unable to recall the names of approximately six employees he claimed he interviewed during the course of his investigation into the applicant's handling of the incident reports even though he was in charge of this investigation and he then stated that he took statements from two employees about the incident reports and when asked their names he stated that only one employee put his "name to paper" (see transcript p 93). Additionally, Mr Welten did not explain why only some of the 15 employees who had generated the unlogged reports had been interviewed.

64 I find that Mr King gave his evidence in a considered manner and in my view he was an honest and straightforward witness. I therefore accept his evidence.

65 As I have concerns about the reliability of the evidence given by Mr Welten particularly given the inconsistencies in his evidence and as parts of his evidence was unconvincing where there is any inconsistency in the evidence given by the applicant and Mr Welten I prefer the evidence given by the applicant. Given this conclusion I also give greater weight to the applicant's evidence than the evidence given by Mr Welten.

66 The applicant argues that the nature of the dismissal was summary and that the payment after termination of monies in lieu of notice does not alter the summary nature of the dismissal.

67 This dismissal was summary in nature. The onus is on the applicant to demonstrate that the dismissal was unfair on the balance of probabilities, however, there is an evidential onus upon the employer to prove that summary dismissal is justified (see *Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers* (1988) 68 WAIG 677 at 679). The question of whether a person is guilty of behaviour serious enough to justify summary dismissal is

essentially a question of fact and degree (*Robe River Iron Associates v Construction, Mining Energy, Timberyards, Sawmills and Woodworkers Union of Australia – Western Australian Branch & Ors* (1995) 75 WAIG 813 at 819). In most cases the employee should be given an opportunity to defend allegations made against them. In *Bi-Lo Pty Ltd v Hooper* (1992) 53 IR 224 at page 229 the Full Bench of the South Australian Commission observed:

> "Where the dismissal is based upon the alleged misconduct of the employee, the employer will satisfy the evidentiary onus which is cast upon it if it demonstrates that insofar as was within its power, before dismissing the employee, it conducted as full and extensive investigation into all of the relevant matters surrounding the alleged misconduct as was reasonable in the circumstances; it gave the employee every reasonable opportunity and sufficient time to answer all allegations and respond thereto; and that having done those things the employer honestly and genuinely believed and had reasonable grounds for believing on the information available at that time that the employee was guilty of the misconduct alleged; and that, taking into account any mitigating circumstances either associated with the misconduct or the employee's work record, such misconduct justified dismissal. A failure to satisfactorily establish any of those matters will probably render the dismissal harsh, unjust or unreasonable."

68 It was not in dispute that the applicant was required to cease working with the respondent at the time he was terminated on 11 November 2005 and the applicant was given a payment in lieu of notice around this time. The issue of whether a dismissal of this nature constitutes a summary termination or a termination on notice was canvassed by Smith C (as she was then) in *Thomas Howell v Barminco Pty Ltd* (2002) 82 WAIG 2528 at 2533:

> "Mr Gifford on behalf of the Respondent contends that the onus of proof that the Applicant was harshly, oppressively or unfairly dismissed lies on the Applicant as the Applicant's employment was terminated by the payment by the Respondent of pay in lieu of notice. In support of its submissions the Respondent relies upon the decision of the Full Bench in *Newmont Australia Ltd v Australian Workers' Union, West Australian Branch, Industrial Union of Workers* (1988) 68 WAIG 677. In that case the Full Bench of the Commission observed that where an employee's employment was terminated by summary dismissal there is an obligation upon the employer to show on balance that misconduct had in fact occurred. The Respondent contends that in this case the Applicant was not dismissed for misconduct but for poor performance so the nature of the termination was not summary. In *The Federated Miscellaneous Workers' Union of Australia, WA Branch v Cat Welfare Society Incorporated* (1991) 71 WAIG 2014 at 2019 Sharkey P and Gregor C observed—
>
> > "It seems to us that whether a dismissal has occurred in circumstances where pay in lieu of notice is made, that the question is one of mixed fact and law as to whether what occurred was a summary dismissal or not.
> >
> > One consideration is that it depends whether such payment is permissible. That in turn depends on the contract and its construction (see Macken J J, McCarry G and Sappideen C "The Law of Employment", 3rd Edition, pages 170-172). In some industries, also, it might be said to be a custom. If then, a payment in lieu of notice were not provided for in the contract, then proper notice has to be given or there is a summary dismissal. The same would apply if there were no custom or usage.
> >
> > It follows that a summary dismissal, as a matter of fact and law, cannot be altered in its nature by payment in lieu of notice."

Smith C (as she was then) also observed:

> "More recently in *Sanders v Snell* [1998] HCA 64 at [16]; (1998) 196 CLR 329 at 337 Gleeson CJ, Gaudron, Kirby and Hayne JJ held that where there is no condition in a contact of employment for payment in lieu of notice, the employer is in breach of the contract if the employer does not give the employee requisite notice of termination. In that case there was a written contract of employment which specified a period of notice to be given.
>
> It is apparent that the Applicant was not immediately paid pay in lieu of notice as he initially made a claim in his application for such a payment. Further, for the reasons set out below I am of the view that the Applicant's termination was sudden and unexpected. It is my view that the Applicant was summarily terminated and the onus of proving the circumstances justifying the termination rests upon the Respondent."

69 On the evidence before me I am unable to conclude that the payment in lieu of notice given to the applicant at termination was in breach of his contract of employment with the respondent as at the date of his termination and therefore unlawful. The applicant did not provide any evidence confirming the details of his contractual arrangements with the respondent and the only documentation given to the Commission about this issue was forwarded to the Commission, by consent, subsequent to the hearing. These documents include a letter of offer of employment to the applicant dated 6 August 1999, a copy of the applicant's Workplace Agreement that expired on 1 October 2004 and a copy of a certified agreement that came into force on 23 February 2005 which did not apply to the applicant's position as a shift supervisor. When the applicant was promoted to the position of shift supervisor on a permanent basis he was notified that his conditions of employment remained unchanged and as nothing was provided to the Commission to suggest otherwise I find that the applicant's conditions of employment at the time he commenced employment with the respondent applied to the applicant at termination. The offer of employment to the applicant dated 6 August 1999, which was accepted by the applicant, included a range of conditions of employment and Clause 9 of this offer states the following:

> "**Termination**
>
> Termination of employment may be effected by either party at any time with four (4) weeks (sic) written notice, or by the payment, or forfeiture of four (4) weeks' pay in lieu of notice, as the case may be.

The employer reserves the right of termination without notice as a result of gross misconduct".

(Exhibit R3)

As the applicant's contract of employment confirms that he could be terminated with a payment in lieu of notice and as the applicant was given a payment in lieu of notice when he was terminated I therefore find that the applicant was not summarily terminated.

70 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.

71 Paragraph 2 and 3 set out the background to this application and the applicant's employment with the respondent.

72 It was not in dispute and I find that the applicant commenced employment with the respondent on 1 October 1999 after he had been working at the respondent's Super Pit mine site in Kalgoorlie with a contractor since 1994 and in July 2003 the applicant was promoted to the position of Shift Supervisor and in this role he supervised approximately 55 employees. There was no evidence and I find that the applicant was not the subject of any disciplinary incidents or was he subject to any counselling for poor performance or inappropriate conduct prior to his termination on 11 November 2005 and I also find that the respondent valued the applicant's contribution as an employee as confirmed in letters the respondent gave to the applicant when granting him successive wage increases in the years prior to his termination which were forwarded to the Commission subsequent to the hearing.

73 I accept that after an incident involving the applicant occurred at the PSI meeting on the night shift on 5 September 2005 the applicant was told by the respondent to take leave and when the respondent advised the applicant that after his return from annual leave on 1 November 2005 he would be demoted to the position of shovel operator, during his period of leave the applicant sought to have this decision overturned by invoking the respondent's grievance policy. I find that when the applicant returned to work on 1 November 2005 he was stood down with pay and told to attend a meeting with the respondent on 2 November 2005, which the applicant did and I find that the applicant was not given any details about the nature of this meeting or that it would be a disciplinary meeting. I find that two further meetings were then held between the applicant and the respondent on 4 November 2005 and 11 November 2005 where a range of issues were discussed and the applicant was put on notice about whether he should remain as a supervisor with the respondent. It was not in dispute and I find that the applicant was terminated after a short break during the meeting held on 11 November 2005.

74 The applicant's letter of termination reads as follows (formal parts omitted):

"I refer to my letter of 9 November, (sic) 2005 and our subsequent meeting of 11 November, (sic) 2005, and confirm my verbal advice to you that as a result of the recent investigation into your failure to process and act upon a number of Incident, Hazard or Near Miss Reports, your employment with this company is terminated effective 11 November, 2005.

You will be paid four (4) weeks in lieu of notice and all outstanding entitlements at your current supervisory rate of pay.

As advised to you, the company will provide outplacement counselling services, and you should contact Dianne Stanton on 90221181 in this regard.

Please contact Linda Richards on 90221184 to arrange finalisation of superannuation matters, etc."

(Exhibit A12)

75 At the hearing Mr Welten stated that the applicant was terminated because he mishandled 47 incident reports which were in a location for which he was responsible. Mr Welten stated the following:

"How do you know they were plainly visible?---Because where (sic) they were found.

Where were they found?---In his office, in the desk of his office."

(Transcript pp 100-101)

76 Prior to the applicant being terminated on 11 November 2005 Mr Welten wrote to the applicant on 9 November 2005 and attached to this letter were copies of the 23 incident reports which had not been logged onto the respondent's system (see Exhibit A5 paragraph 12). After receiving Mr Welten's letter dated 9 November 2005 the applicant responded by letter dated 11 November 2005 which was given to Mr Welten at the outset of this meeting (see Exhibit A7 paragraph 12).

77 After carefully considering all of the evidence relevant to this matter I find that the applicant did not breach his contract of employment by failing to log 23 incident reports onto the respondent's system and neglecting to file the 47 incident reports the respondent claimed were found in the applicant's desk and I find that the respondent did not conduct a full and appropriate investigation into the 47 incident reports and whether or not they were given to the applicant. I am also of the view and I find

that the applicant was denied procedural fairness and natural justice given the way in which the respondent raised issues with the applicant about the 47 incident reports and given the manner of his termination.

78 I understand from the applicant's letter of termination and the evidence given by Mr Welten that the respondent terminated the applicant because 47 incident reports were found in the applicant's desk in his office and the white copy of these incident reports had not been placed on the relevant employee's file. The applicant was also terminated because he failed to log 23 of these reports onto the respondent's computer system.

79 As I accept the applicant's evidence and give his evidence greater weight than the evidence given by Mr Welten I find that the applicant's claim that he was not given the 23 incident reports that were not entered onto the respondent's computer system is plausible and I reject the respondent's claim that the applicant breached the respondent's safety requirements by mishandling the 47 incident reports found in his office sufficient to warrant termination.

80 I have reached these conclusions for a number of reasons. The applicant consistently denied that the 23 unlogged incident reports were given to him and he suggested a range of reasons as to why these incident reports were not handed to him. I accept the applicant's evidence that incident reports generated by employees on his shift were sometimes given to a relieving shift supervisor, leading hand or the shift supervisor on the next shift and I therefore find that it is possible that from time to time these incident reports may not have been handed on to the applicant by these employees and this may well explain why the applicant was not given the 23 unlogged incident reports. Even though the 23 unlogged incident reports were found in the applicant's office they could have been given to the safety representative to hand on to the applicant at some future point as the safety representative kept a bundle of incident reports in his filing cabinet and a number of the incident reports found in the applicant's office which could have come from the safety representative's filing cabinet had both the blue and white copies together. In reaching the view that it is highly likely that the applicant was not given the 23 unlogged incident reports I also take into account that the applicant was not at work when seven of the unlogged incident reports were generated by employees on his shift and it was also the case that incident reports from employees on the applicant's shift were sometimes given to other employees who then logged them on to the respondent's system as Mr Welten confirmed that not all of the logged incident reports found in the applicant's office with the applicant's name on them were logged onto the respondent's system by the applicant. The applicant gave evidence that some of the incident reports with his name on had "Done" written on them which was not written by him which suggests that they were given to someone else who then logged them onto the respondent's system and the applicant stated that he was sometimes given incident reports by employees who were not on his shift and then logged these incident reports onto the respondent's system which indicates that incident reports were not always given to an employee's supervisor to log on to the respondent's system.

81 As two lots of incident reports were found in the applicant's office, one in the safety representative's filing cabinet and the other in the applicant's filing cabinet, and as these bundles were not kept in separate lots when they were reviewed by Mr Welten I cannot conclude that any of the unlogged incident reports were in the bundle of incident reports that were found in the applicant's filing cabinet. Mr King gave evidence that two bunches of incident reports were found in the applicant's office when a person on light duties was asked to tidy up the applicant's office. One lot was found in the applicant's filing cabinet and the other was located in the filing cabinet where the safety representative kept his equipment. Additionally, the applicant confirmed that the safety representative kept incident reports in his locker/filing cabinet:

"Tom	What locker were they in when you walk in the door? Were they in the safety reps locker?
Interviewer	I don't know which one. No, it was in your desk.
Tom	In my locker?
Interviewer	In your area. I'm not sure where
Tom	In my office?
Interviewer	Yeah
Tom	But it wasn't in my locker. What happened is that the safety rep has a locker, right. He has a locker which, which he takes the hazard reports or we put them in a bag. Right, his copies of his hazard reports.
Interviewer	What kind of bag?
Tom	Oh he has a clear plastic bag. And I'd say that's the locker that you've gone through"

(Exhibit A2 p 12)

82 In reaching the conclusion that it is highly likely that the applicant was not given the 23 unlogged incident reports I take into account that the applicant denied ever receiving these reports and no employee who generated the 47 incident reports gave evidence that the incident report they generated was handed to the applicant. The respondent chose not to call Ms Halma and Mr Kennedy to give evidence to confirm that they gave their unlogged incident reports to the applicant and as I have confidence in the veracity of the evidence given by the applicant I find that he was not given these reports. I find Mr Welten's claim that approximately six employees who wished to remain anonymous, out of a total of 15 different employees who had generated the 23 unlogged incident reports, had told him that they had given these incident reports to the applicant to be vague and unsubstantiated hearsay evidence as opposed to the applicant's direct denial that he had been given these reports (see transcript of meeting 2 November 2005 - Exhibit A2 p 12). Mr King did not given evidence confirming that he gave the unlogged incident report with his name on it to the applicant when giving evidence to the Commission and I also note that Mr King gave evidence that if an incident report was handed to him when he was the relieving supervisor in the applicant's

absence he would pass these reports on to the applicant for logging onto the system when the applicant returned to duty, however this may not have been the practice of other relieving supervisors or the leading hands and the safety representative on the applicant's shift who were sometimes given the white copy of incident reports.

83 I accept the applicant's claim and I find that he always responded to safety issues raised with him either verbally or via an incident report and that he dealt with urgent safety issues straight away and it was his usual practice to log all incident reports given to him onto the respondent's system and then place the incident report in the relevant employee's file. I also accept the applicant's evidence that if he failed to deal with a safety matter which required immediate attention including issues raised in some of the 23 unlogged incident reports, these issues should have been raised via a further incident report by employees on the next shift and should have therefore been entered onto the respondent's system and found by Mr Welten when he was investigating whether the 47 incident reports had been logged onto the respondent's system.

84 In my view the respondent's claim that it regarded the mishandling of the incident reports as a serious issue lacks substance. I find that the respondent did not follow up the 47 incident reports that were discovered in the applicant's office in a timely manner as Mr King discovered the incident reports in the applicant's office in two lots soon after the applicant went on annual leave on 9 September 2005 and then gave them to Mr Quartermaine however Mr Welten did not initiate an investigation into these reports until the end of October 2005 (see Exhibit A5 attachment 1). Even though I accept that the respondent regards all safety breaches as being serious I find that the respondent did not have a clear and established procedure for processing its incident reports as there was evidence confirming that employees adopted a range of different practices when generating, passing on and logging incident reports and Mr King was not even trained to log these reports onto the respondent's computer system when he was a relieving supervisor.

85 It may be the case that the incident reports found in the applicant's desk (an unspecified number but no more than 24) were not placed in the relevant employee's file in preparation for an employee's six monthly review however I consider that the applicant's omission in not filing possibly up to 24 incident reports does not warrant disciplinary action being taken against him. In reaching this view I take into account the applicant's evidence that he received and processed approximately three to four incident reports a day which meant that the applicant dealt with and filed a substantial number of incident reports in his role as a supervisor over two years and there was no evidence that the respondent had any issues with the way in which the applicant handled incident reports prior to him commencing annual leave on 9 September 2005. When taking into account all of the circumstances of this case and when applying the relevant authorities I find that this omission did not constitute sufficient reason for terminating the applicant.

86 I have concerns about the way in which the respondent undertook its investigation into the incident reports and I am of the view that the limited investigation undertaken by the respondent into the incident reports fell well short of what was required of it given the issues surrounding this case.

87 After the applicant was told by Mr Welten that 23 unlogged incident reports had been found in his desk he strongly and consistently denied that he had been given these reports and the applicant gave the respondent details about when he was not working when some of the unlogged incident reports were generated and why he may not have been handed these incident reports by other employees including leading hands, the safety representative and the relieving shift supervisor. Given the applicant's unblemished service to the respondent spanning many years and his emphatic denials that he had been given the 23 incident reports as well as the number of incident reports that the applicant appropriately handled in his two years as a supervisor it is my view that it was incumbent upon the respondent to fully investigate whether or not the applicant had been given these incident reports. I find that the respondent should have interviewed the employees who had generated the 47 incident reports to be satisfied that all of the incident reports had in fact been given to the applicant. Even though 18 employees generated the 47 incident reports and fifteen of these employees generated the unlogged incident reports Mr Welten claimed that he spoke to only six of these employees. Mr Welten did not interview Ms Halma about the incident reports she claimed the applicant had not logged on to the system after the applicant emphatically and consistently denied that he had been given these reports and only one person, Mr Kennedy, gave Mr Welten a statement which was not tendered as evidence about his unlogged incident report. There was no evidence that Mr Welten had any discussions with the safety representative to clarify why his name was on some of the incident reports that had not been logged onto the respondent's system and to clarify why he may have retained the white copy of incident reports in his locker and Mr Welten did not investigate exactly where the incident reports were found in the applicant's office as he gave evidence that all of the incident reports had been found in the applicant's desk which was incorrect.

88 The transcript of the meeting held on 11 November 2005 confirms that the respondent was given and read the applicant's letter dated 11 November 2005 whereby he responded in detail about the circumstances surrounding some of the 23 unlogged incident reports however notwithstanding this information the respondent failed to verify or investigate the applicant's response. I accept that the details of the applicant's response to Mr Welten's letter dated 9 November 2005 were discussed at the meeting held on 11 November 2005 however this discussion was brief and in my view did not adequately explore the issues raised by the applicant in his defence. Specifically, the applicant told Mr Welten that he was not on site on the day three incident reports that he was accused of not logging onto the system, one incident report had Mr King's name on it and he again stated that he had never received the incident report generated by Ms Halma and he confirmed that some of the incident reports which had "Done" written had not been written by him yet no action was taken by the respondent to investigate these issues further. Even though Mr Welten gave evidence that he took these matters into account when determining whether or not the applicant should be terminated I am not convinced that this was the case given my views on witness credit and given the wording of the applicant's letter of termination which does not mention the possibility that the applicant was not given all of the 47 incident reports.

89 I find that the applicant was denied procedural fairness and natural justice given the way in which the applicant was interviewed about the incident reports. Specifically I find that the applicant was not given an adequate opportunity to respond to the claim that he had inappropriately handled the 47 incident reports given the way in which the meetings held on 2 and 4 November 2005 were conducted and I find that the first two meetings held on 2 and 4 November 2005 were not structured in such a way to put the applicant on notice that his ongoing employment with the respondent was at risk for mishandling these reports. The meeting held on 2 November 2005 concentrated in the main on the grievance lodged by the applicant with respect to an allegation that he had abused staff members at the PSI meeting on 5 September 2005 and even though I accept that the respondent told the applicant at this meeting about a number of incident reports that had not been properly processed by him most of the discussion centred on a near miss with "the shovel 105" and an incident report filled out by Ms Halma about this incident and her claim that she had generated an incident report and had given it to the applicant. It is also clear from correspondence from the applicant following this meeting that the applicant's main concern was his foreshadowed demotion (see Exhibit A6 paragraph 13). Furthermore, the respondent did not tell the applicant at this point that the applicant had to convince the respondent that he should not be terminated because he had mishandled 47 incident reports. At the second disciplinary meeting held on 4 November 2005 the respondent did not put the applicant on notice until the end of this meeting that his ongoing employment with the respondent may be at risk as the discussions mainly centred on the applicant's foreshadowed demotion and his behaviour at the PSI meeting he had with employees on his shift on 5 September 2005 (Exhibit A3). It was only after this meeting that the respondent sought to separate the issues surrounding the applicant's demotion and the discovery of the 47 incident reports in the applicant's office as confirmed in Mr Welten's letter to the applicant dated 9 November 2005 (see Exhibit A5). I find that it was only after the applicant received this letter from Mr Welten, along with the 23 unlogged incident reports, that the applicant was squarely put on notice that the issue of concern to the respondent was the applicant's handling of the 47 incident reports and the applicant was only then given a proper opportunity to give a response to the respondent about the unlogged incident reports in particular which he did so by letter dated 11 November 2005.

90 I am of the view and I find that the applicant was not given sufficient opportunity to put his case to the respondent as a number of false claims were made about the incident reports by the respondent during the meetings held on 2, 4 and 11 November 2005. Specifically I find that the applicant was given inaccurate information by Mr Welten about where the incident reports were found in his office, the applicant was incorrectly told by Mr Welten that his name was on all incident reports and the applicant was also incorrectly advised by the respondent that he was working on the dates the 23 unlogged incident reports were generated.

91 During the first interview on 2 November 2005 the respondent claimed that the 47 reports in question were found in the applicant's desk, which was contrary to the evidence given by Mr King, which I accept, and that these reports had his name on them. The interviewer stated the following:

"Interviewer	I think you might have started digging the hole. In the processes of going through; and it was triggered by the letter, and we said, well we need to make sure that we've got everything, as we said, the ducks in a row and get everything clear. So we actually went up and went through your desk and we found 47 reports in there (my emphasis). In either a plastic envelope or in the drawer. 23 of those had not been processed (my emphasis). So that means that they just don't exist in our system. We can't find them; we've checked. We can't find anything that even closely resembles them we've gone ten days either side just to make sure that it hasn't been put in the wrong date, and there are 23 of those 47 that just never made it into the system.
Tom	23 of the 47?
Interviewer	Yeah
Tom	Yeah. And were they in, were they given to me.
Interviewer	Yes, they had your name on them (my emphasis). This is the ones that we found that had your name on them."

(Exhibit A2 page 10)

92 The interviewer then also falsely claimed that the applicant was working on shift on the dates the 23 unlogged incident reports were generated. The interviewer stated the following:

"Interviewer	reports, hazard reports. And you were on shift on the dates of the – I mean, we checked (my emphasis).
Tom	Yeah
Interviewer	You were on shift. You were the supervisor on the day and you haven't processed those yet. and (sic) they just haven't been processed through the (sic)"

(Exhibit A2 page 11)

93 At the meeting held on 11 November 2005 Mr Welten falsely stated that witnesses had made statements that the 23 incident reports had been given to the applicant when his evidence at the hearing was that only one employee, Mr Kennedy had made a statement (see paragraph 38). Mr Welten stated the following:

> "But given that these were found in an area that you worked in and that it contained the ones that included the ones that were – statement from the witnesses that they were handed to you was well lead me to believe that they were in fact through your possession. The, you know, therefore the inaction of them. I mean, some of these went back to January. How is it that you could have done the performance review of these people and not having filed in the appropriate place?"
>
> (Exhibit A8 page 2)

94 In the circumstances I conclude that the applicant was unfairly terminated on the basis that the respondent did not have sufficient reason to terminate him, the respondent failed to conduct an adequate investigation into the 47 incident reports and because the applicant was denied procedural fairness and natural justice given the process leading up to and the manner of his termination. He was not given a fair go all round *Undercliffe Nursing Home v Federated Miscellaneous Workers Union of Australia, Hospital Service and Miscellaneous WA Branch* (op cit).

Reinstatement

95 The applicant is seeking reinstatement. The respondent opposes this course of action and argues that the applicant should not be reinstated on the basis that if he was to return to work with the respondent he would be demoted to the position of shovel operator.

96 The applicant has a duty to mitigate his loss however the onus of proof of failure to mitigate loss is on the respondent (see *Growers Market Butchers v Backman* (1999) 79 WAIG 1313. I find on the evidence that the applicant has met the requirement on him to mitigate his loss as I accept that he made genuine efforts to obtain alternative employment after his termination as he obtained ongoing employment with a number of employers shortly after he was terminated and he continued to be in employment up to the date of hearing.

97 The onus is on the respondent to establish that reinstatement or re-employment is impracticable (*Quality Bakers of Australia Ltd v Goulding* (1995) 60 IR 327; *Gilmore v Cecil Bros & Ors* (1996) 76 WAIG 4434 and (1998) 78 WAIG 1099). It is my view that in all of the circumstances the applicant should be reinstated to his former position with the respondent as I find that there is no evidence that the applicant's reinstatement is impracticable.

98 I have already found that the applicant has an unblemished record with the respondent and I accept the applicant's evidence that he was a diligent employee and that he dealt with safety issues promptly and appropriately and it was also the case that the applicant regularly handled and filed a significant number of incident reports in the required manner prior to this incident occurring. I find that within this context the applicant's apparent failure to file up to a maximum of 24 incident reports on employee's personal files is not an impediment to the applicant's reinstatement, particularly given the respondent's lax processes and procedures with respect to how incident reports in general were handled by a number of the respondent's employees. The only argument raised by the respondent about the impracticability of the applicant being reinstated was its claim that the applicant would be demoted if this was to occur. In my view this is a separate issue to this application but on the limited evidence before the Commission about the applicant's foreshadowed demotion and the reasons for this occurring I am not persuaded that this precludes the applicant from returning to his position as shift supervisor. In the circumstances I propose to issue an order that the applicant be reinstated to his former position as a shift supervisor with the respondent as at the time of his termination.

99 In addition to an order for reinstatement, pursuant to s23A(5) of the Act I will order that the respondent pay the applicant a sum of money being the remuneration that the applicant would have earned from his date of termination on 11 November 2005 less any wages and other entitlements paid to the applicant from the date of his termination up to the date of his reinstatement. I will also order that the respondent reinstate the applicant's accrued entitlements from the date of his termination and that his service with the respondent be regarded as continuous for all purposes, including long service leave.

2007 WAIRC 01142

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THOMAS QUINN
	APPLICANT
	-v-
	KALGOORLIE CONSOLIDATED GOLD MINES PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 3 OCTOBER 2007
FILE NO/S	U 260 OF 2005
CITATION NO.	2007 WAIRC 01142
Result	Upheld and Order Issued

Order

WHEREAS on 21 September 2007 the Commission issued Reasons for Decision and a Minute of Proposed Order in relation to this matter and the parties were to contact the Commission by 4.00pm on 28 September 2007 if they required a speaking to the minutes; and

WHEREAS on 28 September 2007 the applicant's representative advised the Commission that the applicant would seek to utilise the liberty to apply provision once the order had issued to have Order 2 varied to provide for him to be reinstated within six weeks of the date of the order; and

WHEREAS the respondent agreed to the amendment being sought by the applicant and advised the Commission that it was not seeking a speaking to the minutes; and

WHEREAS the Commission took the parties correspondence as being a speaking to the Minute of Proposed Order; and

WHEREAS having considered the correspondence of both parties the Commission is of the view that Order 2 should be amended to read that the applicant be reinstated within six weeks of the date of the order;

HAVING HEARD Mr G McCorry as agent on behalf of the applicant and Mr A Cameron as agent on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby:

1. DECLARES that the dismissal of Thomas Quinn by the respondent was unfair.
2. ORDERS that Mr Quinn be reinstated to his former position with the respondent as if his contract of employment had not been terminated on 11 November 2005 within six (6) weeks of the date of this order.
3. ORDERS that the respondent reinstate Mr Quinn's accrued entitlements and that his service with the respondent be regarded as continuous for all purposes including long service leave.
4. ORDERS that the respondent pay Mr Quinn a sum of money as agreed between the parties being the remuneration that he would have earned from the date of his dismissal on 11 November 2005 less any wages and other entitlements paid to him during the period 11 November 2005 up to the date of his reinstatement within 14 days of the date of this order.
5. THAT there be liberty to apply within seven (7) days in respect to Order 2 and Order 4.

(Sgd.) J L HARRISON,
[L.S.] Commissioner.

2007 WAIRC 01205

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MELISSA LEE STANKOVIC
	APPLICANT
	-v-
	MOVEWELL PTY LTD ACN 100 277 405 T/AS MOVEWELL PHYSIOTHERAPY
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	THURSDAY, 1 NOVEMBER 2007
FILE NO	B 494 OF 2006
CITATION NO.	2007 WAIRC 01205

Result	Application discontinued
Representation	
Applicant	Mr C Fayle as agent
Respondent	Mr T Smetana of Counsel

Order

WHEREAS this is an application pursuant to section 29(1)(b)(ii) of the Industrial Relations Act 1979; and

WHEREAS the applicant advised the Commission on 16 October 2007 that she wanted to discontinue the application; and

WHEREAS the parties have waived their rights to speak to the Minutes of Proposed Order pursuant to s.35(4) of the Industrial Relations Act 1979;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders -

THAT the application be and is hereby discontinued.

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

2007 WAIRC 01219

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	YVETTE CHRISTINE TURNER
	APPLICANT
	-v-
	ELISABETH MALISA KNIGHT T/A HUNTINGDALE VETINARY (SIC) CENTRE
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 7 NOVEMBER 2007
FILE NO/S	U 128 OF 2007
CITATION NO.	2007 WAIRC 01219

Result	Discontinued
Representation	
Applicant	Ms R Sinton
Respondent	Ms E Knight

Order

WHEREAS this is an application pursuant to s29(1)(b)(i) of the Industrial Relations Act 1979; and

WHEREAS on 21 September 2007 the Commission convened a conference for the purpose of conciliating between the parties, however, agreement was not reached; and

WHEREAS the application was set down for hearing and determination on 8 and 9 November 2007; and

WHEREAS on 24 October 2007 the applicant's representative advised the Commission by e-mail that the parties had reached an agreement and the hearing was vacated; and

WHEREAS on 5 November 2007 the applicant filed a Notice of Discontinuance in respect of the application; and

WHEREAS on 7 November 2007 the respondent consented to the matter being discontinued;

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

THAT this application be, and is hereby discontinued.

(Sgd.) J L HARRISON,
[L.S.] Commissioner.

2007 WAIRC 01204

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NADIA VOIGT
	APPLICANT
	-v-
	CHRISTIE WHYTE MOORE
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	THURSDAY, 1 NOVEMBER 2007
FILE NO	U 129 OF 2007
CITATION NO.	2007 WAIRC 01204

Result Application discontinued

Order

WHEREAS this is an application pursuant to section 29(1)(b)(i) of the Industrial Relations Act 1979; and

WHEREAS the applicant advised the Commission on 18 October 2007 that she wanted to discontinue the application; and

WHEREAS the parties have waived their rights to speak to the Minutes of Proposed Order pursuant to s.35(4) of the Industrial Relations Act 1979;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders -

THAT the application be and is hereby discontinued.

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

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Health Services Union of Western Australia (Union of Workers)	Director General of Health in right of the Minister for Health as the Metropolitan Health Service at Path West Laboratory Medicine WA	Scott C	PSAC 17/2007	11/05/2007	dispute in relation to classification levels of Laboratory Technicians and Technical Assistants	Concluded
Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Robert Duval Foods	Harrison C	CR 59/2006	N/A	Alleged unfair dismissal	Discontinued
The Civil Service Association of Western Australia Incorporated	Chief Executive Officer, Government Employees Superannuation Board of Western Australia	Scott C	PSAC 35/2007	N/A	Dispute re Fixed-Term Contract employment	Concluded

Parties		Commissioner	Conference Number	Dates	Matter	Result
The Civil Service Association of Western Australia Incorporated	A/Director General Department of Environmental and Conservation	Scott C	PSAC 33/2007	17/09/2007	Dispute re application of modes of employment	Concluded
The Civil Service Association of Western Australia Incorporated	Dental Health Services (ABN 13 993 250 709)	Scott C	PSAC 38/2007	N/A	Dispute in relation to back payment of Uniform and Laundry allowances.	Concluded

PROCEDURAL DIRECTIONS AND ORDERS—

2007 WAIRC 01152

TRANSPORT WORKERS (GOVERNMENT) AWARD, 1952

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES DEPARTMENT OF CONSUMER AND EMPLOYMENT PROTECTION

APPLICANT

-v-

TRANSPORT WORKERS UNION OF AUSTRALIA

RESPONDENT

CORAM SENIOR COMMISSIONER J H SMITH

DATE FRIDAY, 5 OCTOBER 2007

FILE NO/S APPL 927 OF 2005

CITATION NO. 2007 WAIRC 01152

Result Order issued to amend the name of the Applicant and the name of the Respondent

Representation

Applicant Mr R Heaperman as agent

Respondent Mr N J Hodgson

Order

HAVING heard Mr R Heaperman as agent on behalf of the Applicant and Mr N J Hodgson on behalf of the Respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

(1) THAT the name of the Applicant be deleted and that be substituted therefor the name, Minister for Agriculture and Food and Others; and

(2) THAT the name of the Respondent be deleted and that be substituted therefor the name, Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch.

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

2007 WAIRC 01163

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHARLENE BYSOUTH
	APPLICANT
	-v-
	DONNELLY RIVER WINES
	RESPONDENT
CORAM	SENIOR COMMISSIONER J H SMITH
DATE	FRIDAY, 12 OCTOBER 2007
FILE NO/S	B 92 OF 2007
CITATION NO.	2007 WAIRC 01163

Result	Order issued to amend the name of the Respondent
Representation	
Applicant	In person
Respondent	Mr S Heathcote (of counsel)

Order

HAVING heard the Applicant in person and Mr Heathcote 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, Carmelo Borrello and Margaret Jean Borrello both as trustee for The C & M J Borrello Family Trust trading as Donnelly River Wines.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Australian Workers Union and Department of Environment and Conservation Visitor Centres Industrial Agreement 2007 AG 50/2007	26/10/2007	The Department of Conservation and Environment	The Australian Workers' Union, West Australian Branch, Industrial Union of Workers	Commissioner S Wood	Agreement registered
Beehive Montessori School (Enterprise Bargaining) Agreement 2007 AG 61/2007	1/11/2007	The Independent Education Union of Western Australia, Union of Employees and Beehive Montessori School	(Not applicable)	Commissioner S Wood	Agreement registered
WA Health - LHMU - Support Workers Industrial Agreement 2007 AG 59/2007	12/10/2007	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	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Commissioner S Wood	Agreement registered

NOTICES—Appointments—

2007 WAIRC 01228

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, Commissioner SM Mayman to be an additional Public Service Arbitrator for a period of one year from the 9th day of November, 2007.

Dated the 9th day of November, 2007.

CHIEF COMMISSIONER A.R. BEECH

2007 WAIRC 01229

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, Commissioner S Wood to be an additional Public Service Arbitrator for a period of one year from the 9th day of November, 2007.

Dated the 9th day of November, 2007.

CHIEF COMMISSIONER A.R. BEECH

RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 6/2007	Lisa Byrne	North Metropolitan Area Health Service	Scott C	Reclassification appeal dismissed	14/11/2007
PSA 8/2007	Robert William Boag	North Metropolitan Area Health Service	Scott C	Reclassification appeal dismissed	7/11/2007
PSA 10/2007	Errol Phillip Tweedie	North Metropolitan Area Health Service	Scott C	Reclassification appeal dismissed	7/11/2007
PSA 11/2007	Lewis Chung	North Metropolitan Area Health Service	Scott C	Reclassification appeal dismissed	7/11/2007
PSA 12/2007	Barbara Margetts	North Metropolitan Area Health Service	Scott C	Reclassification appeal dismissed	7/11/2007
PSA 13/2007	Roger Dawson Campbell	North Metropolitan Area Health Service	Scott C	Reclassification appeal dismissed	7/11/2007
PSA 14/2007	John Lockwood	North Metropolitan Area Health Service	Scott C	Reclassification appeal dismissed	7/11/2007