



Western Australian Industrial Gazette

PUBLISHED BY AUTHORITY

Sub-Part 4

WEDNESDAY 23 APRIL, 2008

Vol. 88—Part 1

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

88 W.A.I.G.

CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

PUBLIC SERVICE ARBITRATOR—Awards/Agreements—Variation of—

2008 WAIRC 00164

EDUCATION DEPARTMENT MINISTERIAL OFFICERS SALARIES ALLOWANCES AND CONDITIONS AWARD 1983 NO 5 OF 1983

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

DEPARTMENT OF EDUCATION AND TRAINING

RESPONDENT

CORAM

PUBLIC SERVICE ARBITRATOR

COMMISSIONER S WOOD

DATE

FRIDAY, 14 MARCH 2008

FILE NO

P 26 OF 2007

CITATION NO.

2008 WAIRC 00164

Result Award varied

Representation

Applicant Mr M Sims

Respondent Mr A Harper

Order

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

THAT the Education Department Ministerial Officers Salaries Allowances and Conditions Award 1983 No 5 of 1983 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.

[L.S.]

(Sgd.) S WOOD,
Commissioner,
Public Service Arbitrator.

SCHEDULE

1. **Schedule G – Overtime Allowance: Delete Part 1 – Out of Hours Contact of this schedule and insert the following in lieu thereof:**

PART I - OUT OF HOURS CONTACT

(Operative from first pay period on or after 14 March 2008)

Standby	\$7.41 per hour
On Call	\$3.71 per hour
Availability	\$1.85 per hour

2008 WAIRC 00171

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

RESPONDENTS

CORAM

PUBLIC SERVICE ARBITRATOR

COMMISSIONER S WOOD

DATE

FRIDAY, 14 MARCH 2008

FILE NO

P 25 OF 2007

CITATION NO.

2008 WAIRC 00171

Result Award varied
Representation**Applicant** Mr M Sims**Respondents** Mr A Harper*Order*

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

THAT the Government Officers Salaries, Allowances and Conditions Award 1989 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,
Commissioner,
Public Service Arbitrator.

[L.S.]

SCHEDULE

1. **Schedule I – Clause 22 – Overtime Allowance: Delete Part 1 – Out of Hours Contact of this schedule and insert the following in lieu thereof:**

PART I - OUT OF HOURS CONTACT

(Operative from first pay period on or after 14 March 2008)

Standby	\$7.41 per hour
On Call	\$3.71 per hour
Availability	\$1.85 per hour

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

2. Schedule K – Shift Work Allowance: Delete this schedule and insert the following in lieu thereof:

SCHEDULE K - SHIFWORK ALLOWANCE

A shift work allowance of \$17.04 is payable for each afternoon or night shift of seven and one half (7.5) hours worked.

The shift work allowance calculation is 12.5% of the daily salary rate for a Level 1, Year 7 officer.

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

(Operative from first pay period on or after 14 March 2008)

3. Schedule L – Other Allowances: Delete this schedule and insert the following in lieu thereof:

SCHEDULE L OTHER ALLOWANCES

- (1) Diving - (Clause 44)
\$5.94 per hour or part thereof.
- (2) Flying - (Clause 45)
 - (a) Observation and photographic duties in fixed wing aircraft - \$10.97 per hour or part thereof.
 - (b) Cloud seeding and fire bombing duties, observation and photographic duties involving operations in which fixed wing aircraft are used at heights less than 304 metres or in unpressurised aircraft at heights more than 3048 metres - \$15.04 per hour or part thereof.
 - (c) When required to fly in a helicopter on fire bombing duties, observation and photographic duties or stock surveillance - \$20.79 per hour or part thereof.
- (3) Sea-Going Allowances (Clause 51)
 - (a) Victualling
 - (i) Government Vessel - meals on board not prepared by cook - \$27.98 per day.
 - (ii) Government Vessel - meals on board are prepared by a cook - \$21.06 per day.
 - (iii) Non Government Vessel - \$25.54 each overnight period.
 - (b) Hard Living Allowance - 58 cents per hour or part thereof.

(Operative from first pay period on or after 14 March 2008)

4. Clause 55 – Mortuary Allowance: Delete this clause and insert the following in lieu thereof:

55. – MORTUARY ALLOWANCE

- (1) Laboratory Technicians and Assistants employed by the Board of Western Australia Centre for Pathology and Medical Research, engaged in mortuary duties associated with Coronial Inquiries shall receive an allowance of \$1,809 per annum, payable by fortnightly instalments.
- (2) This allowance is compensation for the following matters:
 - (a) the disabilities involved in the handling of and autopsy work associated with decomposed, obnoxious, vermin infested and infected bodies; and
 - (b) the need to perform work in refrigerated and other low temperature storage areas of the Mortuary.

(Operative from first pay period on or after 14 March 2008)

2008 WAIRC 00173

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 S WOOD

DATE

FRIDAY, 14 MARCH 2008

FILE NO

P 27 OF 2007

CITATION NO.

2008 WAIRC 00173

Result Award varied
Representation
Applicant Mr M Sims
Respondent Mr A Harper

Order

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

THAT the Government Officers (Social Trainers) Award 1988 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,
 Commissioner,
 Public Service Arbitrator.

[L.S.]

SCHEDULE

1. Schedule C – Shift Work Allowance: Delete this schedule and insert the following in lieu thereof:

SCHEDULE C. - SHIFT WORK ALLOWANCE

A shiftwork allowance of \$17.04 is payable for each afternoon or night shift worked.

The shiftwork allowance calculation is 12.5% of the daily salary rate for a Level 1, Year 7 employee.

Clause 56(2) of this Award defines salary for calculation purposes.

(Operative from first pay period on or after 14 March 2008)

2. Schedule E – Overtime Allowance: Delete Part 1 – Out of Hours Contact of this schedule and insert the following in lieu thereof:

PART I - OUT OF HOURS CONTACT

(Operative from first pay period on or after 14 March 2008)

Standby \$7.41 per hour
 On Call \$3.71 per hour
 Availability \$1.85 per hour

3. Clause 21. – Overtime: Delete paragraph (b) of subclause (5) of this clause and insert the following in lieu thereof:

(b) Except as otherwise agreed between the Employer and the Association, an employee who is required by the Employer to be on "out of hours contact" during periods off duty shall be paid an allowance in accordance with the following formulae for each hour or part thereof the employee is on "out of hours contact".

Standby

Level 2 (minimum) weekly rate	x	1	x	37.5		
		37.5		100		

On Call

Level 2 (minimum) weekly rate	x	1	x	18.75		
		37.5		100		

Availability

Level 2 (minimum) weekly rate	x	1	x	18.75	x	50
		37.5		100		50

Such allowances are contained in Part I of Schedule E. - Overtime Allowance of this Award.

Provided that payment in accordance with this paragraph shall not be made with respect to any period for which payment is made in accordance with the provisions of subclause (3) of this clause when the employee is recalled to work.

2008 WAIRC 00162

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

RESPONDENTS**CORAM**

PUBLIC SERVICE ARBITRATOR

COMMISSIONER S WOOD

DATE

FRIDAY, 14 MARCH 2008

FILE NO

P 24 OF 2007

CITATION NO.

2008 WAIRC 00162

Result	Award varied
Representation	
Applicant	Mr M Sims
Respondents	Mr A Harper on behalf of the Metropolitan Health Service Board Mr D Ellis on behalf of the Health Services Union of Western Australia (Union of Workers)

Order

HAVING heard Mr M Sims on behalf of the applicant, Mr A Harper on behalf of the Metropolitan Health Service Board and Mr D Ellis on behalf of the Health Services Union of Western Australia (Union of Workers), the Public Service Arbitrator, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Graylands Selby-Lemnos and Special Care Health Services Award 1999 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,
Commissioner,
Public Service Arbitrator.

[L.S.]

SCHEDULE**1. Schedule H - Overtime: Delete Part 1 – Out of Hours Contact of this schedule and insert the following in lieu thereof:****PART I - OUT OF HOURS CONTACT**

(Operative from first pay period on or after 14 March 2008)

Standby \$7.41 per hour

On Call \$3.71 per hour

Availability \$1.85 per hour

2. Schedule K – Diving, Flying and Seagoing Allowances: Delete this schedule and insert the following in lieu thereof:**SCHEDULE K - DIVING, FLYING AND SEA GOING ALLOWANCES**

(1) Diving - (Clause 33)

\$5.94 per hour or part thereof.

(2) Flying - (Clause 34)

(a) Observation and photographic duties in fixed wing aircraft - \$10.97 per hour or part thereof.

(b) Cloud seeding and fire bombing duties, observation and photographic duties involving operations in which fixed wing aircraft are used at heights less than 304 metres or in unpressurised aircraft at heights more than 3048 metres - \$15.04 per hour or part thereof.

(c) When required to fly in a helicopter on fire bombing duties, observation and photographic duties or stock surveillance - \$20.79 per hour or part thereof.

- (3) Sea Going Allowances (Clause 40)
 - (a) Victualling
 - (i) Government Vessel - meals on board not prepared by cook - \$27.98 per day.
 - (ii) Government Vessel - meals on board are prepared by a cook - \$21.06 per day.
 - (iii) Non Government Vessel - \$25.54 each overnight period.
 - (b) Hard Living Allowance - 58 cents per hour or part thereof.

The allowances prescribed in this schedule shall apply from the first pay period on or after 14 March 2008 and shall be varied in accordance with any movement in the equivalent allowances in the Public Service Award 1992.

2008 WAIRC 00161

PUBLIC SERVICE AWARD 1992

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

THE DIRECTOR GENERAL OF THE DEPARTMENT OF AGRICULTURE AND OTHERS

RESPONDENTS

CORAM

PUBLIC SERVICE ARBITRATOR
COMMISSIONER S WOOD

DATE

FRIDAY, 14 MARCH 2008

FILE NO

P 23 OF 2007

CITATION NO.

2008 WAIRC 00161

Result Award varied
Representation
Applicant Mr M Sims
Respondents Mr A Harper

Order

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

THAT the Public Service Award 1992 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,
Commissioner,
Public Service Arbitrator.

[L.S.]

SCHEDULE

1. Schedule H - Overtime: Delete Part 1 – Out of Hours Contact of this schedule and insert the following in lieu thereof:

PART I - OUT OF HOURS CONTACT

(Operative from first pay period on or after 14 March 2008)

Standby \$7.41 per hour
On Call \$3.71 per hour
Availability \$1.85 per hour

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

2. Schedule J – Shift Work Allowance: Delete this schedule and insert the following in lieu thereof:

SCHEDULE J - SHIFT WORK ALLOWANCE

A shift work allowance of \$17.04 is payable for each afternoon or night shift of seven and one half (7.5) hours worked.

The shift work allowance calculation is 12.5% of the daily salary rate for a Level 1, Year 7 officer.

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

(Operative from first pay period on or after 14 March 2008)

3. Schedule K – Diving, Flying and Seagoing Allowances: Delete this schedule and insert the following in lieu thereof:

SCHEDULE K - DIVING, FLYING AND SEA GOING ALLOWANCES

- (1) Diving - (Clause 45)
\$5.94 per hour or part thereof.
- (2) Flying - (Clause 46)
- (a) Observation and photographic duties in fixed wing aircraft - \$10.97 per hour or part thereof.
- (b) Cloud seeding and fire bombing duties, observation and photographic duties involving operations in which fixed wing aircraft are used at heights less than 304 metres or in unpressurised aircraft at heights more than 3048 metres - \$15.04 per hour or part thereof.
- (c) When required to fly in a helicopter on fire bombing duties, observation and photographic duties or stock surveillance - \$20.79 per hour or part thereof.
- (3) Sea Going Allowances (Clause 52)
- (a) Victualling
- (i) Government Vessel - meals on board not prepared by cook - \$27.98 per day.
- (ii) Government Vessel - meals on board are prepared by a cook - \$21.06 per day.
- (iii) Non Government Vessel - \$25.54 each overnight period.
- (b) Hard Living Allowance - 58 cents per hour or part thereof.

AWARDS/AGREEMENTS—Variation of—

2008 WAIRC 00169

HAIRDRESSERS AWARD 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

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

APPLICANT

-v-

THE MASTERS LADIES' HAIRDRESSERS INDUSTRIAL UNION OF EMPLOYERS OF WESTERN AUSTRALIA AND OTHERS

RESPONDENT

CORAM

COMMISSIONER J L HARRISON

DATE

FRIDAY, 14 MARCH 2008

FILE NO/S

APPL 124 OF 2007

CITATION NO.

2008 WAIRC 00169

Result

Award varied

Representation

Applicant

Mr T Pope

Respondent

Mr O Moon as agent for the Masters Ladies' Hairdressers Industrial Union of Employers of Western Australia

Mr D Jones as agent for Rosanna Epton and Bill Wilson

Order

HAVING heard Mr T Pope on behalf of the applicant, Mr O Moon as agent on behalf of the Masters Ladies' Hairdressers Industrial Union of Employers of Western Australia and Mr D Jones as agent on behalf of Rosanna Epton and Bill Wilson, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

THAT the *Hairdressers Award 1989 (No A 32 of 1988)* be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 13 March 2008.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

SCHEDULE

1. Clause 11. – Wages: Delete subclause (2)(c) of this clause and insert the following in lieu thereof:

(c) APPRENTICE (OFF THE JOB GRADUATE)

An Apprentice (Off the Job Graduate) is an Apprentice, as defined in subclause (2) of Clause 5. - Definitions of this Award, who has successfully completed a training program, which has been accredited by the Training Accreditation Council and which meets all the off-the-job training requirements of an apprenticeship, at a registered training provider, prior to being indentured as an apprentice

First Year	50
Second Year	70
Third Year	85

(d) Adult Apprentices

In the case of an apprentice aged twenty-one years or over, where the rate of wage determined by the application of paragraphs (a) or (b) of this subclause is less than the minimum wage for adults as prescribed by the Commission from time to time in General Orders, that minimum wage shall apply in lieu of the rates otherwise applicable by the application of this subclause.

2. Clause 16. – Meal Money: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) The meal money required to be paid to all employees pursuant to this clause shall be \$10.55.

3. Clause 22. – Tools of Trade: Delete subclause (4) of this clause and insert the following in lieu thereof:

(4) Tool Allowance

In addition to the weekly wage a tool allowance of \$7.20 per week shall be payable to full time Seniors, part time Seniors, indentured apprentices, and probationary apprentices.

4. Clause 32. – First Aid Allowance: Delete this clause and insert the following in lieu thereof:

An employee holding either a Red Cross or St. John Senior First Aid Certificate of at least 'A' level who is appointed by the employer to perform first aid duties shall be paid \$8.60 per week in addition to the employee's ordinary rate.

CANCELLATION OF—Awards/Agreements/Respondents—

2008 WAIRC 00206

ELECTRONIC SERVICING EMPLOYEES (BUILDING MANAGEMENT AUTHORITY) AWARD 1984

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	MONDAY, 7 APRIL 2008
FILE NO/S	APPL 10 OF 2008
CITATION NO.	2008 WAIRC 00206

Result	Award cancelled
---------------	-----------------

Order

WHEREAS the Commission, being of the opinion that there was no employee to whom the following award applied, did give notice on the 27th day of February, 2008 of an intention to make an Order cancelling the award;

AND WHEREAS at the 28th day of March, 2008 there were no objections to the making of such an Order;

NOW THEREFORE, I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, pursuant to the powers conferred by s.47 of the Act, do hereby order that the following award be cancelled:

ELECTRONIC SERVICING EMPLOYEES
(BUILDING MANAGEMENT AUTHORITY) AWARD 1984

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2008 WAIRC 00175

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	ADELE ALISA	APPLICANT
	-v-	
	BRETT TITCHENER (ROCKETFUEL)	RESPONDENT
CORAM	COMMISSIONER S WOOD	
HEARD	MONDAY, 4 FEBRUARY 2008	
DELIVERED	FRIDAY, 14 MARCH 2008	
FILE NO.	B 159 OF 2007, U 159 OF 2007	
CITATION NO.	2008 WAIRC 00175	

CatchWords	Unfair dismissal - Denied contractual benefits - Notice, Annual leave - Award coverage - Casual employment - Casual loading - Set-off - Industrial Relations Act s 29(1)(b)(i) and (ii), s 37(1), s 26.	
Result	Applicant dismissed unfairly; notice payable Benefit under an Award; Commission lacks jurisdiction	
Representation		
Applicant	Ms A Alisa	
Respondent	Mr B Titchener	

Reasons for Decision

- 1 The applicant, Ms Adele Alisa, claims denied contractual benefits of annual leave and notice on termination. The amount claimed for annual leave is \$10,120 gross which she says equates to ten weeks pay. The amount claimed for notice is \$1,518 gross. This is calculated as two weeks pay in lieu of notice, being \$2,024, less the amount already paid, which was 22 hours at a pay rate of \$23 per hour.
- 2 The applicant claims also a declaration that she was dismissed unfairly. The applicant does not seek reinstatement or an award of compensation. Ms Alisa contends that whilst she was treated as a casual employee, she was in fact not a casual. She says that she managed the coffee shop and worked consistently an average of 45 hours per week. She was not aware of any performance problems and the reason given for her termination was unlawful in that she was absent temporarily from work due to illness.
- 3 The applicant says that on 20 September 2007 she had obtained a medical certificate and was absent from work due to the flu. Mr Titchener, the owner, telephoned her and was angry that she was not at work. He then sent an SMS message to her on 22 September 2007 to ask if he could come to her home to talk. He asked the applicant to agree to a separation of their professional relationship. Ms Alisa replied that he was sacking her. She says:

“The reason that I was given for my termination at the time was that the belief of Brett that he could not rely on me to operate the business in his future absence as I was always too sick and further I should have stayed at work and not doing so meant I wasn’t dedicated enough.” (Transcript p.5)
- 4 The applicant says that she was devastated by this conversation. She says that she received multiple thankyou cards from Mr Titchener and other staff. She received two bonuses in 2007. Ms Alisa says that on 19 September she received an SMS message from Mr Titchener thanking her for her excellent work and that she was “worth her weight in gold”. On 18

September 2007 they had discussed an increased role for her in the business whereby she would act for Mr Titchener while he was on holidays in 2008. She says that she was not made aware of performance issues that could result in the termination of her employment. She says, "during the course of my employment Brett and I did discuss various challenges and we always worked through these and agreed on outcomes".

- 5 Ms Alisa says that on 23 August 2007 a letter was left for her in the office. The letter identified perceived changes in her behaviour and required her to "lift my act before asking staff to do similarly". Ms Alisa discussed this letter with Mr Titchener on her return from leave three weeks later and Mr Titchener asked her to disregard the letter as there had been some miscommunication.
- 6 The applicant says that her job was taken by Mr Titchener's brother-in-law, Mr Rowe, on the day of her dismissal. She says that Mr Titchener arranged this with Mr Rowe the day prior to her dismissal. She believes that her final pay included a payment for about 22 hours of notice in lieu.
- 7 Under cross-examination the applicant says that Mr Titchener spoke to her on occasion about her performance but these problems were resolved and they moved on. She says that about 18 months ago Mr Titchener spoke to another employee, Catherine, and herself about their treatment of a fellow employee. He had indicated that their behaviour had been sufficient to warrant termination of their employment. Ms Alisa says that the matter was resolved and from that point on they had an excellent relationship. She disagrees that she was warned at any stage for moodiness or not communicating properly with other employees.
- 8 Ms Alisa says that Mr Titchener told her that the reason for her dismissal was that he could not trust that she would not get sick while he was away, that she was always sick and that if she had been dedicated she would have stayed at work on 20 September 2007. She says that he asked her to agree that they were ending their professional relationship. She would not agree with the proposal as she was being dismissed. She agrees that prior to leaving on holidays for Sweden she was concerned that her job was in jeopardy in that she was concerned that the job would become untenable due to Mr Titchener's opinion of her.
- 9 On 20 September 2007 Ms Alisa telephoned Mr Titchener to advise that she was unwell. She says that she was told that it was her decision as to whether she went home. She denies that she told customers and other employees that Mr Titchener had told her she had to stay at work. Mr Titchener contends that he advised her that it was her decision to go home and to arrange coverage of other staff; which she failed to do. She says that Mr Titchener was very angry at her having to go home.
- 10 Under questioning Ms Alisa says that her understanding was that she was the full-time manager for the respondent and was paid at a casual rate of pay; she did not consider at the time of employment that she was entitled to payment for annual and sick leave. She does not believe that she discussed with Mr Titchener at any stage a permanent position with the provision of leave. Her duties were banking, ordering, staff training, opening the store and quality control.
- 11 Mr Titchener gave evidence that he is in partnership in business with his wife. In March 2005 he advertised for a casual barista/counter hand; although he cannot remember the wording of the advertisement. The applicant applied and was advised that it was a casual position; which he says was agreed by both of them. Mr Titchener says that he has only ever employed staff on a casual basis. Most of his staff are university students. He says that no employee consistently has the same hours both in number or actual shifts. He says:

"When Adele applied for her position as the only non-student with no other commitments she was looking for full time number of hours and due to her experience and seniority I employed her as, I guess, a key position on the roster. Most of the part time staff work on average 15 hours per week. Obviously Adele's position would be equivalent to three part time staff so it was reasonably important." (Transcript p.31)

Mr Titchener says that all employees were employed under the Restaurant, Tearooms and Catering Award. He exhibited her taxation declaration form where she has listed her employment as casual. He exhibited also a table of award pay rates to display her casual rate of pay and he says employees were paid above the award rate. Ms Alisa took two overseas holidays in February and September 2007 of five weeks and two weeks respectively. She was not paid for this leave, or for various days of sick which she had, as she was casual, knew she was casual and never challenged this.

- 12 In December 2006 Mr Titchener says that he offered to put Ms Alisa on permanent staff as he had calculated that keeping her as casual was costing more money. Ms Alisa refused saying that she did not take holidays and would prefer to have the additional 25% loading in pay.
- 13 Mr Titchener says that Ms Alisa was generally given the hours she requested which on "a number of occasions was around 45 to 50 hours", and that her hours generally fluctuated between 40 and 50 hours. He described her duties as being much like the other staff and says:

"Adele and I have had a generally good personal relationship since she started. She has been counted as part of our family and to some degree still is. Unfortunately during this period there have been patches where we have not got on and I have been severely disappointed with her work performance. Problems generally come to light with her handling of other staff. Adele has a tendency, I believe, to be overly harsh and critical, to harbour resentment if offended or criticised, even slightly. She was seen by me generally to almost have vendettas against staff members that had done something to offend her." (Transcript p.34)

- 14 Around April 2007 he became concerned as to how Ms Alisa had been managing staff. In response he compiled the Staff Management Policy. He says that Ms Alisa would intervene when the business was busy and take over the duties of other staff as they were not working fast enough in her view. This created fear and tension in the shop. On 16 May 2007, Mr Titchener sent an SMS to the applicant after a period of two weeks in which she would not talk to him. He met with her the next day and gave her a final warning that if her moodiness did not stop she would be dismissed.
- 15 On 24 August he experienced further problems with the applicant. He put his concerns in a letter to her and then sent her an SMS the next day to say that he hoped his letter would not be taken too harshly. She replied in a text message, "no problemo". In July 2007 he discussed with Ms Alisa the possibility of her managing the business unsupervised while he took two months leave later that year, and perhaps the next year. He says the arrangement was not definite. Before this could happen she was told that she needed to improve her skills in relation to compliance with the systems of the business and the coffee quality. He reallocated the duties of staff training away from Ms Alisa to another staff member and the applicant took offence at this. Their relationship went downhill after this. Another staff member said she would resign because of Ms Alisa and staff morale was particularly low. Ms Alisa's performance continued to decline. Mr Titchener did not say anything to her prior to her going on leave to Sweden as he did not wish to ruin her holiday.
- 16 On her return from leave on 18 September 2007 she was "particularly sullen and moody". He spoke to her about this and reminded her that she was supposed to be running the shop while he was away in New Zealand (ie during October and November 2007). He advised her that he doubted she would be able to handle managing the shop. The next day she was fine then on Thursday, 20 September 2007 he received a telephone call from the applicant. He was at home instructing his brother how to order produce while he was away in New Zealand. The applicant was at the shop. She advised him she was sick. He asked her why she was calling him as she was supposed to be handling the shop unsupervised. He expected her to either finish the shift, if "she was not particularly unwell", or to get someone to cover her duties. He says that he was cross but polite to Ms Alisa. When he arrived at the shop several hours later it was in disarray. He was cross because he was told by staff that Ms Alisa had advised several customers that he said she was not allowed to go home when she was sick. He telephoned the applicant to see what was wrong and how long she would be away from work. He advised her to go to the doctor. She rang later and said she had been to the doctor, had an ear infection and had been given two or three days off, but would try to get to work. He asked what arrangements she had made to cover her absence and she indicated that she had not made any arrangements.
- 17 Mr Titchener says that by Saturday at 11 o'clock he was "getting desperate as to whether she was in a fit state of mind to continue to run the business". He went to her house and tried to discuss the events of the week but the applicant refused to discuss them. He says:
- "I advised her that due to the ongoing difficulties and the fact that I believed the despite all the efforts I had put in over 18 months nothing was changing and in fact, it was getting worse and she would be dismissed. While I still wish to retain a friendship with her I told her that I was happy to tell people because it was unexpected and sudden that she had left of her own free will rather than being fired."
- and
- "At that time because I believed that Adele's position was casual and I also believed that her conduct over the previous weeks and months could be described as workplace bullying and therefore left myself in a precarious position if I allowed it to continue any longer, I considered that was serious misconduct and dismissed her without notice."
- and
- "I felt at that point in time that Adele had given up making any effort dealing with her personal issues which lead her to become the person that she had become. When Adele was good she was very, very good as the thank you notes that she has previously produced attest to however when criticised and faced with a difficult situation she acted in an intimidating threatening and unprofessional manner which I believed at that time was seriously affected the viability of my business."
(Transcript p.38)
- 18 Under cross-examination Mr Titchener conceded that Ms Alisa's employment was regular in terms of the hours she worked, but only because he agreed to the hours which she wanted. He says that sometimes the applicant performed her duties extremely well and sometimes extremely badly. He later says that on the whole Ms Alisa was a good worker. He says that in May 2007 when they had a performance discussion the issues between them were resolved and they agreed to move on. He says that they then had a good period until around late August 2007. He had earlier agreed to pay her a bonus and he kept his promise even though her performance had deteriorated. Mr Titchener says that in response to his letter of August 2007 which criticised the applicant's performance, Ms Alisa sent back an SMS to say the letter was fine and she would try harder.
- 19 Ms Shipster, an employee who had worked in the shop for two and a half years, gave evidence that she had previously been on good terms with Ms Alisa. That changed in September 2007 when Ms Shipster took over training staff from Ms Alisa. Ms Shipster says at that time the applicant stopped talking to her and when asked questions by other employees, Ms Alisa would tell them to ask Ms Shipster. Ms Shipster says also that the applicant would contradict her instructions to other staff. On the final day of work when Ms Alisa was ill, Ms Shipster says that the applicant told her that Mr Titchener had told her that she had to do the full shift and not to go home. She mentioned this also to a few customers. Ms Shipster says that Ms Alisa left about nine or ten o'clock. She did not know where Ms Alisa had gone, but Ms Alisa had rostered on another employee, Bec.

- 20 Ms Shipster says that in May 2007 Ms Alisa showed her an SMS from Mr Titchener about a meeting he wanted to have with the applicant. Ms Alisa was worried about the meeting and about being dismissed. Ms Shipster says that when Mr Titchener was not in the shop Ms Alisa was mostly in charge. She says that at times Ms Alisa told her of discussions she had with Mr Titchener where he expressed concerns about her coffee making or treatment of staff; mostly the latter. Ms Shipster says that when she resigned Mr Titchener discussed with her that he would dismiss Ms Alisa but that he did not have anyone to take her place and to cover that many hours.
- 21 In closing Mr Titchener submitted that the applicant's employment was as a casual, but if it were found to be otherwise then her claim for annual leave should be set-off against the casual loading she received. In response to a question from the Commission as to what was the "misconduct" of the applicant, Mr Titchener said:
- "Sir it was arguably no specific event but it was a general...this is the problem Sir, it's really hard to describe but it's like a moodiness and a sullenness and a sarcasm and intimidation and belittling the staff and making them do demeaning jobs whenever she felt upset with somebody or felt that they didn't meet her expectations or had offended her. She generally took that action with junior staff and new staff or the more timid members. On her return that behaviour became more and more consistent up until the September 2007 where it was happening on an almost daily basis. I choose to ignore it to allow her to go on holiday and have a break and when she returned on the Monday it turned exactly back to the old behaviours. Her behaviour on the Thursday before she was dismissed gave me grave doubts as to her state of mind and whether she would continue to, I guess, harass the staff and make decisions that weren't correct. Her work performance plummeted whenever she was those frame of minds. I guess it was outside my area of abilities or responsibilities to try and help her come to work in a normal happy frame of mind when she was making decisions." (Transcript p.58)
- 22 I turn first to the issue of whether the employment was covered by an award and whether the employment status of the applicant was in fact casual. Mr Titchener says that he followed the Restaurant, Tearoom and Catering Workers' Award, 1979 ("the Award") and paid Ms Alisa above the Award rate, but at Level 2 of the Award. The applicant, in her application, refers to the Award and to Level 3 in the Award, but says she is unsure. The relevant clauses of the Award are as follows:

"4. - SCOPE

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

"6. - DEFINITIONS

- (1) **Restaurant and/or Tearoom** means any meal room, dining room, grill room, coffee shop, tea shop, oyster shop, fish cafe, cafeteria or hamburger shop and includes any place, building, or part thereof, stand, stall, tent, vehicle or boat in or from which food is sold or served for consumption on the premises and also includes any establishment or place where food is prepared and/or cooked to be sold or served for consumption elsewhere.
-
- (3) **Food and Beverage Attendant Grade 1** means an employee who is engaged in any of the following:
- (a) picking up glasses;
 - (b) emptying ashtrays;
 - (c) general assistance to food and beverage attendants of a higher grade not including service to customers;
 - (d) removing food plates;
 - (e) setting and/or wiping down tables;
 - (f) cleaning and tidying of associated areas.
- (4) **Food and Beverage Attendant Grade 2** means an employee who has not achieved the appropriate level of training and who is engaged in any of the following:
- (a) supplying, dispensing or mixing of liquor including the sale of liquor from the bottle department;
 - (b) assisting in the cellar or bottle department;
 - (c) undertaking general waiting duties of both food and/or beverage including cleaning of tables;
 - (d) receipt of monies;
 - (e) attending a snack bar;
 - (f) engaged on delivery duties.
- (5) **Food and Beverage Attendant Grade 3** means an employee who has the appropriate level of training and is engaged in any of the following:
- (a) supplying, dispensing or mixing of liquor including the sale of liquor from the bottle department;
 - (b) assisting in the cellar or bottle department, where duties could include working up to four hours per day (averaged over the relevant work cycle) in the cellar without supervision;
 - (c) undertaking general waiting duties of both food and liquor including cleaning of tables;

- (d) receipt and dispensing of monies;
- (e) engaged on delivery duties; or
- (f) in addition to the tasks performed by a food and beverage attendant grade 2 the employee is also involved in:
 - (i) the operation of a mechanical lifting device; or
 - (ii) attending a wagering (e.g. TAB) terminal, electronic gaming terminal or similar terminal.
- (g) and/or means an employee who is engaged in any of the following:
 - (i) full control of a cellar or liquor store (including the receipt, delivery and recording of goods within such an area);
 - (ii) mixing a range of sophisticated drinks;
 - (iii) supervising food and beverage attendants of a lower grade;
 - (iv) taking reservations, greeting and seating guests;
 - (v) training food and beverage attendants of a lower grade.”

“11. - CASUAL EMPLOYEES

- (1) A casual employee shall mean an employee engaged and paid as such and whose employment may be terminated by either the employer or the employee giving not less than 1 hours notice or the payment or forfeiture, as the case requires, of 1 hours pay.
- (2) A casual employee shall not be engaged for less than 2 consecutive hours each shift.
- (3) A casual employee shall be paid only an hourly base rate of pay that is an amount not less than 1/76th of the fortnightly rate prescribed in Clause 21. - Wages Rates for the relevant classification for any work performed.
- (4) In addition to the hourly base rate of pay prescribed in subclause (3) of this clause, a casual employee shall also be paid the following loading –

DAY	% PENALTY RATE
Monday to Friday	25
Saturday & Sunday	50
Public Holiday	125
- (5) Where a shift commences on one day and ceases on the following day, for each hour worked on that shift the employee shall be paid at the rate applying to the day on which that hour of work is actually performed.
- (6) A casual employee is to be informed, before they are engaged, that they are employed on a casual basis and that there is no entitlement to paid sick leave or annual leave.”

“12. - PART-TIME EMPLOYEES

- (1) A part-time worker shall mean a worker who, subject to the provisions of Clause 8. - Hours, regularly works no less than twenty ordinary hours per fortnight nor less than three hours per work period.
- (2) A part-time worker shall receive payment for wages, annual leave, holidays, bereavement leave, and sick leave on a pro-rata basis in the same proportion as the number of hours worked each fortnight bears to seventy-six hours.
- (3) Notwithstanding any other provision of this award, the employer and the worker may, by agreement, increase the ordinary hours to be worked in any particular pay period to a maximum of seventy-six ordinary hours. Such extra hours shall be paid for at ordinary rates of pay.”

Clause 21 of the Award, for the purpose of this application, includes the classification covered earlier in Clause 6.

23 The Act at s.37 provides:

“37. Effect, area and scope of awards

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

24 Therefore in the absence of any term in the Award which expressly provides otherwise, the Award extends to and binds all employees employed as Food and Beverage Attendants in establishments as defined in Clause 6 of the Award. Ms Alisa’s duties fit within the classification descriptions in Clause 6 of the Award. I make no comment as to the level at which she was paid. The respondent’s business, on the evidence of both Ms Alisa and Mr Titchener, falls within the description in Clause 6(1) of the Award. I consider that both the applicant and the respondent expect that the Award applies to this employment. I find that this employment relationship is bound by the Award. The fact that the Award covers the employment relationship has a two-fold relevance. It has impact on the contractual benefit claim in terms of jurisdiction. I will say more on this later. It means also that the definitions in the Award of the employment status of an employee also have relevance.

25 As to whether the applicant was a casual employee, the Full Bench in *Christine Anne Miles & Richard Glington Miles T/As Milesaway Tours and Melrose Farm Pty Ltd T/As Milesaway Tours v Warren Graham Milward, Department of Consumer & Employment Protection* 87 WAIG 2991 considered recently the issue of casual employment. In that case the award definition of casual was essentially similar; i.e. a person employed and engaged as such. The Full Bench held that:

“203. Consistent with what was said in *McLaren*, deciding whether someone was engaged as a casual worker requires an examination of what the parties intended and agreed about how, when and what work is to be carried out. If the parties agree that the worker will perform the same duties and work the same hours each week (and the ordinary hours are less than 38), the worker will be part-time under the award. If on the other hand the worker is engaged to work on a one off basis for a day they will obviously be casual. Within these bookends there is a range of possibilities where the distinction might be less clear.

204. Then the facts and circumstances will need to be considered and an evaluation made about whether the employee is/was regularly employed. In deciding this, various things could be relevant such as:-

- (i) What were the express terms of the agreement.
- (ii) The way the agreement has been performed in practice; and/or what were the terms of the agreement, as inferred from what has occurred.
- (iii) The frequency of the work and the number of hours worked.
- (iv) Whether the same or different duties were performed
- (v) How it is determined when work is done and what duties are performed; and how and when this is communicated between the employer and employee.”

26 One must first then look at how the employee was initially employed. There is no written contract which displays the terms of the employment relationship. Mr Titchener says that he applied the Award and employed the applicant at Level 2 given her duties and experience. I think there can be little doubt from the evidence that both applicant and respondent knew that the employment was as a casual. The taxation declaration lends support to this conclusion. The applicant was paid as a casual. However, the employment relationship cannot be made casual simply by a label. The issue is whether the employment can properly be described in fact and law as casual. Mr Titchener referred to the advertisement to which Ms Alisa responded originally. I do not have the benefit of that advertisement, but I do not have any reason to doubt the evidence of Mr Titchener in that regard. The Award clause which sets out casual employment is a typical clause whereby a casual is one who is engaged and paid as such. The Award provides no further assistance; the applicant does not neatly fit into the part-time description either.

27 Mr Titchener says that at one time he offered to employ Ms Alisa as a full-time employee but she refused. This evidence is contested by the applicant. I should say at this point that there is some difficulty in assessing the evidence as all relevant matters were not put properly to witnesses in cross-examination (the *Browne v. Dunn* rule) and, given the complexity of many of the questions asked, the answers may not have matched properly what the cross-examiner thought was put. Nevertheless I am confident that both parties had ample opportunity to present their cases and I do not consider that credibility is a significant issue in assessing the evidence. In any event the point as to whether Ms Alisa was at one time offered full-time employment and refused is not definitive. Albeit I have sympathy for this view as I expressed in *Julie Anne Gibson and Christine Erica Roberts v Chubb Security Services Ltd* 84 WAIG 2641, the Full Bench took the view that an expressed desire by an employee to remain casual was not definitive and the actual pattern of work needed to be assessed (84 WAIG 3798).

28 The applicant’s pattern of work must then be considered. It is important to ascertain whether the employment was regular and whether the applicant had a legitimate expectation of ongoing employment. Ms Alisa tendered her payslips in evidence. A summary of these is as follows:

week ending	hours	rate	Gross	overtime hours	rate	amount	Bonus	TOTAL
27/02/2005	9	16.75	\$150.75					\$150.75
13/03/2005	35.5	17.5	\$621.25					\$621.25
20/03/2005	41	17.5	\$717.50					\$717.50
27/03/2005	36.5	17.5	\$638.75					\$638.75
3/04/2005	30	17.5	\$525.00					\$525.00
10/04/2005	45.5	17.5	\$796.25					\$796.25

week ending	hours	rate	Gross	overtime hours	rate	amount	Bonus	TOTAL
17/04/2005	48	17.5	\$840.00					\$840.00
24/04/2005	55.75	17.5	\$975.63					\$975.63
1/05/2005	29.25	17.5	\$511.88					\$511.88
8/05/2005	33.5	17.5	\$586.25					\$586.25
16/05/2005	44.5	17.5	\$778.75					\$778.75
22/05/2005	43	17.5	\$752.50					\$752.50
29/05/2005	40	16.75	\$670.00				50	\$720.00
5/06/2005	32.5	17.5	\$568.75	8	20.1	\$160.80		\$729.55
12/06/2005	34.5	17.5	\$603.75			\$-		\$603.75
19/06/2005	47	16.75	\$787.25			\$-		\$787.25
4/07/2005	31	17.5	\$542.50	8	20.1	\$160.80		\$703.30
10/07/2005	39.75	17.5	\$695.63	8	20.1	\$160.80		\$856.43
17/07/2005	48.25	17.5	\$844.38			\$-		\$844.38
24/07/2005	47.75	17.5	\$835.63	4	20.1	\$80.40		\$916.03
7/08/2005	41.75	16.75	\$699.31	4.25	20.1	\$85.43		\$784.74
14/08/2005	38	17.5	\$665.00			\$-		\$665.00
21/08/2005	44	17.5	\$770.00	4	20.1	\$80.40		\$850.40
31/07/2005	46.25	17.5	\$809.38			\$-		\$809.38
28/08/2005	45.75	18.5	\$846.38	4.25	20.1	\$85.43		\$931.80
4/09/2005	44.25	18.5	\$818.63	8.25	20.1	\$165.83		\$984.45
11/09/2005	43	18.5	\$795.50	4	20.1	\$80.40		\$875.90
18/09/2005	43.5	18.5	\$804.75	4	20.1	\$80.40		\$885.15
25/09/2005	44	18.5	\$814.00			\$-		\$814.00
2/10/2005	33.5	18.5	\$619.75	12.25	20.1	\$246.23		\$865.98
9/10/2005	43	18.5	\$795.50	4	20.1	\$80.40		\$875.90
17/10/2005	48	18.5	\$888.00	4.25	20.1	\$85.43		\$973.43
25/10/2005	47.5	18.5	\$878.75	4.25	20.1	\$85.43		\$964.18
30/10/2005	47.5	18.5	\$878.75			\$-		\$878.75
6/11/2005	42.5	18.5	\$786.25	8.25	20.77	\$171.35		\$957.60
13/11/2005	51	18.5	\$943.50	8.25	20.77	\$171.35		\$1,114.85
20/11/2005	39.25	18.5	\$726.13			\$-		\$726.13
27/11/2005	31	18.5	\$573.50	8.25	20.77	\$171.35		\$744.85
4/12/2005	50.5	18.5	\$934.25	8.25	20.77	\$171.35		\$1,105.60
11/12/2005	51.5	18.5	\$952.75	8.25	20.77	\$171.35		\$1,124.10
18/12/2005	42	18.5	\$777.00	8.25	20.77	\$171.35		\$948.35
average hours	41.22			3.20				

44.42

week ending	hours	rate	Gross	overtime hours	rate	amount	TOTAL
1/01/2006	24.75	18.5	\$457.88	16.5	20.77	\$342.71	\$800.58
8/01/2006	44	18.5	\$814.00		20.77	\$-	\$814.00
15/01/2006	36.5	18.5	\$675.25	8.25	20.77	\$171.35	\$846.60
5/03/2006	41.5	18.5	\$767.75	4	20.77	\$83.08	\$850.83
12/03/2006	28	18.5	\$518.00	12.25	20.77	\$254.43	\$772.43
19/03/2006	35.5	18.5	\$656.75	4	20.77	\$83.08	\$739.83
26/03/2006	39	18.5	\$721.50	4	20.77	\$83.08	\$804.58
2/04/2006	41.5	18.5	\$767.75	4	20.77	\$83.08	\$850.83

week ending	hours	rate	Gross	overtime hours	rate	amount	TOTAL
9/04/2006	43	18.5	\$795.50	4	20.77	\$83.08	\$878.58
16/04/2006	32.75	18.5	\$605.88		20.77	\$-	\$605.88
23/04/2006	27	18.5	\$499.50	4	20.77	\$83.08	\$582.58
30/04/2006	33.5	18.5	\$619.75	4	20.77	\$83.08	\$702.83
7/05/2006	29	18.5	\$536.50	4	20.77	\$83.08	\$619.58
14/05/2006	42	18.5	\$777.00	4	20.77	\$83.08	\$860.08
21/05/2006	39.25	18.5	\$726.13	4	20.77	\$83.08	\$809.21
28/05/2006	32.5	18.5	\$601.25	4	20.77	\$83.08	\$684.33
4/06/2006	38.5	18.5	\$712.25	4	20.77	\$83.08	\$795.33
11/06/2006	30	18.5	\$555.00	12.25	20.77	\$254.43	\$809.43
18/06/2006	44.25	18.5	\$818.63	4	20.77	\$83.08	\$901.71
25/06/2006	39.25	18.5	\$726.13	4	20.77	\$83.08	\$809.21
2/07/2006	40	18.5	\$740.00	4	20.77	\$83.08	\$823.08
16/07/2006	40	18.5	\$740.00	4	20.77	\$83.08	\$823.08
23/07/2006	38.25	18.5	\$707.63	4	20.77	\$83.08	\$790.71
6/08/2006	43.25	20	\$865.00	4.25	21.6	\$91.80	\$956.80
13/08/2006	40.25	20	\$805.00		21.6	\$-	\$805.00
20/08/2006	46.5	20	\$930.00	4.25	21.6	\$91.80	\$1,021.80
27/08/2006	46.75	20	\$935.00	4	21.6	\$86.40	\$1,021.40
3/09/2006	44.5	20	\$890.00	4	21.6	\$86.40	\$976.40
10/09/2006	43.5	20	\$870.00	4	21.6	\$86.40	\$956.40
17/09/2006	37.5	20	\$750.00	4	21.6	\$86.40	\$836.40
24/09/2006	46	20	\$920.00	4	21.6	\$86.40	\$1,006.40
1/10/2006	43	20	\$860.00	4	21.6	\$86.40	\$946.40
8/10/2006	45.75	20	\$915.00		21.6	\$-	\$915.00
15/10/2006	40.75	20	\$815.00	4	21.6	\$86.40	\$901.40
22/10/2006	45	20	\$900.00	4.5	21.6	\$97.20	\$997.20
29/10/2006	38.5	20	\$770.00	4	21.6	\$86.40	\$856.40
5/11/2006	43.25	20	\$865.00	4	21.6	\$86.40	\$951.40
13/11/2006	45	20	\$900.00	4	21.6	\$86.40	\$986.40
19/11/2006	35.25	21	\$740.25	4	21.6	\$86.40	\$826.65
16/11/2006	40	21	\$840.00	4	21.6	\$86.40	\$926.40
3/12/2006	44	21	\$924.00	4	21.6	\$86.40	\$1,010.40
10/12/2006	46.5	21	\$976.50	4.5	21.6	\$97.20	\$1,073.70
17/12/2006	46.75	21	\$981.75	3.5	21.6	\$75.60	\$1,057.35
24/12/2006	41.75	21	\$876.75		21.6	\$-	\$876.75
31/12/2006	24.75	21	\$519.75	8.25	21.6	\$178.20	\$697.95
Average hours	39.3			4.41			

43.71

week ending	hours	rate	Gross	overtime hours	rate	amount	TOTAL
7/01/2007	37.5	21	\$787.50	8.25	21.6	\$178.20	\$965.70
14/01/2007	38.25	21	\$803.25	8.25	21.6	\$178.20	\$981.45
21/01/2007	52	21	\$1,092.00	8.25	21.6	\$178.20	\$1,270.20
4/03/2007	45	21	\$945.00	4.5	21.6	\$97.20	\$1,042.20
11/03/2007	37	22	\$814.00	11.5	22	\$253.00	\$1,067.00
18/03/2007	43	22	\$946.00	4	22	\$ 88.00	\$1,034.00

week ending	hours	rate	Gross	overtime hours	rate	amount	TOTAL
25/03/2007	51.75	22	\$1,138.50		22	\$ -	\$1,138.50
1/04/2007	41.75	22	\$918.50	4	22	\$ 88.00	\$1,006.50
8/04/2007	34	22	\$748.00	5	22	\$110.00	\$858.00
15/04/2007	33.25	22	\$731.50	4	22	\$88.00	\$819.50
22/04/2007	42.5	22	\$935.00	4	22	\$ 88.00	\$1,023.00
29/04/2007	33.5	22	\$737.00	4	22	\$88.00	\$825.00
6/05/2007	40.75	22	\$896.50	4	22	\$ 88.00	\$984.50
13/05/2007	42.25	22	\$929.50	4	22	\$ 88.00	\$1,017.50
20/05/2007	42.5	22	\$935.00	2	22	\$ 44.00	\$979.00
27/05/2007	33	22	\$726.00	4	22	\$ 88.00	\$814.00
3/06/2007	37	22	\$814.00	4	25	\$ 00.00	\$914.00
10/06/2007	33.25	22	\$731.50	12	25	\$300.00	\$1,031.50
17/06/2007	37	22	\$814.00	8.25	25	\$206.25	\$1,020.25
24/06/2007	43	22	\$946.00	4.5	25	\$112.50	\$1,058.50
1/07/2007	33.5	22	\$737.00	4	25	\$100.00	\$837.00
8/07/2007	41.5	23	\$954.50	3.5	25	\$ 87.50	\$1,042.00
15/07/2007	38.75	23	\$891.25	4	25	\$100.00	\$991.25
22/07/2007	43.25	23	\$994.75	3.5	25	\$ 87.50	\$1,082.25
29/07/2007	46	23	\$1,058.00	4	25	\$100.00	\$1,158.00
5/08/2007	42.5	23	\$977.50	4	25	\$100.00	\$1,077.50
14/08/2007	45	23	\$1,035.00	4	25	\$100.00	\$1,135.00
19/08/2007	42	23	\$966.00	4	25	\$100.00	\$1,066.00
26/08/2007	38.5	23	\$885.50	4	25	\$100.00	\$985.50
2/09/2007	35.5	23	\$816.50	5	25	\$125.00	\$941.50
average hours	40.16			4.95			

45.11

- 29 From these it can be seen that the applicant's employment on a weekly basis varied in the hours worked; albeit Ms Alisa worked an average of approximately 40 hours per week and regularly worked close to, if not more than, a full-time employee. The evidence of Mr Titchener is in effect that he gave the applicant the hours she sought. He says also that she effectively worked in with the demands of the business. Whatever rationale is applied to the working pattern it is clear that the hours display continual employment and regular employment which is not pre-dominantly of a part-time nature. The applicant was consistently employed each day and each week except for the days or weeks when she was ill or away on unpaid leave, throughout the whole of her employment. The applicant, from the day she was employed, did not have to ask whether her services were needed on future days. She was employed from day one to work, in Mr Titchener's words, about three times the load of the normal casual worker. Clearly by the respondent and the applicant had the expectation that Ms Alisa's employment was ongoing. She worked to a roster but was expected to be available each day.
- 30 The duties which the applicant performed were constant, with the proviso that she was trained to take on additional duties and she had a senior role in business.
- 31 In my view having considered the method of engagement, the Award stipulations, the consistency and extent of the employment and the duties of the applicant, I am of the view that the employment is not casual in nature. The label the parties place on the relationship, namely 'casual', is not the governing factor. Given my finding, Ms Alisa was entitled to the benefits of paid sick and annual leave. I will return to the question of annual leave.
- 32 As for the fairness or otherwise of the dismissal I find that the dismissal was unfair for the following reasons. It is the case that the employment relationship was for the great majority of the time a good working relationship. Indeed Mr Titchener described their relationship as a friendship also. The two or three areas of Ms Alisa's behaviour where he expressed difficulty were her treatment of other staff, her moodiness and lack of communication and perhaps her coffee making skills. He complained also that she could not take criticism. I use the word "perhaps" in relation to her coffee making skills because this matter was not put properly to Ms Alisa. Additionally, it does not sit well with the fact that she had a senior role in nearly all facets of the shop over an extended period, and one of the main products of the shop is various styles of coffee. Mr Titchener employed Ms Alisa in part because she was an experienced barista.
- 33 The two real concerns were that Ms Alisa was moody and on occasion did not treat other staff properly. Ms Alisa denied those allegations, except in limited circumstances. Mr Titchener says that he was concerned that other staff wanted to leave because

of Ms Alisa. The evidence of Ms Shipster lends some support to this evidence at least towards the end of the employment. The alleged poor behaviour was not constant in that it became a problem about 18 months prior to the dismissal, then again in May 2007 when Mr Titchener considered dismissing Ms Alisa, because of her treatment of another staff member, then again in late August 2007. Ms Alisa says that each time Mr Titchener and her resolved any differences and moved on. This indeed would seem to be the case except for the period in August/September 2007. The applicant was away in Sweden for the bulk of this period. Against this one must look at the whole of the employment. Ms Alisa was said to be a good worker who was always good with customers and who fulfilled a senior and responsible role in the business. So much so that the intent was that she was to run the business, in the absence of Mr Titchener, during October and November 2007. Yet she was sick one day, during a period when her behaviour had been at times moody and critical of staff, and Mr Titchener became upset that she had telephoned him to tell him about her illness, rather than attend to any problem in the shop. The day prior to this Ms Alisa had been praised for her efforts in the business.

- 34 Ms Shipster gave evidence that Mr Titchener had discussed with her that he might dismiss Ms Alisa. I am not clear whether this was part of a conversation about Ms Shipster's resignation, but it would appear so. Ms Shipster says that Mr Titchener did not have anyone to replace Ms Alisa and to do her hours. The other point emphasised by Mr Titchener was that when Ms Alisa rang him on 20 September 2007, to advise of her illness, she had not sorted out the replacement; he had to fix the problem himself some hours later when he attended at the shop. Ms Shipster gave evidence that Ms Alisa had in fact organised a relief person, Bec. Mr Titchener was also concerned that Ms Alisa had told customers that Mr Titchener had told her she had to stay at work. I would suggest that there was some miscommunication in a difficult conversation over the telephone between Ms Alisa and Mr Titchener on 20 September 2007. However, the actions that Mr Titchener has attributed to the applicant on 20 September do not amount to misconduct as he has submitted. They do not amount to conduct which should have led to Ms Alisa's dismissal. At the same time that both Mr Titchener and Ms Alisa were preparing for her to manage the shop in his absence, a telephone call about her being ill led to Mr Titchener confirming in his mind that Ms Alisa was not capable of managing the shop. Even if Ms Alisa was not capable of managing the shop in Mr Titchener's absence, then this is no reason to dismiss her from the job for which she was employed. Mr Titchener says he was, "getting desperate as to whether she was in a fit state of mind to continue to run the business". This, in my view, was the governing sentiment which led to the dismissal. Yet in his evidence, he downplayed at times, the applicant's senior role in the business. I find the dismissal to be harsh and unfair.
- 35 The dismissal on all the evidence was without notice and that in itself was an aspect of unfairness. The dismissal as a whole was unfair, however, summary dismissal could not possibly be justified in the circumstances. The worse that Ms Alisa could be said to have done, to cause a fundamental breach of trust going to the root of the contract, was to tell customers that Mr Titchener told her that she had to stay at work whilst sick. She denies this, however, this is not an act justifying summary dismissal. I consider that she obtained that view from the conversation with Mr Titchener. It may not be what he said directly, but it was a legitimate impression gained by the applicant.
- 36 The Commission must decide whether it is practicable for the employment relationship to be re-instated. I do not consider reinstatement to be practicable. The dismissal has caused a fracture in the relationship which was both professional and personal. The applicant has secured other employment and is content in that employment. The applicant does not seek an award of compensation and seeks simply a declaration that she was dismissed unfairly. Albeit she gained new employment quite quickly there would appear to be some loss, including some ongoing loss. Given the applicant does not seek compensation and because I do not have sufficient evidence to make the appropriate calculation, I would not make an order for compensation, with the exception of the payment for notice. The notice payment is a loss caused by the dismissal to which the applicant is entitled as compensation. The applicant has claimed the amount under her contractual benefits claim. Given my obligations under s26 of the Act, including the public interest issue of avoiding unnecessary litigation, I will make an order for notice under the unfair dismissal application. The lack of notice is connected to the dismissal and for reasons which I will explain I do not have jurisdiction to deal with the contractual benefits claim.
- 37 Mr Titchener said that he paid Ms Alisa an additional 25 hours on top of the 15 or 13 hours she had worked in that pay period, because he thought it was the right thing to do. The applicant says that she was paid an additional 22 hours. I do not know for sure how many hours the applicant had worked that week. Her final pay was for 35.5 standard hours at the rate of \$23 per hour and 5 hours overtime at the rate of \$25 per hour. I consider it likely, given the amount of hours in her final pay and the hours she is said to have worked that she was paid 22 hours and not 25 hours for what could be construed as notice; albeit Mr Titchener does not describe it as such. The applicant says she was due two weeks' notice and claims that two weeks less the 22 hours at the average rate of pay. Her average weekly rate of pay, using the table above, for her last year being 27 August 2006 to 26 August 2007 was \$980.11 per week. The calculation for notice would therefore be 2 x \$980.11 equals \$1960.22. From this must be subtracted 22 hours by \$23 per hour, equals \$506. The remaining total is therefore \$1,454.22. The Award prescribes that two weeks notice would have been payable except where summary dismissal was justified. I would order that \$1,454.22 be paid as compensation by way of notice, for the unfair dismissal.
- 38 As I have stated the applicant's employment was governed by the Award. Therefore the amount claimed for annual leave is an amount which might otherwise be due under the Award, given my finding that the applicant was not in fact and law casual. The non payment of a benefit under a contract of employment, ie a claim pursuant to s.29(1)(b)(ii) is:
- “(ii) that he has not been allowed by his employer a benefit, not being a benefit under an award or order, to which he is entitled under his contract of employment”

- 39 The jurisdiction then for the non-payment of a benefit under an Award belongs with the Industrial Magistrate. The same difficulty may be said to arise from the claim for unpaid notice except, as I have found, that amount can be said to arise directly from the unfairness of the dismissal. I would therefore issue an order dismissing the claim for denied contractual benefits for want of jurisdiction.
- 40 The respondent submitted that if the Commission were to find that the employment is not casual in nature, there should be a set-off for the annual leave against the casual loading which was consistently paid to Ms Alisa throughout her employment. Whilst it is not for me to issue any order arising from the claim for denied contractual benefits I would make some comments as to the principles of set off generally for the benefit of the parties.
- 41 Andersen J in the decision of the IAC in *James Turner Roofing Pty Ltd v Peters* 83 WAIG 427 expressed the following as principles which govern set-off:

“21 These cases must be discussed in some detail, which I will do later, but meanwhile I think the relevant principles that are to be extracted from them can be stated as follows:

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

In that matter the consideration was whether payment of an all up rate could be off-set against various unpaid benefits under an award.

- 42 In the *Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers – Western Australian Branch and the Communications, Electrical, Electronic, and Energy Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division WA Branch v Anodisers W.A. and Others* 86 WAIG 2537, the applicant unions applied to vary the casual loading in the Metal Trades General Award 1966. The Commission in Court considered the composition of the casual loading and referred with approval to a Chamber of Commerce and Industry survey which attributed a significant portion of the loading to the absence of annual and sick leave for casuals. The survey considered also other conditions which casuals lack, such as security of employment and notice; and conditions which they enjoy, such as bereavement and parental leave. It can be seen from the decision that a significant part of the casual loading is paid for the lack of annual leave entitlement for casuals
- 43 The Industrial Magistrate considered the application of *James Turner Roofing* to annual leave and the casual loading, amongst other matters, in the *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Div. v GJ McBride, Netspark Electrical Pty Ltd* 85 WAIG 1762. The relevant parts of his reasons are as follows:

“Application of the Principle in *James Turner Roofing Pty Ltd*

67. The application of the principle established in *James Turner Roofing Pty Ltd* (supra) requires an analysis of a particular allowance and a determination as to whether the particular allowance is capable of being the subject of an all in rate. In my view the Claimant’s claim for payment of redundancy cannot be the subject of the “all in rate”. In *James Turner Roofing Pty Ltd* (supra) His Honour Anderson J said at page 432 (paragraph 48):

I do not say that in no instance has the appellant contravened the award. It may be, for example, that some of the entitlements prescribed in the award and which were denied to the respondent cannot be discharged by payment of money. The obligation to provide those entitlements may not be capable of being discharged by the payment of an all-in rate, no matter how much it may exceed the rates set forth in the award. In that case there could be no question of set off. For example, I would doubt that there is a sufficient degree of correlation between the

nature of the payment made to the respondent and the nature of the obligation to pay untaken long service leave. I would doubt that the over award payment for hours worked could be set-off against the obligation to pay untaken long service leave. It will be for the Industrial Magistrate to consider these matters.

68. Only entitlements, which are finite and determinable for the purpose of calculation of any pay period, are those to be considered as subject to set-off. Redundancy pay for example could not possibly be contemplated as being part of the "all in rate". That entitlement accrues upon the happening of a triggering event of termination. It is indeterminable on a weekly basis. Further the payment is entirely variable contingent on the length of service. Given that the quantum payable is contingent upon variable factors that cannot be known or calculated until the triggering event occurs the same cannot therefore be calculated on a weekly basis. It follows that it cannot form part of the "all in rate". The entitlement is in the same class as entitlements such as long service leave, to which His Honour referred. On the other hand other Award entitlements such as Annual Leave Loading, Travel Allowance, Grievance Special Allowance and Safety Footwear Allowance are finite in nature. They are calculable for each pay period. There is certainty in the quantum payable and are not contingent upon a triggering event. They are entitlements to which the principle outlined in *James Turner Roofing Pty Ltd* (supra) applies.

....

82. The entitlement to proportionate leave and loading thereon is calculable from 21 November 2001, being the date upon which Mr Blake ceased (at law) to be a casual employee. Such is payable from that date until 28 June 2002. However in view of the fact that annual leave has already been paid by way of a casual loading for the period from 21 November 2001 until 28 April 2002, the Claimant is not entitled to recover payment for annual leave for that period. If he were able to do so then such would amount to double dipping and be contrary to the relevant principle discussed in *James Turner Roofing Pty Ltd* (supra)."

44 I make no determination on the question of whether the casual loading paid to the applicant, throughout her employment, can be set-off against the claim for unpaid annual leave under the Award. The decision is not mine to make. However, from the cases cited above it would appear likely that such a set-off would be allowable.

2008 WAIRC 00176

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ADELE ALISA

APPLICANT

-v-

BRETT TITCHENER (ROCKETFUEL)

RESPONDENT

CORAM COMMISSIONER S WOOD

DATE FRIDAY, 14 MARCH 2008

FILE NO B 159 OF 2007

CITATION NO. 2008 WAIRC 00176

Result Application dismissed for lack of jurisdiction

Representation

Applicant Ms A Alisa

Respondent Mr B Titchener

Order

HAVING heard Ms A Alisa on her own behalf and Mr B Titchener 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 lack of jurisdiction.

[L.S.]

(Sgd.) S WOOD,
Commissioner.

2008 WAIRC 00185

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
ADELE ALISA **APPLICANT**

-v-
BRETT TITCHENER (ROCKETFUEL) **RESPONDENT**

CORAM COMMISSIONER S WOOD
DATE THURSDAY, 27 MARCH 2008
FILE NO U 159 OF 2007
CITATION NO. 2008 WAIRC 00185

Result Applicant dismissed unfairly; notice payable
Representation
Applicant Ms A Alisa
Respondent Mr B Titchener

Order

HAVING heard Ms A Alisa on her own behalf and Mr B Titchener 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, Adele Alisa, was unfairly dismissed by the respondent on the 22 September 2007;
- (2) DECLARES that reinstatement is impracticable;
- (3) ORDERS that the said respondent do hereby pay within 7 days of this order, as compensation by way of notice, the amount of \$1,454.22 to Adele Alisa, less any taxation that may be payable to the Commissioner of Taxation..

[L.S.]

(Sgd.) S WOOD,
Commissioner.

2008 WAIRC 00189

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
GENINE MARIE ASHBY **APPLICANT**

-v-
BRONWYN BAIN T/AS MUZZ BUZZ **RESPONDENT**

CORAM COMMISSIONER S WOOD
DATE FRIDAY, 28 MARCH 2008
FILE NO U 201 OF 2007
CITATION NO. 2008 WAIRC 00189

Result Application discontinued
Representation
Applicant Mr T Pope as agent
Respondent Ms B Bain

Order

WHEREAS this is an application pursuant to section 29(1)(b)(i) of the Industrial Relations Act 1979; and
WHEREAS a conciliation conference was convened on 18 February 2008 at the conclusion of which the matter was resolved; and

WHEREAS the applicant advised the Commission on 18 March 2008 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.

[L.S.]

(Sgd.) S WOOD,
 Commissioner.

2008 WAIRC 00154

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	LAURIE R CASTLES	APPLICANT
	-v-	
	G STOCKER PILBARA LOGISTICS WA PTY LTD	RESPONDENT
CORAM	COMMISSIONER S WOOD	
DATE	WEDNESDAY, 12 MARCH 2008	
FILE NO	B 10 OF 2008	
CITATION NO.	2008 WAIRC 00154	

Result Application discontinued

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 4 March 2008 that 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.

[L.S.]

(Sgd.) S WOOD,
 Commissioner.

2008 WAIRC 00199

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	GHIELMIE DANIELS	APPLICANT
	-v-	
	GLEN ROSS	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN	
DATE	WEDNESDAY, 2 APRIL 2008	
FILE NO/S	U 14 OF 2008	
CITATION NO.	2008 WAIRC 00199	

Result	Application discontinued
Representation	
Applicant	In person
Respondent	Mr G Ross

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*;
AND WHEREAS on 19 February 2008 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 20 March 2008 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:
WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*;
THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.

2008 WAIRC 00213

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
DARREN WILLIAM DORANT

PARTIES

APPLICANT

-v-

PATRICK BWL

RESPONDENT

CORAM COMMISSIONER S M MAYMAN
DATE WEDNESDAY, 9 APRIL 2008
FILE NO/S U 447 OF 2006
CITATION NO. 2008 WAIRC 00213

Result	Application dismissed
Representation	
Applicant	Mr D W Dorant
Respondent	No appearance

Order

WHEREAS on 24 July 2006 Darren William Dorant filed an application pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979*;
AND WHEREAS a conference was conducted on 25 October 2006, at which time the matter was not settled and, at the request of the parties, was adjourned to enable private discussions to be held with a view to settling the matter;
AND WHEREAS on 24 May 2007 the applicant advised the Commission he was seeking further advice;
AND WHEREAS 12 November 2007 the respondent raised a preliminary matter asserting the Commission lacked the jurisdiction to deal with the application due to the standing of the respondent as a constitutional corporation;
AND WHEREAS the application was listed by the Commission for a directions hearing prior to the hearing the preliminary matter on 22 November 2007;
AND WHEREAS the directions hearing listed for 22 November 2007 was adjourned;
AND WHEREAS on 4 February 2008 the Commission wrote to the applicant requiring submissions in writing within 28 days on the applicant's views on the jurisdictional issue;

AND WHEREAS the applicant failed to contact the Commission or provide written submissions by 3 March 2008 as requested;
 AND WHEREAS on 25 March 2008 the applicant did provide in writing his views on the jurisdictional issue raised by the respondent;
 AND WHEREAS on 17 March 2008 the Commission listed the application for hearing on 7 April 2008 for the applicant to show cause why the application should not be dismissed for want of prosecution;
 AND WHEREAS having heard from Mr D W Dorant on his own behalf;
 AND WHEREAS Mr Dorant sought a further adjournment of proceedings to enable him to seek further advice;
 AND WHEREAS the Commission considered Mr Dorant's request and finds Mr Dorant has had adequate time to prepare for the proceedings given the application was first filed in August 2006;
 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 dismissed for want of jurisdiction.

(Sgd.) S M MAYMAN,
 Commissioner.

[L.S.]

2008 WAIRC 00202

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

RUSSELL JAMES HENDY

APPLICANT

-v-

TREVOR CUMMINGS

GLOBAL GARDEN CARE

RESPONDENT

CORAM COMMISSIONER S M MAYMAN
HEARD MONDAY, 25 FEBRUARY 2008
DELIVERED FRIDAY, 4 APRIL 2008
FILE NO. B 160 OF 2007
CITATION NO. 2008 WAIRC 00202

CatchWords Industrial law (WA) – Denied contractual entitlements – Principles applied – Application upheld in part - *Industrial Relations Act 1979* (WA) - s 29(1)(b)(ii)
Result Claim for outstanding contractual entitlements upheld in part
Representation
Applicant Mr R J Hendy
Respondent No appearance

Reasons for Decision

[given extempore as edited by the Commissioner]

- 1 This is an application by Russell James Hendy ("the applicant") pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the Act") seeking benefits due to him under his contract of employment with Trevor Cummings, Global Garden Care ("the respondent").
- 2 Following the notice of application being filed on 5 October 2007, there was no Form 5, notice of answer and counter proposal filed despite a number of written requests from the Western Australian Industrial Relations Commission ("the Commission") to the respondent. The respondent failed to attend conferences listed for Thursday, 6 December 2007 and Thursday, 13 December 2007. On each occasion, telephone contact was made with the respondent by my associate confirming the dates and times of the conferences. The matter was listed for hearing on Tuesday, 12 February 2008. A notice of hearing was sent to the respondent and telephone contact was made with the respondent confirming the hearing date however the respondent claimed that he was not aware of the hearing and failed to attend.
- 3 The Commission adjourned the hearing and re-listed the matter for Monday, 25 February 2008. A notice of hearing was sent to both the applicant and the respondent. The Commission was satisfied the notice of hearing was sent to the respondent at the correct address and that no mail had been returned. The Commission was further satisfied the respondent knew the matter was on but did not attend. The Commission considered it was appropriate to hear and determine the matter in accordance with s 27(1)(d) of the Act and proceed to deal with this matter in the absence of the respondent.

The Claim

- 4 The applicant claimed outstanding contractual entitlements were owed to him being one week's payment in lieu of notice, \$893.00 (gross) and three weeks' annual leave, \$2679.00 (gross), a total of \$3572.00 (gross).
- 5 At the outset of the hearing the applicant claimed, based on the failure of the respondent to attend either of the conferences or hearings, that the Commission should grant the applicant's claim without hearing any evidence or submissions. The Commission rejected the applicant's request.

Applicant's Evidence

- 6 The applicant testified when first employed by the respondent he responded to a newspaper ad promoting a position with the respondent as a labourer/gardener. The applicant testified he met with the respondent at the premises of the respondent. The applicant testified that at that meeting a discussion took place and a contract of employment with the respondent was reached verbally, the respondent agreeing to an entitlement of four weeks' annual leave, full sick leave entitlement and a rate of \$22.00 per hour. The applicant testified that the respondent at the time referred to bonuses. The applicant testified he was paid \$893.00 (gross) per week and he worked 40 hours per week. Throughout the applicant's employment, the respondent paid him weekly by electronic funds transfer to a Westpac account (Exhibit Hendy 1). The applicant testified that at no stage did he receive payslips.
- 7 The applicant testified that his duties included mowing, general garden maintenance of private houses and some landscaping and he worked for the respondent for some 16 weeks commencing on 14 May 2007. The applicant testified that just prior to the conclusion of his employment he was approached by the respondent and informed he was to be taken off the garden maintenance round and placed on a Homeswest round. The applicant testified that the respondent emphasized the applicant was to start the new arrangements that day. The applicant testified that he was given no option nor was he asked his opinion and was informed by the respondent the Homeswest job had been messed up by other people and there may be a reduced number of persons working on the round.
- 8 The applicant testified that he was advised by the respondent that he was to be trained in this new position for two weeks by Daniel, another employee. The applicant testified he rang and spoke with the respondent on Thursday, 6 September 2007 to advise him he was not happy with the arrangement. The applicant testified that the respondent told him to:

"Try and stick it out ..."

(transcript page 6)

The applicant testified that he rang the respondent on Friday, 7 September 2007 at about 5:30pm and again advised him that he was not happy with the new position and gave the respondent a week's notice of his resignation. The applicant testified that he was willing to continue to work through to and including Friday, 14 September 2007. The applicant testified later on the same day, the respondent informed him:

"I don't need you, you might as well stay home."

(transcript page 6)

- 9 The applicant testified the respondent offered him work on the previous gardening round at a reduced rate of pay, a reduction of some \$100.00 per week. The applicant refused the offer and continued to make himself available to the respondent to work out the period of notice. The applicant testified he was abused by the respondent and instructed to remain at home. The applicant testified he rang the pay person and subsequently the respondent asking for his outstanding wages. The applicant testified contact was then made with the respondent, contact which became acrimonious, the respondent alleging the applicant had stolen items of equipment from the premises; a whipper snipper harness and face mask. The applicant testified he was informed by the respondent that payment was being withheld until these items were returned. The applicant testified that the payment in lieu and outstanding annual leave entitlements were never received.

Conclusion

- 10 I have listened carefully to the evidence of the applicant and considered the written details introduced by way of exhibits. It is my view that the applicant's evidence has been presented honestly and to the best of his recollection.
- 11 The Commission accepts the applicant was employed as a labourer/gardener with the respondent between 14 May 2007 and 7 September 2007. I accept also that the applicant was employed under a contract of employment reached verbally, following a response by the applicant to a newspaper advertisement and subsequently, an interview between the two at the premises of the respondent, where the applicant was offered the job and the offer was accepted. The Commission is satisfied that the terms of the contract of employment were known and that an award did not apply.
- 12 The onus was on the applicant to prove that his claim, in this case a total of \$3572.00 (gross), comprised benefits to which he was entitled under his contract of employment with the respondent. It is for the Commission to determine the terms of the contract of employment and to ascertain whether the claim constituted a benefit denied under such a contract having regard to the obligations of the Commission to act according to equity, good conscience and the substantial merits of the case. In making my decision the Commission has had regard for the principles outlined in *Belo Fisheries v Froggett* (1983) 63 WAIG 2394 and *Perth Finishing College Pty Ltd v Watts* (1989) 69 WAIG 2307. It is the Commission's view that the applicant has been denied contractual benefits by the respondent. The Commission finds the respondent has denied the applicant a contractual benefit of one week's payment in lieu of notice, \$893.00 (gross).

- 13 The Commission considers the respondent has denied the applicant part of the annual leave entitlement claimed. The Commission rejects the entitlement claimed by the applicant as being three weeks' annual leave and finds, based on the number of weeks of service, a denied benefit extending to 1.39 week's annual leave, an amount of \$1,241.20 (gross).
- 14 The Commission finds that the respondent owes to the applicant the following contractual entitlements:
 - (a) Payment for one week in lieu of notice (\$893.00 (gross)); and
 - (b) Payment for 1.39 week's annual leave (\$1,241.20 (gross)).
- 15 A Declaration and Order has already issued for the total amount of \$2,134.20 less any taxation owing. I indicated my views at the time of hearing this matter advising the applicant my reasons would issue later. These are those reasons.

2008 WAIRC 00140

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

RUSSELL JAMES HENDY

APPLICANT

-v-

TREVOR CUMMINGS
GLOBAL GARDEN CARE

RESPONDENT

CORAM COMMISSIONER S M MAYMAN
DATE MONDAY, 10 MARCH 2008
FILE NO/S B 160 OF 2007
CITATION NO. 2008 WAIRC 00140

Result Declaration and orders made
Representation
Applicant Mr R J Hendy
Respondent No appearance

Declaration and Order

HAVING heard Mr R J Hendy on his own behalf as the applicant and there being no appearance on behalf of the respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby –

- 1. DECLARES that the applicant has been denied contractual benefits in the form of payment of 1 week in lieu of notice (\$893.00 gross) and of 1.39 week's annual leave (\$1241.20 gross); and
- 2. ORDERS that the respondent pay the applicant the sum of \$2134.20 (less any taxation owing) within seven (7) days of the date of the issuance of this order; and
- 3. ORDERS that the application is otherwise hereby dismissed.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

2008 WAIRC 00182

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MOHAMED TAREK IBRAHIM

APPLICANT

-v-

CONSIDINE ARCHITECT

RESPONDENT

CORAM COMMISSIONER S M MAYMAN
DATE TUESDAY, 25 MARCH 2008
FILE NO/S B 85 OF 2007
CITATION NO. 2008 WAIRC 00182

Result	Application struck out for want of prosecution
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS an application was lodged in the Commission pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979*;
AND WHEREAS on 22 August 2007 a conference between the parties was convened;
AND WHEREAS at the conclusion of the conference agreement was reached between the parties;
AND WHEREAS on the 13 March 2007 the Commission listed this matter for the applicant to show cause why his application ought not be struck out for want of prosecution;
AND WHEREAS the applicant failed to contact the Commission or to attend the hearing;
NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT the application be struck out for want of prosecution.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

2008 WAIRC 00204

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	SUSAN M V MCCAUGHEY	APPLICANT
	-v-	
	BUNNINGS GROUP LIMITED, INNALOO	RESPONDENT
CORAM	SENIOR COMMISSIONER J H SMITH	
DATE	FRIDAY, 4 APRIL 2008	
FILE NO/S	U 189 OF 2007	
CITATION NO.	2008 WAIRC 00204	

Result	Dismissed
---------------	-----------

Order

WHEREAS this is an application pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979*;
AND WHEREAS on 4 January 2008 and 15 February 2008, the Commission wrote to the Applicant advising that unless she provided written submissions as to why this Commission may have jurisdiction to hear and determine her claim or she contacted the Commission within 28 days, the Commission would make an order dismissing the application;
AND WHEREAS on 4 April 2008, the Applicant had not contacted the Commission in respect of this matter nor filed a Notice of withdrawal or discontinuance;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act*, hereby orders —
THAT the application be and is hereby dismissed.

(Sgd.) J H SMITH,
Senior Commissioner.

[L.S.]

2008 WAIRC 00214

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ERRON LEE MORGAN **APPLICANT**

-v-

ST BARBARA MINES LIMITED **RESPONDENT**

CORAM COMMISSIONER S M MAYMAN

DATE WEDNESDAY, 9 APRIL 2008

FILE NO/S B 134 OF 2007

CITATION NO. 2008 WAIRC 00214

Result Application dismissed

Representation

Applicant No appearance

Respondent Ms H Miller (of counsel)

Order

WHEREAS on 8 August 2007 Erron Lee Morgan filed an application pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979*;

AND WHEREAS a conference was conducted on 22 November 2007, at which time the respondent made an offer of settlement which was subsequently accepted by the applicant;

AND WHEREAS an aspect of the agreement was that the offer and acceptance would be in full and final settlement of all matters in relation to the applicant's employment with the respondent;

AND WHEREAS the Commission was advised by the respondent that the settlement had been implemented and a deed of settlement signed by both parties;

AND WHEREAS the Commission wrote to the applicant requesting a Notice of discontinuance be filed;

AND WHEREAS the Commissioner's Associate Ms Allison made contact with the applicant on numerous occasions;

AND WHEREAS the applicant at no stage filed a Notice of discontinuance;

AND WHEREAS the Commission listed the matter to show cause as to why the application ought not be discontinued on 7 April 2008;

AND WHEREAS the Commission received written submissions from counsel for the respondent requesting the application be dismissed on public interest grounds;

AND WHEREAS the respondent submitted to continue the application was not necessary or desirable in the public interest pursuant to s 27(1)(a)(ii);

AND WHEREAS the Commission was satisfied that the terms of the agreement as reached in full and final settlement had indeed been implemented;

AND WHEREAS on 17 March 2008 the Commission notified the applicant the application was listed for hearing on 7 April 2008 for him to show cause why his application ought not be discontinued;

AND WHEREAS the applicant failed to contact the Commission or to attend the hearing;

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

THAT this application be, and is hereby dismissed in accordance with s 27(1)(a)(ii) of the *Industrial Relations Act 1979*.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

2008 WAIRC 00205

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES COLLEEN J ROSE **APPLICANT**

-v- **RESPONDENT**

BUNBURY CLEANING SERVICE

CORAM COMMISSIONER P E SCOTT

DATE FRIDAY, 4 APRIL 2008

FILE NO/S U 184 OF 2007

CITATION NO. 2008 WAIRC 00205

Result Application Dismissed

Order

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

WHEREAS on the tenth day of March 2008 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at that conference, agreement in principle was reached between the parties; and

WHEREAS on the 3rd day of April 2008, the Applicant advised the Commission that the matter had been resolved in accordance with the agreement reached between the parties and that she therefore wished to discontinue the application;

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

THAT this application be, and is hereby dismissed.

[L.S.]

(Sgd.) P E SCOTT,
Commissioner.

2008 WAIRC 00183

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LUKE SCOTT-MALCOLM **APPLICANT**

-v- **RESPONDENT**

BARRICK GOLD OF AUSTRALIA LTD

CORAM COMMISSIONER S WOOD

DATE TUESDAY, 25 MARCH 2008

FILE NO U 8 OF 2008

CITATION NO. 2008 WAIRC 00183

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 6 March 2008 that 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.

[L.S.]

(Sgd.) S WOOD,
Commissioner.

2008 WAIRC 00208

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MRS ROSLYN WILLIAMS	APPLICANT
	-v-	
	DONNYBROOK HOSPITAL WA COUNTRY HEALTH SERVICE SOUTH WEST	RESPONDENT
CORAM	COMMISSIONER P E SCOTT	
DATE	FRIDAY, 4 APRIL 2008	
FILE NO/S	U 204 OF 2007	
CITATION NO.	2008 WAIRC 00208	

Result Application Dismissed

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the Industrial Relations Act 1979; and
 WHEREAS on the 10th day of March 2008 the Commission convened a conference for the purpose of conciliating between the parties; and
 WHEREAS on the 3rd day of April 2008, the Applicant advised the Commission that she did not wish to pursue this application;
 NOW THEREFORE, the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:
 THAT this application be, and is hereby dismissed.

[L.S.]

(Sgd.) P E SCOTT,
Commissioner.

2008 WAIRC 00179

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION THOMAS WOODFORD	APPLICANT
	-v-	
	THE DEPARTMENT OF EDUCATION AND TRAINING WESTERN AUSTRALIA	RESPONDENT
CORAM	COMMISSIONER J L HARRISON	
DATE	MONDAY, 17 MARCH 2008	
FILE NO/S	U 506 OF 2006	
CITATION NO.	2008 WAIRC 00179	

Result Discontinued

Order

WHEREAS this is an application pursuant to s29(1)(b)(i) of the Industrial Relations Act 1979; and
 WHEREAS on 19 December 2006, 26 February 2007, 18 April 2007 and 4 October 2007 the Commission convened conferences for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of the conference on 4 October 2007 the parties were given further time to progress a proposal to resolve this matter; and

WHEREAS on 3 December 2007 the applicant advised the Commission that he would be lodging a Notice of Discontinuance in relation to his application; and

WHEREAS the Commission contacted the applicant on a number of occasions about lodging a Notice of Discontinuance; and

WHEREAS on 12 February 2008 the applicant filed a Notice of Discontinuance in respect of the application; and

WHEREAS on 17 March 2008 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.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

CONFERENCES—Matters referred—

2008 WAIRC 00181

DISPUTE REGARDING RE CLASSIFICATION OF POSTION OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INCORPORATED)

APPLICANT

-v-

COMMISSIONER CORRUPTION AND CRIME COMMISSION,
THE MINISTER FOR PUBLIC SECTOR MANAGEMENT

RESPONDENTS

CORAM

COMMISSIONER P E SCOTT
PUBLIC SERVICE ARBITRATOR

HEARD

WEDNESDAY, 4 JULY 2007

DELIVERED

THURSDAY, 20 MARCH 2008

FILE NO.

PSACR 27 OF 2006

CITATION NO.

2008 WAIRC 00181

CatchWords

Industrial law (WA) – Public service officer – Appointment to staff of Corruption and Crime Commission – Abolition of position – Application of Public Sector Management (Redeployment and Redundancy) Regulations – Appointment of public service officers – Appointment to the Public Service – Office, post or position – Permanency – Secondment – “Appointment for a term” – “Contract of employment that has a fixed term” – “Fixed term officer” – Termination on notice during appointment – *Industrial Relations Act 1979* (WA) s 44 – *Public Sector Management Act 1994* (WA) long title, s 3, Part 3 – ss 64, 65 66 – *Corruption and Crime Commission Act 2003* (WA) ss 175, 179, 180, 181 – *Public Sector Management (Redeployment and Redundancy) Regulations 1994* (WA) reg 4 – *Corruption and Crime Commission Agreement 2005*

Result

Reasons for Decision Issued

Representation

Applicant

Mr W Claydon for The Civil Service Western Australia (Incorporated)

Respondent

Mr M Hemery of Counsel for the Commissioner Corruption and Crime Commission,
Mr R Andretich of Counsel for the Minister for Public Sector Management

Reasons for Decision

- 1 This is a matter not resolved by conciliation which was referred for hearing and determination under section 44 of the Industrial Relations Act 1979 (“IR Act”) in the following terms:

“1. The Applicant says that:

- (a) Mr Glen Ross was employed by the Corruption and Crime Commission (“the CCC”) by letter dated 22 November 2004, which included the terms of employment as Manager – Corruption Prevention, Education and Research.
- (b) The letter contained the following terms of employment:
 - (i) Clause 3 provided that he was employed pursuant to s 179 of the *Corruption and Crime Commission Act 2003* (WA) (“the CCC Act”).
 - (ii) Clause 4 provided that his appointment was for a term of 5 years, from 8 October 2004 to 7 October 2009.
 - (iii) Clause 20 provided that the contract could be terminated by one month’s notice, in writing, by either side.
 - (iv) Clauses 9 and 10 provided for a 9% employer superannuation contribution in addition to an annual salary of \$94,768.
 - (v) Clause 7 provided that he was entitled to the benefits of the *Government Officers Salaries and Allowances Conditions Award 1989* (WA) (“the GOSAC Award”) and the *Government Officers Salaries Allowances and Conditions General Agreement 2004* (WA) (“the GOSAC General Agreement”) subject to modifications specified in the contract.
- (c) Mr Ross was appointed to the CCC as a Level 9. Prior to this appointment he held a substantive position as a Level 7 public service officer.
- (d) From August 2002 to January 2004 Mr Ross was seconded to the Kennedy Royal Commission in the position of Manager, Research, Policy and Reform Unit, at Level 8. From February 2004 to October 2004 he had various secondments to the CCC at Class 1 and Level 9.
- (e) On 19 January 2006 the *Corruption and Crime Commission Agreement 2005* (WA) (“the CCC Agreement”) was registered and came into force. Clause 9 of the CCC Agreement recognised that the sole mode of employment was a contract of employment up to 5 years duration with termination by one month’s notice.
- (f) By letters dated 16 and 18 January 2006 the CCC advised Mr Ross and the Civil Service Association of Western Australia Incorporated (“the CSA”), respectively, that Mr Ross’s position had been reclassified to Level 8. Notwithstanding that decision, the CCC continued to pay Mr Ross at Level 9.
- (g) On 17 January 2006 Mr Ross disputed the decision to reclassify the position, in writing. He also raised a grievance under the *CCC Agreement*. Further correspondence and meetings ensued between Mr Ross and the CCC in January 2006.
- (h) By letter dated 1 September 2006 the CCC advised Mr Ross that his Level 9 position had not been reclassified to Level 8 but rather that the Level 9 position had been abolished effective from 16 January 2006.
- (i) In that letter the CCC also advised Mr Ross that as he had refused to accept an alternative position at Level 8 there were no other suitable vacancies and he would be registered for redeployment pursuant to the *Public Sector Management Act (Redeployment and Redundancy) Regulations 1994* (WA) (“the PSMRR”) and would be paid at Level 7.
- (j) Mr Ross has been paid at Level 7.3 since 1 September 2006.
- (k) The Department for Premier and Cabinet (“the DPC”) on behalf of the Minister for Public Sector Management (“the Minister”) advised Mr Ross that it did not accept his registration for redeployment as he was employed pursuant to a fixed-term contract.
- (l) The DPC has also advised Mr Ross that he was entitled to return to the public sector pursuant to s 180(3) of the *CCC Act* and be paid as a Level 7, the level at which his position was classified prior to joining the CCC.
- (m) The Applicant contends that Mr Ross’s term of employment is not a ‘fixed-term contract’ as contemplated by the *PSMRR*, in particular reg 4. Part 6 of the *Public Sector Management Act 1994* (WA) (“the PSM Act”) applies to the CCC and Mr Ross has the benefit of the *PSM Act* and the *PSMRR*.
- (n) Accordingly, Mr Ross was entitled to be redeployed into the public service in accordance with the provisions of the *PSMRR*.

- (o) If the *PSMRR* did not apply then Mr Ross is entitled to be consulted about the level to which he would return to the public service and the Minister is required to consider whether the return should be at a level higher than the minimum provided by s 180(3) of the *CCC Act*.
2. The Applicant seeks:
- (a) An order that Mr Ross be paid salary and entitlements at Level 9 as from 1 September 2006.
 - (b) An order that Mr Ross be redeployed into the public service under the *PSMRR*.
 - (c) In the alternative to (a) and (b):
 - (i) An order that Mr Ross be consulted as to the operation of s 180(3) of the *CCC Act*; and
 - (ii) A declaration as to the principles the Minister ought to consider when exercising discretion under s 180(3) of the *CCC Act*.
3. The CCC says that:
- (a) It accepts that Mr Ross's term of employment was not a 'fixed-term contract' as contemplated by *PSMRR*, in particular reg 4.
 - (b) It accepts that the exclusion of the *PSMRR* in reg 4(2)(d) of the *PSMRR* did not apply to Mr Ross.
 - (c) Mr Ross:
 - (i) was a 'permanent officer' in the 'public service' classified at Level 7 under the *PSM Act* prior to his appointment by the CCC by contract dated 22 November 2004 ("the contract of employment").
 - (ii) retained the status of a 'permanent officer' in the 'public service' classified at Level 7 while employed by the CCC under the contract of employment.
 - (d) Accordingly, on this basis also the exclusion of the *PSMRR* in reg 4(2)(d) of the *PSMRR* did not apply to Mr Ross.
 - (e) Mr Ross was entitled to be redeployed into the public service in accordance with the provisions of *PSMRR*.
 - (f) Mr Ross's position with the CCC under the contract of employment was 'abolished' by the CCC on 16 January 2006 within the meaning of the *PSMRR*.
 - (g) Mr Ross therefore had an entitlement to be redeployed in accordance with the provisions of the *PSMRR*, on and from 16 January 2006.
 - (h) By letter dated 1 September 2006 the CCC informed Mr Ross that he had ceased to hold an office with the CCC.
 - (i) Upon ceasing to hold an office with the CCC, Mr Ross became entitled under s 180(3) of the *CCC Act* to be appointed to an office under Part 3 of the *PSM Act* by the Minister. Accordingly, the CCC had no obligations in relation to any such appointment.
 - (j) Upon Mr Ross ceasing to hold an office with the CCC, and pending redeployment or appointment to an office by the Minister, Mr Ross remained a 'permanent officer' in the 'public service' at classification Level 7 and the obligation to meet Mr Ross's entitlement as such was upon the Minister and not the CCC.
 - (k) Notwithstanding this, between 1 September 2006 and 9 March 2007 the CCC continued to meet Mr Ross's entitlements as a 'permanent officer' in the 'public service' at classification Level 7.
 - (l) Mr Ross was appointed by the Minister pursuant to s 180(3) of the *CCC Act* to an office in the public service under the *PSM Act* with the classification Level 7.3 with effect from 8 March 2007.
 - (m) By reason of and upon Mr Ross's appointment to an office in the public service on and from 8 March 2007, Mr Ross ceased to be entitled to redeployment under the *PSMRR*.
 - (n) The CCC neither accepts nor rejects the CSA's alternative contentions that:
 - (i) Mr Ross is (or was) entitled to be consulted about the level to which he would return to the public service if s 180(3) of the *CCC Act* were to apply; and

- (ii) the Minister would have to consider objectively Mr Ross's Level 9 status and whether or not he could be returned to the public service at that level or a level other than the minimum requirements of s 180(3) of the *CCC Act*

on the grounds that any entitlement of Mr Ross under s 180(3) of the *CCC Act* to be appointed to an office under Part 3 of the *PSM Act* is an entitlement to be appointed to an office by the Minister, and the CCC has no obligations under s 180(3) of the *CCC Act* in relation to any such appointment.

4. In response to the relief sought by the CSA the CCC rejects that Mr Ross is entitled to be paid salary and entitlements at Level 9 as from 1 September 2006, and says further that:

- (a) Regulation 23 of the *PSMRR* does not provide an entitlement to payment pending redeployment at the rate of pay of an office abolished, but rather specifies that rate of pay to be used for the purpose of certain provisions in the *PSMRR*.
- (b) If (which is denied) reg 23 provides Mr Ross with an entitlement to be paid at Level 9 on and from 1 September 2006 pending redeployment:
 - (i) the obligation to pay was on the Minister and not on the CCC; and
 - (ii) any such obligation ceased upon appointment to an office in the public service by the Minister pursuant to s 180(3) of the *CCC Act* on and from 8 March 2007.
- (c) The CCC rejects that Mr Ross is entitled to be redeployed in to the public service under the *PSMRR* on the ground that upon the appointment by the Minister to an office pursuant to s 180(3) of the *CCC Act* Mr Ross's entitlement to redeployment ceased;
- (d) The CCC neither accepts nor rejects the claim for relief sought on the grounds set out in paragraph 2(c) above.

5. The Director General of the DPC, on behalf of the Minister, rejects the Applicant's claims and says that:

- (a) Section 179 of the *CCC Act* only permitted Mr Ross to be appointed to the staff of the CCC 'for a term' not 'exceeding 5 years'.
- (b) An appointment made in accordance with s 179 of the *CCC Act* is employment that has a 'fixed term' for the purposes of the *PSMRR*.
- (c) Mr Ross was not a 'permanent officer' following his appointment to the staff of the CCC and therefore the *PSMRR* did not apply to him as a result of the operation of reg 4(2)(d).
- (d) If the *PSMRR* applied to Mr Ross following the abolition of his position, which is denied, they ceased to do so when he accepted employment offered to him pursuant to s 180(3) of the *CCC Act*.

6. The Director General of the DPC, on behalf of the Minister, does not admit the Applicant's contentions or that Mr Ross is entitled to the relief sought on his behalf."

2. The parties have submitted a Statement of Agreed Facts and Documents. Many of the Agreed Facts repeat some of the facts and law asserted in the Memorandum of Matters Referred for Hearing and Determination, however, it is appropriate to set them all out. They are as follows:

- "1. The applicant is the Civil Service Association of Western Australia Incorporated ["CSA"], an organisation duly registered under the Industrial Relations Act 1979.
- 2. The Corruption and Crime Commission is an organisation established pursuant to the Corruption and Crime Act 2003 ["CCC Act"].
- 3. Glenn Ross was employed by the Corruption and Crime Commission ["the first respondent"] as Manager – Corruption Prevention, Education and Research, by letter dated 22 November 2004, which included terms of employment. A copy of that letter and his terms of employment are attached as Attachment "A".
- 4. The letter contained the following terms of employment:
 - (i) By clause 3, he was employed pursuant to s.179 CCC Act.
 - (ii) By clause 4, his appointment was for a term of 5 years from 8 October 2004 to 7 October 2009.
 - (iii) By clause 20 the contract could be terminated by one month's notice in writing by either side.
 - (iv) By clauses 9 and 10 his salary was specified as \$94,768 per annum in addition to 9% employer contribution for superannuation.
 - (v) By clause 7 he was entitled to the benefits of the GOSAC award and General Agreement subject to modifications specified in the contract.

5. Attachment "AA" and "AB" respectively are copies of the GOSAC award and the General Agreement as they stood at the date of appointment.
6. By the letter of 22 November 2004, Mr Ross was appointed to Level 9 within the broad banding classification system operating within the WA Public Sector.
7. Prior to joining the first respondent Mr Ross held a substantive position classified as Level 7 – public service officer. Attachment "AC" is Mr Ross's letter of appointment by the Ministry of Justice dated 18 November 1997. Attachment "AD" is Mr Ross's Employee Commencement Advice dated 24 February 1998.
8. From 23 September 2002 to January 30 January 2004 Mr Ross was employed on secondment as Manager of the Research, Policy and Reform Unit with the Kennedy Royal Commission at Level 8. Attachment "AE" is a copy of a letter from the Kennedy Royal Commission to the Department of Justice dated 24 September 2002 confirming the secondment of Mr Ross. Attachment "AF" is a copy of a Fixed Term Contract dated 14 October 2002 signed by Mr Ross in respect of that appointment. Attachment "AG" is copy of a letter from the Kennedy Royal Commission to Mr Ross dated 5 August 2003 extending Mr Ross's fixed term appointment to 30 November 2003. Attachment "AH" is a letter from the Kennedy Royal Commission to the Department of Justice extending Mr Ross's secondment until 30 January 2004.
9. By letter of appointment dated 29 January 2004 Mr Ross was employed by the first respondent as Manager, Corruption Prevention, Education and Research in the Corruption Prevention, Education and Research Director, for a term from 2 February 2004 to 28 May 2004. The appointment was at Level 8, year 3 on a salary of \$86,553. Attachment "AI" is the letter of appointment.
10. From 2 February 2004 to 17 May 2004, Mr Ross was appointed Acting Director, Corruption Prevention, Education and Research, and was paid a Higher Duties Allowance as a Class 1.
11. On and from 17 May 2004, the Director, Corruption Prevention, Education and Research was appointed, and Mr Ross reverted to the position of Acting Manager, Corruption Prevention, Education and Research. Mr Ross remained a Class 1 from 17 May 2004 to 17 June 2004. On and from 17 June 2004, Mr Ross was employed in this position at the classification Level 9, year 1, until he commenced employment under the contract of employment dated 22 November 2004.
12. On 19 January 2006 the Corruption and Crime Commission Industrial Agreement was registered and came into force [see PSAAG 28 of 2005; and 2006 WAIRC 03495]. A copy of this agreement is attached as Attachment "B". The agreement included clause 9(2) which provided as follows:

Appointment

- (2) *Officers shall only be appointed by way of a fixed term contract of employment pursuant to Section 179 of the Corruption and Crime Commission Act 2003 for a term not exceeding five years and be eligible to be reappointed. Officers appointed shall be advised in writing of the terms of appointment and such advice shall specify the dates of commencement and termination of employment*

13. By letter dated 16 January 2006 the first respondent wrote to Mr Ross in the following terms:

Following a review of the structure of the Corruption Prevention, Education and Research (CPER) Directorate, including a period of consultation, I wish to advise you that the position you occupy has been reclassified. As part of the review it has been determined to amend the classification of this new position to Level 8. The previous title of the position has been retained. A copy of the revised job description form (JDF) is attached for your information.

As per previous verbal advice, your remuneration will remain at Level 9 (the level to which you were previously appointed) during the life of the current contract. Accordingly, you will be entitled to the privileges afforded officers at that level, including access to the Government Vehicle Scheme.

The CPER Directorate will now operate within three (3) teams, each supported by a manager reporting to the Director, CPER. Your position as manager will be to continue with the activities contained within your JDF as part of this new structure, including the management of senior consultants. I encourage you to discuss your continuing role within CPER with you Director. These changes take effect immediately.

All other terms and conditions of employment remain unchanged.

A copy of that letter is attached as Attachment "C".

14. In accordance with that letter, the first respondent continued to pay Mr Ross at Level 9, in addition to other entitlements under his contract of employment dated 22 November 2004.
15. On 17 January 2006 Mr Ross disputed in writing the unilateral reclassification of his position from Level 9 to Level 8; in that he raised a grievance under the CCC Industrial Agreement. In January 2006 there were meetings involving the Applicant and the first respondent to discuss Mr Ross's grievance, and

correspondence followed. Copies of his grievance and other correspondence between 17 January 2006 and 17 February 2006 are attached as Attachment "D". Attachment "DA" are copies of further correspondence regarding attempts by the first respondent to address the grievance of Mr Ross as follows:

- a. letter from Commissioner Hammond to Mr Ross dated 17 February 2006;
 - b. letter from Commissioner Hammond to Mr Ross dated 27 February 2006;
 - c. letter from Commissioner Hammond to Mr Ross dated 10 March 2006;
 - d. file note of meeting with Mr Ross dated 15 March 2006;
 - e. letter from Mr Ross to Acting Commissioner Shanahan SC dated 20 March 2006;
 - f. letter from Acting Commissioner Shanahan SC to Mr Ross dated 27 March 2006.
16. By letter dated 18 January 2006 the first respondent confirmed to the CSA the reclassification of Mr Ross's position from Level 9 to Level 8. A copy of this letter is attached as Attachment "E".
17. On and from 23 March 2006 Mr Ross went on extended sick leave from the first respondent's employment. Attachment "EA" is the following correspondence relating to Mr Ross's return from sick leave:
- (a) letter from Commissioner Hammond to Mr Ross dated 10 July 2006;
 - (b) letter from Mr Ross to Commissioner Hammond dated 12 July 2006;
 - (c) letter from Mr Ross to Commissioner Hammond dated 12 July 2006;
 - (d) letter from Mr Ross to Commissioner Hammond dated 21 July 2006;
 - (e) letter from Commissioner Hammond to Mr Ross dated 21 July 2006;
 - (f) letter from Mr Ross to Commissioner Hammond dated 24 July 2006;
 - (g) letter from Ms Grant to Mr Ross dated 26 July 2006;
 - (h) letter from Mr Ross to Commissioner Hammond dated 28 July 2006;
 - (i) letter from Ms Grant to Mr Ross dated 31 July 2006;
 - (j) letter from Mr Ross to Commissioner Hammond dated 2 August 2006;
 - (k) letter from Ms Grant to Mr Ross dated 3 August 2006;
 - (l) letter from Mr Ross to Commissioner Hammond dated 3 August 2006;
 - (m) letter from Mr Ross to Commissioner Hammond dated 4 August 2006;
 - (n) letter from Ms Grant to Mr Ross dated 11 August 2006;
 - (o) email from Mr Ross to Ms Grant dated 11 August 2006;
 - (p) letter from Ms Grant to Mr Ross dated 16 August 2006;
 - (q) letter from Mr Ross to Commissioner Hammond dated 18 August 2006;
 - (r) letter from Mr Ross to Commissioner Hammond dated 25 August 2006;
 - (s) letter from Ms Grant to Mr Ross dated 31 August 2006.
18. By letter dated 1 September 2006 the first respondent advised Mr Ross that his Level 9 position had not been reclassified to Level 8 as previously stated, but that it had been abolished effectively from 16 January 2006. A copy of this letter is attached at Attachment "F".
19. By the same letter the first respondent advised Mr Ross that as he had refused to accept an alternative position at Level 8, there were no other suitable vacancies within the agency, and he would therefore be registered for redeployment in the public service pursuant to the Public Sector Management Act (Redeployment and Redundancy) Regulations 1994 ["PSMRR"].
20. Further that he would be paid at Level 7, rather than Level 9. Mr Ross has been paid at Level 7.3 since 1 September 2006, regardless as to which respondent was his employer.
21. By e-mail dated 4 September 2006 the Executive-Director of the first respondent advised staff of the Commission's decision to terminate unilaterally Mr Ross's contract. A copy of that e-mail is attached as Attachment "G".
22. Notwithstanding the first respondent's advice to Mr Ross that he would be registered for redeployment, the Department for Premier and Cabinet ["DPC"] on behalf of the Minister for Public Sector Management would not accept his registration for redeployment by the first respondent.
23. Mr Ross has disputed the entire decision of the first respondent to change the characterisation of his employment status, and entitlements, including the decision to pay him at Level 7.3. This dispute is evidenced by letters to the first respondent dated 9, 11 and 12 October 2006, and culminated in the

applicant filing PSAC 27 of 2006. Copies of these three letters are attached as Attachment "H". Attachment "HA" are copies of the following letters from the first respondent responding to these concerns:

- (a) letter from first respondent to Mr Ross dated 11 October 2006;
 - (b) letter from first respondent to CSA dated 12 October 2006;
 - (c) letter from first respondent to Mr Ross dated 18 October 2006.
24. Attachment 'HB' is a copy of a letter from the Department of Premier and Cabinet and the CCC to the CSA dated 13 November 2006, setting out the terms proposed for resolution of the CSA's grievance following a conciliation conference between the parties to PSAC 27 of 2006 on 3 November 2006. These terms were accepted by all parties.
 25. DPC advised the first respondent that Mr Ross did not qualify for redeployment because he was employed pursuant to a fixed term contract.
 26. By letter dated 9 October 2006 Mr Ross disputed the advice from DPC to the first respondent (sic) A copy of this letter is attached as Attachment "I". He wrote again on or about 2 January 2007 to DPC concerning disputed matters or concerns. A copy of this letter is attached as Attachment "J".
 27. Nevertheless the DPC advised that Mr Ross was entitled to return to the public service pursuant to s. 180(3) CCC Act, and be paid at Level 7, the level which he enjoyed in the public service prior to joining the first respondent.
 28. Mr Ross disputed the advice received from DPC; in particular the unilateral decision to revert him to Level 7 without negotiation or discussion.
 29. During January 2007 Mr Ross advised the Minister for Public Sector Management that he wished to avail himself of the entitlement contained in s. 180(3) CCC Act. This is evidenced by the letter dated 2 January 2007 [Attachment "J"] and an e-mail conversation between Mr Ross and Mr Volaric during January 2007. A copy of this e-mail conversation is attached at Attachment "K",
 30. By letter dated 5 February 2007 the first respondent purported to resile from a proposed arrangement to settle parts of the dispute on the basis of Mr Ross's alleged non-compliance with other arrangements. A copy of this letter, and other details, is attached as Attachment "L".
 31. By letter dated 6 February 2007 Mr Ross disputed that he failed to comply with the arrangements, and by letter dated 12 February 2007 the first respondent advised him that it would cease making payment of salary to him as from close of business on 15 February 2007. Copies of these letters are attached as Attachment "M".
 32. By letter dated 14 February 2007 the Director-General of the Department for Premier and Cabinet, on behalf of the Minister offered employment to Mr Ross in the department at Level 7.3. A copy of this letter is attached as Attachment "N".
 33. Prior to that letter Mr Ross received by letter dated 9 February 2007 from DPC a response to his letters dated 9 October 2006 and 1 February 2007, wherein DPC reiterated its previous position. A copy of this letter is attached as Attachment "O".
 34. Mr Ross accepted the offer of engagement with the DPC under protest by e-mail on 22 February, and reiterated his protest by letter dated 4 March 2007. Copies of these communications are attached as Attachment "P".
 35. The first respondent continued to pay Mr Ross up to and including 8 March 2007, after which the second respondent commenced paying Mr Ross.
 36. By letter dated 12 March 2007 DPC replied to Mr Ross's letter of 4 March 2007. A copy of this letter is attached as Attachment "Q".
 37. Mr Ross is engaged currently on work with DPC at Level 7.3."

The Parties' Submissions

- 3 It is not my intention to set out all of the arguments of the parties as most of them are covered by the Memorandum of Matters Referred for Hearing and Determination.

The Hearing

- 4 At the commencement of the hearing of this matter the Minister called evidence from Michael Ambrose McLaughlan, Principal Policy Officer, Redeployment, with the DPC. Mr McLaughlan has held that position or a similar position since 1984. He gave evidence of government policy, and of the recommendation of Commissioner G L Fielding in the "*Review of the Public Sector Management Act*" of April 1996 to the effect that the PSMRR did not apply to employees, amongst others, whose employment ceased on the expiry of the term of their contract of employment (reg 4(2)(d)). Commissioner Fielding recommended that:

“Regulation 4(2)(d) of the Public Sector Management (Redeployment and Redundancy) Regulations 1994 be amended to make it clear that those whose employment is liable to cease on the expiry of a fixed term contract be excluded from the operations of the Regulations.” (p 182)

- 5 Mr McLaughlan gave evidence of the amendment to reg 4 in accordance with that recommendation and in particular in exhibit 2. He provided a copy of a document headed “Policy Statement December 2002 – Redeployment and Redundancy” which noted under the heading of Policy that:

“5. Casual and temporary employees are not entitled to redeployment and redundancy benefits if their employment is terminated. Similarly, fixed term contract employees who have completed their term of engagement are not entitled to redeployment or redundancy benefits. However, where such a contract has been terminated prematurely due to no fault of the employee, a need may arise for compensation in accordance with the terms of the contract.”

(Exhibit 3)

- 6 On the basis of this material and his experience, Mr McLaughlan said that a fixed term contract is one that is for a term. Mr McLaughlan was not cross examined.
- 7 The Minister also called evidence from Daniel Volaric, Director of Workforce Management within the Public Sector Management Division. I take this to be a division of the DPC.
- 8 Mr Volaric gave evidence that he engaged with Mr Ross’s representatives to formulate a process whereby Mr Ross would be returned to the public service under s 180(3) of the *CCC Act*, following a conference before the Commission on the 3 November 2006. He said that it was “agreed to enter into a proposal to meet with the union, DOCEP” and the CCC to identify the “practice and mechanisms” to give effect to s 180(3). He gave evidence of his endeavours to explore options for the resolution of this matter with the other parties. Mr Volaric said that based on past experience it would not be easy to redeploy Mr Ross at Level 9 within the public service due to the seniority of the level and the nature of such positions as those opportunities were few and far between.
- 9 A letter dated the 22 March 2007 addressed to Ms Toni Walkington, Branch Secretary, CPSU/CSA (exhibit 4) was received into evidence. This letter indicates the Applicant’s view that s 180(3) of the *CCC Act* provides a right of return to the public service at no lesser classification than the position previously held by the officer.
- 10 It is not my intention to set out all of the relevant documentation in this matter. However, the terms of the letter of offer of employment to Mr Ross by the CCC, which offer Mr Ross accepted are as follows:

“Dear Glenn Ross

OFFER OF EMPLOYMENT

I am pleased to offer you an appointment as a member of staff of the Corruption and Crime Commission on the terms and conditions set out below.

If you accept this offer of employment, most of the terms of the Government Officers Salaries, Allowances and Conditions (GOSAC) General Agreement 2004, read in conjunction with the GOSAC Award 1989 will apply, as amended from time to time, until the Commission and its members of staff make a Commission-Staff Agreement.

The GOSAC Award 1989 and the GOSAC General Agreement 2004 are registered in the Western Australian Industrial Relations Commission (WAIRC). A Commission-Staff Agreement will operate, upon registration, as an industrial agreement in the WAIRC.

If you accept the terms and conditions, please initial each page, sign the last page before an adult witness and return it to the Manager, Human Resources & Planning at the Commission.

Mike Silverstone

EXECUTIVE DIRECTOR”

- 11 Attached to that letter is a document headed “Terms and Conditions” which contains the following relevant provisions:

“Terms and Conditions

Employee

1. The employee is Glenn Ross

Employer

2. The employer is the Corruption and Crime Commission established by the *Corruption and Crime Commission Act 2003* (WA) (the CCC Act).

Employment under the CCC Act

3. The employee is employed under section 179 of the CCC Act, which provides, among other things, that:
 - (a) The Commission may appoint members of staff.

- (b) A member of staff is not to be appointed for a term exceeding 5 years and is eligible for reappointment.
- (c) The Commission may determine the remuneration and other terms and conditions of service of staff.
- (d) Remuneration and other terms and conditions of employment are not to be less favourable than is provided for in an applicable award or other agreement under the *Industrial Relations Act 1979* (WA) or the *Minimum Conditions of Employment Act 1993* (WA).

Terms of appointment

- 4. The employee is appointed to the position of Manager, Corruption Prevention, Education & Research for a term of 5 years from 8 October 2004 to 7 October 2009.
 - (a) Nothing in the entirety of this clause is to be interpreted as imposing upon either party an obligation or entitlement to enter into negotiations for a further term of employment, an option or right to extend the period of this agreement or to enter into a new agreement.
 - (b) The parties may enter into negotiations to extend the duration prior to termination of the agreement.

...

Government Officers Salaries, Allowances and Conditions Award and General Agreement apply except as varied

- 7. The terms and conditions that apply are those in the Government Officers Salaries, Allowances and Conditions Award as amended from time to time (the GOSAC Award) and the Government Officers Salaries, Allowances and Conditions General Agreement, as amended from time to time (the GOSAC Agreement), except as varied by the terms set out below under "Variations to GOSAC terms and conditions".
 - 7.1 The current GOSAC Award is the GOSAC Award of 1989. The current GOSAC Agreement is the GOSAC Agreement of 2004.
 - 7.2 The GOSAC Agreement of 2004 provides that it is to be read in conjunction with the GOSAC Award of 1989 and that where the provisions of the Award and the Agreement are inconsistent, the provisions of the Agreement shall prevail.

GOSAC Award and Agreement to be superseded by Commission–staff agreement

- 8. The employer proposes to negotiate with its members of staff a Commission-Staff agreement that will set out all the terms and conditions of employment for Commission members of staff. Once registered in the Western Australian Industrial Relations Commission (WAIRC), the Commission-Staff Agreement will supersede the terms in the GOSAC Award and GOSAC Agreement. The Commission-Staff Agreement will provide terms and conditions no less favourable than that provided in the GOSAC Award and GOSAC Agreement.
 - 8.1 The employee acknowledges that when the Commission-Staff agreement is registered as an industrial agreement by the WAIRC, such agreement will extend to and bind the Employee in accordance with subsection 41(4) of the *Industrial Relations Act 1979*.

Salary on commencement

- 9. The employee's commencing salary is \$94,768 per annum plus the employer's superannuation payments of 9% per annum to an approved superannuation fund.

Remuneration

- 10. Upon commencement, the Commission will remunerate the Employee in accordance with the package set out below ("the Remuneration Package")

Salary		\$94,768
Level		9.1
Employer's compulsory contribution to superannuation	8,529	
Total		103,397

Subject to satisfactory performance, increases in remuneration may occur in accordance with the relevant industrial instrument. Performance will be reviewed via an annual Performance Management System, currently being developed.

- 10.1 The Employee is entitled to overtime, allowances, loadings or other penalty rates.
- 10.2 The Employee is eligible to join the Government Vehicle Scheme (GVS), and is entitled to utilise a Commission vehicle for operational and private use, in accordance with Commission policy. The Employee shall make a fortnightly contribution as determined under the GVS, for the privilege. The current contribution payable is \$93.50 per fortnight.

...

Terms of the GOSAC Award and GOSAC Agreement varied by this agreement

13. The following special terms and conditions apply to the employee's employment with the Commission, and replace any similar terms and conditions contained within the GOSAC Award and GOSAC Agreement.

...

Termination of Agreement

20. Notwithstanding any other provision contained in this Agreement, the Employee may be summarily dismissed without notice in circumstances, including but not limited to:
- (a) serious or persistent breach of any of the terms of this Agreement;
 - (b) disregard of lawful instructions or non-compliance with duties owed in the Employment;
 - (c) dishonesty (including theft or fraud);
 - (d) unauthorised disclosure of information acquired by the Employee by reason of, or in the course of, the exercise of the employee's functions under the Act;
 - (e) forgery or deliberate falsification of any record;
 - (f) serious or persistent breach of any of the Commission's policies;
 - (g) absence from the business of the commission on unauthorised leave for a period of five (5) or more business days;
 - (h) bankruptcy.
- 20.1 Either the Commission or the Employee may terminate the employment by giving one-month prior notice in writing to the other party.
- 20.2 In the event of the termination of the Employment by the Commission pursuant to clause 20.1, the Commission may elect to pay the Employee one month's salary in lieu of providing notice or any combination of such notice and payment in lieu of notice.
- 20.3 The Commission may, at its sole discretion, for all or any part of the notice period not require the Employee to carry out his duties and attend the Commission's premises.
- 20.4 Nothing in this Agreement prevents the Commission from suspending the Employee on full pay pending the resolution of any matter of alleged misconduct.

Terms and Conditions accepted

(signed)

Glenn Ross

22 November 2004"

(Attachment A to Statement of Agreed Facts and Documents)

The Statutory Scheme – The Public Sector Management Act 1994

- 12 The *PSM Act* is, according to its long title, "An Act to provide for the administration of the Public Sector of Western Australia and the management of the Public Service and of other public sector employment..." amongst other things. A "public service officer" is defined in s 3 as "executive officer, permanent officer or term officer employed in the Public Service under Part 3." Section 3 also defines a "permanent officer" as "person appointed under section 64(1)(a) for an indefinite period". (Section 64 falls within **Part 3 – Public Service** of the *PSM Act*.) Section 3 also defines an "organisation" as "non-SES organisation or SES organisation."
- 13 **Division 3 – Public service officer other than executive officers of Part 3 – Public Service** deals with the appointment of public service officers other than executive officers (s64); the transfer of those officers within and between departments and organisation (s 65); their secondment (s 66), and the vacation of offices of public service officers (s 67). Those sections provide as follows:

64. Appointment of public service officers other than executive officers

- (1) Subject to this section and to any binding award, order or industrial agreement under the *Industrial Relations Act 1979* or employer-employee agreement under Part VID of the *Industrial Relations Act 1979*, the employing authority of a department or organisation may in accordance with approved procedures appoint for and on behalf of the Crown a person as a public service officer (otherwise than as an executive officer) on a full-time or part-time basis —
 - (a) for an indefinite period as a permanent officer; or
 - (b) for such term not exceeding 5 years as is specified in the instrument of his or her appointment.
- (2) An appointment under subsection (1) shall be to such level of classification and remuneration as is determined by the relevant employing authority —
 - (a) in accordance with approved procedures; and
 - (b) as being appropriate to the functions to be performed by the person so appointed.
- (3) The employing authority of a department or organisation shall —
 - (a) in accordance with approved procedures; and
 - (b) at the time of the appointment of a person under subsection (1) or, if that employing authority considers it impracticable to make the appointment concerned at that time, at a later time,
appoint the person to fill a vacancy in an office, post or position in the department or organisation.
- (4) Subject to subsection (5), a person appointed under subsection (1)(b) cannot apply for an appointment under subsection (1)(a) unless the relevant vacancy has first been advertised in public service notices or in a daily newspaper circulating throughout the State.
- (5) Subsection (4) does not apply to a person —
 - (a) appointed under subsection (1)(b); and
 - (b) having, or occupying an office, post or position having, the lowest level of classification at which persons of the same prescribed class as that person are at the relevant time recruited into the Public Service.
- (6) The employing authority of an organisation shall not make an appointment under subsection (1) unless the written law under which the organisation is established or continued authorises or requires the appointment or employment of public service officers for the purposes of that organisation.
- (7) Nothing in this section prevents a public service officer who holds an office, post or position in one department or organisation from being appointed, whether by way of promotion or otherwise, to an office, post or position in another department or organisation.

65. Transfer of public service officers other than executive officers within and between departments and organisations

- (1) If an employing authority considers it to be in the interests of its department or organisation to do so, that employing authority may transfer at the same level of classification a public service officer other than an executive officer from one office, post or position in that department or organisation to another such office, post or position —
 - (a) for which that public service officer possesses the requisite qualifications; and
 - (b) the functions assigned to which are appropriate to that level of classification.
- (2) If an employing authority of a department or organisation considers it to be in the interests of the Public Service to do so, that employing authority may, with the approval of the employing authority of another department or organisation and after consulting the public service officer concerned, transfer at the same level of classification a public service officer (other than an executive officer) from an office, post or position in the first-mentioned department or organisation to an office, post or position in the other department or organisation —

- (a) for which latter office, post or position that public service officer possesses the requisite qualifications; and
 - (b) the functions assigned to which latter office, post or position are appropriate to that level of classification.
- (3) On the transfer of a public service officer under subsection (2), the employing authority of the department or organisation to which that transfer takes place —
- (a) becomes the employing authority of the public service officer; and
 - (b) is substituted for the employing authority of the department or organisation from which that transfer takes place as a party to any contract of employment of the public service officer.

66. Secondment of public service officers other than executive officers from departments or organisations

An employing authority of a department or organisation (in this section referred to as “**the seconding authority**”) may, if it considers it to be in the public interest to do so and the public service officer concerned consents, enter into an arrangement in writing with another such employing authority or with an employer outside the Public Sector for the secondment of a public service officer (other than an executive officer) in the department or organisation of the seconding authority to perform functions or services for, or duties in the service of, the other department or organisation or that employer during such period as is specified in that arrangement.

67. Vacation of office of public service officer other than executive officer

The office of a public service officer (other than an executive officer) becomes vacant if —

- (a) that public service officer dies;
- (b) in the case of a term officer, the term officer completes a term of office and is not reappointed;
- (c) that public service officer is dismissed, or retires from office, under this Act;
- (d) the employment of that public service officer in the Public Sector is terminated under section 79(3);
- (e) that public service officer resigns his or her office in writing addressed to his or her employing authority and that employing authority accepts that resignation; or
- (f) that public service officer is appointed or transferred under this Part to another office, post or position.

14 Therefore, according to s 64, the following applies:

1. An employing authority of a department or organisation may, on behalf of the Crown appoint a person as a public service officer;
2. That appointment is subject to binding awards and/or agreements under the *IR Act*;
3. Appointment is to be according to approved procedures;
4. Appointment may be for an indefinite period as a permanent officer – ie a permanent officer is appointed without any expiration date specified.
5. Alternatively to 4. above, appointment may be “for such term not exceeding 5 years as is specified in the instrument of his or her appointment.”
6. Appointment is to a level of classification and remuneration. The classification and level of remuneration are to be in accordance with approved procedures and appropriate to the function to be performed by the person.
7. According to approved procedures and at the time of appointment or at a later time, appointment is made to a vacant office, post or position in a department or organisation.

In summary, there is the appointment:

1. for an indefinite period (permanent officer), or for a term not exceeding 5 years;
2. to a level;
3. to a vacant office, post or position.

15 Section 65 provides for transfer of public service officers from one office, post or position to another within the organisation or department or to another department or organisation.

16 Section 66 provides for the secondment of public service officers to another employing authority or to an employer outside the Public Sector for a specified period with the consent of the officer.

- 17 Section 67 provides that the office of a public service officer becomes vacant in a range of specified circumstances, those relevant here include:
- (a) the completion of the specified term of a term appointment and there being no reappointment;
 - (b) dismissal;
 - (c) resignation in writing which is accepted by the employing authority;
 - (d) appointment or transfer under **Part 3** to another office, post or position.

Mr Ross's Status Prior to CCC.

- 18 The evidence and the agreed facts make clear that Mr Ross was appointed as a permanent public service officer on 15 December 1997, by the Ministry of Justice to the position of Manager – Forensic Case Management Team, Level 7, year 3, Casuarina Prison, Offender Management.
- 19 He was seconded to the Royal Commission into Whether There Has Been Any Corrupt or Criminal Conduct by Western Australian Police Officers (the Royal Commission). This secondment commenced on 23 September 2002 and was to end on 31 August 2003. It is clear from Exhibit 5, Attachment “AE”, that this was in fact a secondment from the Department of Justice. According to the letter of secondment, Mr Ross would continue to be paid by the Department of Justice which would recoup its expenses from the Royal Commission. As part of this secondment, Mr Ross entered into what was described as a “Fixed Term Contract” with the Royal Commission for the period specified in the letter of secondment. This “Fixed Term Contract” says that it is in accordance with s 29 of the *PSM Act*. Section 29 of the *PSM Act* sets out the function of chief executive officers and chief employees, including responsibility for recruitment, selection, appointment and redeployment of employees. It seems then, that reference to s 29 is in respect of the chief executive officer’s responsibility for staff, rather than anything specifically related to Mr Ross.
- 20 The “Fixed Term Contract” was extended until 30 November 2003 (Exhibit 5, Attachment “AG”).
- 21 The agreed documents also contain reference to a “further extension of the secondment until the 30 January 2004” (Exhibit 5, Attachment “AH”). This was arranged between the Royal Commission and the Department of Justice.
- 22 Having examined the *PSM Act* and the correspondence arranging for Mr Ross to “work for” the Royal Commission, I conclude that this was by way of a secondment for the original term plus two extensions. Reference to a “Fixed Term Contract” is to be read in the context of the secondment arranged between the Royal Commission and the Department of Justice. It was not a stand alone contract of employment. Rather it set out the terms under which Mr Ross would work for the Royal Commission while seconded to it. During the secondment, he remained a public service officer. At the end of the term of the secondment, and its extensions, he was still a permanent officer of the Department of Justice, appointed to Level 7 holding the position which he held immediately prior to his secondment. That is the effect of a secondment. The officer does not lose their status as a permanent officer appointed for an indefinite term. Their employer remains the originating organisation which continues to pay salary and other entitlements. These expenses are recouped from the other organisation.

The Statutory Scheme – The CCC Act

- 23 Section 178 provides that the CCC is not on SES organisation under the *PSM Act*. The CCC may obtain the services of persons through a range of mechanisms. **Section 179. Staff of the Commission** provides that the CCC may appoint a member of staff for a term not exceeding 5 years. Such staff are not employed under **Part 3** of the *PSM Act*. It may also second staff from the Public Service, a State agency or otherwise in the service of the State (s 181(1)). It may also second from other State, Territory or Commonwealth employment (s 181(2)). It may also engage “suitably qualified persons to provide ... services, information or advice” (s 182).
- 24 Section 179 also provides that the CCC has the power to determine remuneration and other terms and conditions of staff provided they are not less favourable than those in an applicable award, order, agreement or the *Minimum Conditions of Employment Act 1993*.
- 25 Section 180 deals with **Entitlements of public service officers** in the following terms:
- “(1) If a public service officer is appointed to the staff of the Commission under section 179, that person is entitled to retain all his or her accruing and existing rights, including any rights under the *Superannuation and Family Benefits Act 1938*, as if service as an officer of the Commission were a continuation of service as a public service officer.
 - (2) If a person ceases to be an officer of the Commission and becomes a public service officer the service as an officer of the Commission is to be regarded as service in the Public Service for the purpose of determining that person's rights as a public service officer and, if applicable, for the purposes of the *Superannuation and Family Benefits Act 1938*.

(3) If —

- (a) an officer of the Commission was immediately before his or her appointment under section 179 a permanent officer under Part 3 of the *Public Sector Management Act 1994*; and
- (b) that person ceases to be an officer of the Commission for a reason other than dismissal for substandard performance, breach of discipline or misconduct,

that person is entitled to be appointed to an office under Part 3 of the *Public Sector Management Act 1994* of at least the equivalent level of classification as the office that person occupied immediately prior to appointment under section 179.”

26 An examination of these provisions demonstrates that:

- 1. Members of staff are to be appointed for a term not exceeding 5 years.
- 2. **Part 3** of the *PSM Act* does not apply. Therefore ss 64 to 67 dealing respectively with the appointment of a public service officer for indefinite periods (permanent officers) or terms not exceeding five years; appointment to a level, and to an office, post or position; transfer within and between departments and organisations; secondments from departments and organisations, and vacation of office, do not apply to a person appointed as a member of the staff of the CCC.
- 3. The CCC may determine the salaries and conditions of its staff subject to certain minima.

27 Therefore, an officer of the staff of the CCC is not a public service officer. This is confirmed by s 180(1) which says that if a public service officer is appointed to the staff of the CCC under s 179, that person retains all accruing and existing rights, as if service as an officer of the CCC were a continuation of service as a public service officer. The words “as if” indicate that, in fact, service with the CCC is not service as a public service officer. However all accruing and existing rights are retained. What are those rights? One such right is specified. It is a right under the *Superannuation and Family Benefits Act 1938*. One could reasonably assume that it means that any accrued entitlements arising from length of service, such as long service leave are retained. Whether it means more than that was not argued before me.

28 Subsection (2) deals with a person who ceases to be an officer of the CCC and becomes a public service officer. Their service as an officer of the CCC counts for particular purposes.

29 Subsection (3) provides that if a person ceases to be an officer of the CCC and was a permanent officer under Part 3 of the *PSM Act* they are entitled to be appointed to an office under Part 3 of the *PSM Act* of at least equivalent classification level to the office they occupied immediately prior to appointment to the staff of the CCC, if they have not been dismissed from the staff of CCC due to substandard performance or conduct. The reference to “was”, being the past tense, confirms that the public service officer does not continue to be such during appointment to the CCC staff.

30 Had the legislature intended that public service officers could take up appointments with the CCC and retain their status as permanent public service officers it could easily have so provided. Rather, it has provided:

- 1. that the staff of the CCC are not appointed under Part 3 of the *PMS Act* (ie not to the Public Service);
- 2. refers to service with the CCC counting as if it were service as a public service officer;
- 3. for a person who was appointed to the staff of the CCC who becomes a public service officer after ceasing that appointment is to have that service regarded as service in the Public Service;
- 4. that a person who was a public service officer immediately before being appointed to the staff of the CCC is entitled to appointment to a position in the Public Service on cessation of that appointment.

It was not argued before me, so I draw no conclusion regarding it, however, support for the exclusion of staff of the CCC from status as public service officers may be found in the capacity of the CCC to determine salaries and conditions for staff above those applying to public service officers (s 179 *CCC Act*).

31 So public service officers can be appointed to the staff of the CCC. They retain their existing rights as if service as an officer of the CCC were a continuation of service as a public service officer. If they cease to be an officer of the CCC and have not been dismissed from the staff of the CCC for specified reasons, they are entitled to be appointed to at least an equivalent classification level of office to that which they occupied prior to their appointment to the staff of the CCC.

32 Applying this legislative scheme to Mr Ross’s circumstances as set out in the agreed facts and documents, I conclude that while he was an officer of the staff of the CCC, Mr Ross was not a public service officer, but retained his accruing and existing rights. His service is treated as if it were continuous.

33 When Mr Ross ceased to be an officer of the CCC for any reason other than those specified, provided that he was a permanent officer immediately before his appointment to the CCC, Mr Ross was entitled to be appointed to an office under Part 3 of the *PSM Act* of at least the same classification level as the office he occupied immediately before his appointment to the CCC. Mr

Ross was a permanent officer immediately before his appointment to the CCC. He ceased to be an officer of the CCC for a reason other than those specified. Therefore he was entitled to be appointed to an office under Part 3 of the *PSM Act* of at least the equivalent level of classification of the office he held immediately prior to appointment as an officer of the CCC. The office he held, according to the agreed facts, was that to which he was appointed as a permanent officer, not the office to which he was seconded.

- 34 I raised with parties during the course of the hearing whether in fact Mr Ross was still appointed to that office, post or position he held as a permanent officer of the Department of Justice as there was no evidence before the Commission that he had resigned, retired, been dismissed or terminated from the public service and he was not appointed or transferred to another office, post or position under Part 3 of the *PSM Act*. None of them was able to answer that question.
- 35 According to s 67 of the *PSM Act*, an office would become vacant in specified circumstances. If none of those circumstances applied to Mr Ross, he would still be appointed to that office within the Department of Justice. If that were so, one would expect his engagement by the CCC would be secondment, (s 181 *CCC Act*) not an appointment for 5 years (s 179 *CCC Act*).
- 36 The office of a public service officer becomes vacant in a range of circumstances set out in s 67 of the *PSM Act*. None of them includes appointment to the staff of the CCC. However, for the officer to retain that position would be consistent with secondment rather than appointment to the CCC. Merely because an officer does not resign his position does not mean that he retains it. It is highly unlikely that an officer would retain his or her position if he or she takes up employment elsewhere but does not formally resign.
- 37 Secondment, described earlier, is that arrangement which maintains the relationship between the employing authority and the officer, the officer being substantively appointed to a position (to which position he is entitled to return) while he performs work for another organisation.
- 38 A public service officer may be seconded “to assist” the CCC (s 181). The reference within the *CCC Act* to appointment is quite distinct from that in respect of secondment, the former being “appoint(ed as) members of staff” and the latter, “seconded or otherwise engaged to assist the” CCC (s 181(1)).
- 39 Mr Ross was appointed “as a member of staff” of the CCC (Exhibit 5, Attachment “A”). The appointment was “under section 179 of the *CCC Act*” (Exhibit 5, Attachment “A” – Terms and Conditions, cl 3). The appointment was not a secondment.
- 40 This confirms that Mr Ross was appointed as an officer of the staff of the CCC, and during that appointment, he was not appointed under Part 3 of the *PSM Act*. Therefore he was not a permanent public service officer during that appointment.
- 41 In the circumstances, it is most likely that Mr Ross’s appointment to the staff of the CCC in some other way caused the vacancy of his permanent position as a public service officer within the Department of Justice. He had no position to return to. If he retained permanent officer status and the position he had occupied at the Department of Justice remained his, at the end of his appointment with the CCC, his right to return to a position of at least equivalent level as that of the position as provided for by s 180(3) of the *CCC Act* would be unnecessary. Alternatively, he still holds that position and is entitled to return to it. As noted above, I think this is highly unlikely.

Is Mr Ross Eligible for Redeployment?

- 42 Section 180(3) of the *CCC Act* is designed to provide for an officer who was immediately prior to his appointment to the staff of the CCC, a permanent public service officer who ceases to be an officer of the CCC for “a reason” (ie any reason) other than substandard performance, breach of discipline or misconduct, to be entitled to be appointed to an office of at least the equivalent level of classification to that he held in his permanent appointment. Therefore, the PSMRR do not come into play. When the provisions of the *CCC Act*, under which Mr Ross was appointed, have done their work, he is no longer in a situation which enlivens the PSMRR.
- 43 However, if that were not so, and if Mr Ross were not able to return to the position he held within the Department of Justice, Mr Ross’s eligibility for redeployment would need to be considered under the PSMRR. The PSMRR apply, according to reg 4, “to and in relation to all employees in departments or organisations and to all employing authorities of departments or organisations”. Subregulation (2) sets out various categories of employees who are not eligible for redeployment or voluntary severance under those regulations. An employee “who is employed under a contract of employment that has a fixed term and who is not a permanent officer” is one such category.
- 44 As concluded earlier in these Reasons, Mr Ross was not a permanent officer while engaged by the CCC. Was he “employed under a contract of employment that has a fixed term”? “Fixed term” is not defined.
- 45 In respect of public service officers, there is no reference to “fixed term”, however there is a definition in s 3 of the *PSM Act* of “term officer” being “person appointed under s 64(1)(b) for a term not exceeding 5 years”. There are only two types of appointments:
1. for an indefinite period as a permanent officer; and
 2. for such term not exceeding 5 years as is specified in the instrument of his or her appointment (s 64, Part 3 *PSM Act*).
- 46 However while an officer of the CCC, Mr Ross was not appointed under Part 3 of the *PSM Act* (see s 179(3) *CCC Act*).
- 47 Mr Ross’s letter of appointment said that he was appointed “for a term of 5 years” with a commencement date and an end date. However, the employment could be terminated by giving one month’s notice in writing (exhibit 5, attachment “A”, clause

20.1). There is an inconsistency in having an appointment for “a term of 5 years” and being subject to a month’s notice. However that is what Mr Ross and the CCC agreed to, as did the Civil Service Association and the CCC in the CCC Agreement registered on 19 January 2006. Therefore authorities which exclude the prospect of early termination on notice from a so-called fixed term contract are of little assistance. This is employment governed by statute.

48 The Terms and Conditions attached to the Offer of Employment letter (Exhibit 5, Attachment “A”) records that the terms of GOSAC Award, as amended by the GOSAC Agreement, “except as varied by the term set out below under “Variations to GOSAC terms and conditions”” applied. It also provided that:

“8. The employer proposes to negotiate with its members of staff a Commission-Staff agreement that will set out all the terms and conditions of employment for Commission members of staff. Once registered in the Western Australian Industrial Relations Commission (WAIRC), the Commission-Staff Agreement will supersede the terms in the GOSAC Award and GOSAC Agreement. The Commission-Staff Agreement will provide terms and conditions no less favourable than that provided in the GOSAC Award and GOSAC Agreement.

8.1 The employee acknowledges that when the Commission-Staff agreement is registered as an industrial agreement by the WAIRC, such agreement will extend to and bind the Employee in accordance with subsection 41(4) of the *Industrial Relations Act 1979*.”

49 Such an agreement was reached and was registered by the Public Service Arbitrator on 19 January 2006 (*The Corruption and Crime Commission Agreement 2005*) (Exhibit 5, Attachment A1). That agreement provided at **clause 7 – Definitions**, the definition of “fixed term officer” as follows:

“(1) “fixed term officer” means an officer who is employed on a full time or part time basis on a contract of service of specified duration not exceeding five years.”

50 **Clause 9 – Contract of Service** provides at subclause (2):

“(2) Officers shall only be appointed by way of a fixed term contract of employment pursuant to Section 179 of the Corruption and Crime Act 2003 for a term not exceeding five years and be eligible to be reappointed. Officers appointed shall be advised in writing of the terms of the appointment and such advice shall specify the dates of commencement and termination of employment.”

51 Subclause (7) provides that:

“The Commission may terminate employment by providing one months prior notice in writing to the officer or by paying one months salary in lieu of notice”.

These provisions are consistent with the *CCC Act*.

52 **Clause 55. – Redeployment & Severance** provides as follows:

“(1) Where a position is abolished the Commission will wherever possible redeploy the employee to a suitable alternative position at an equivalent salary level to the abolished position. The Commission will give consideration to the employees’ skills, training, experience and/or ability to acquire new skills when assessing a suitable alternative position.

(2) The parties intend to finalise the terms for redeployment and severance entitlements under this Agreement within 3 months of the registration of this Agreement and incorporate it into the Agreement by variation.”

53 It is noted that the CCC purported to “reclassify the position” Mr Ross occupied by letter dated 16 January 2006, which is before the date of registration of the CCC Agreement on 19 January 2006.

54 In any event, it seems that the terms “term office” used in the *PSM Act*; “contract of employment that has a fixed term” used in the PSMRR at reg 4; “appointed for a term” used in s 179 *CCC Act*; “fixed term officer” used in clause 7 – Definitions and “fixed term contract of employment” used in clause 9 – Contract of Employment of the CCC Agreement and “for a term of 5 years” used in Mr Ross’s Terms and Conditions of employment have the same meaning, ie, a specified term with a commencement and termination date. Nowhere else within the *PSM Act*, PSMRR, the *CCC Act*, or the CCC Agreement is there reference to a type of employment arrangement (other than indefinite) which may meet the description of “a contract of employment that has a fixed term”. In those circumstances, it does not matter that there was provision for termination on notice during the “term” of the contract. Accordingly, I find that reference to “contract of employment that has a fixed term” used in the PSMRR reg (4) encompasses “appointment for a term” under s 179 of the *CCC Act*, and “for a term of 5 years” used in Mr Ross’s Terms and Conditions of employment.

55 Mr Ross’s appointment with the CCC was not indefinite. To be otherwise would have been contrary to the legislation.

56 Accordingly, if the PSMRR applied to the CCC, Mr Ross not would have been eligible for redeployment or voluntary severance under those regulations on the basis that he was employed under a contract of employment that had a fixed term and he was not then a permanent officer.

57 On the basis that Mr Ross was not, during his appointment to the staff of the CCC, a permanent public service officer employed under Part 3 of the *PSM Act*, and was employed under a contract of employment that had a fixed term, he was not entitled to redeployment into the public service in accordance with the provisions of the *PSMRR*.

Mr Ross's Appointment Under s180 CCC Act

58 The Applicant says that as an alternative, Mr Ross ought to have been consulted as to the operation of s 180(3) of the *CCC Act* and seeks a declaration as to the principles the Minister ought to consider when exercising discretion under s 180(3) of that Act.

59 The CCC was mistaken as to what it was actually doing when it abolished the position Mr Ross occupied. In any event, the effect of what it did in purporting to reclassify the position, to redeploy Mr Ross to what was effectively a new position, and maintain Mr Ross's salary at Level 9, was consistent with the provision of **clause 55 – Redeployment and Severance** subcl (1) of the CCC Agreement. Nonetheless, the process applied by the CCC in "declassifying" the position appears to have left a lot to be desired.

60 From February 2006, the CCC and Mr Ross attempted to negotiate a satisfactory resolution to the issue, including a range of options.

61 According to the email from Mr Ross to Vanessa Grant of 11 August 2006, Mr Ross performed the duties of the new Level 8 position for a short time. He clearly did so under protest, while maintaining his views as to his contracted right to the Level 9 position of Manager CPER. For many months the CCC and Mr Ross continued to be in dispute as to the contractual, organisational and process issues associated with the reorganisation and consequential position abolition. Mr Ross was not redeployed within the CCC. However, until 1 September 2006, the CCC continued to pay Mr Ross at Level 9 salary.

62 On 1 September 2006, the CCC advised Mr Ross that it viewed his appointment to its staff as effectively terminated as the position he had held no longer existed. Accordingly, his appointment was to terminate "under section 179(1) of the Corruption & Crime Commission Act 2003 (CCC Act) in the Level 9 position on the grounds of redundancy" (Exhibit 5, Attachment "F"). The CCC characterised the termination, without notice as it was, as a repudiation of the contract. While it continued in dispute with Mr Ross, and while it attempted to resolve the issue of his redeployment eligibility under the *PSMRR* with the DPC, the CCC continued to pay Mr Ross albeit at Level 7.3, his previous substantive level.

63 In March 2007, Mr Ross again became a public service officer, this time within the DPC, pursuant to s 180(3) of the *CCC Act*. Mr Ross accepted this arrangement. His email to Mr Volaric of 22 February 2007 says that he did so under duress.

64 Section 180(3) of the *CCC Act* provides that Mr Ross is entitled to be appointed to a position under Part 3 of the *PSM Act* of at least equivalent level to that of the position Mr Ross occupied prior to his employment with the CCC. In this case, that means no less than Level 7.3. Whether it ought to be a higher level than that is a matter for consideration of a range of issues. Although those issues have not been canvassed before me, it would be reasonable to assume that they should include an objective assessment of:

1. The availability of positions at the equivalent level and above;
2. The nature of those positions;
3. The experience, skills and qualifications required for those positions and the experience, skills and qualifications of the officer concerned.

65 One would expect that the officers concerned would either be invited, or would take the initiative, to state a case to the organisation which was to appoint them as to the appropriate level of position to which they ought to be appointed.

66 It may be that the officers are appointed to the CCC at the same level as the position they previously substantively held. The officers may or may not have developed and utilised higher level skills, experience and qualifications in the time of appointment to the CCC. If the work and experience were at the same level as previously, there may be no call or justification to appoint to other than the same level as the previous substantively held position.

67 On the other hand, the appointment to the CCC may have been at a higher level than the previously held substantive position. What should happen if there are no positions available which utilise or require the special skills or experience the officer gained or utilised in the appointment to the CCC? For example, if the appointment to the CCC involved the officer developing skills and experience at a much higher level than before, but there are no positions at all or no positions available, which match those particular higher level skills and experience. One would not expect the officer to be appointed to a position at the higher level without being skilled or experienced in the areas required by that position.

68 Given the circumstances under which Mr Ross accepted appointment to the DPC following over a year of unsuccessful negotiations with the CCC, and given that Mr Ross accepted the appointment, to use the words of the email of 22 February 2007, "under duress" (Exhibit 5, Attachment "P"), it would hardly be surprising if negotiations as to the position for him to be appointed to were unsatisfactory to him.

69 As these matters have not been fully canvassed before me, I am unable to come to any final conclusions about the principles to be applied under s 180(3) of the *CCC Act* without inviting further submissions from the parties. The parties may consider that the issues canvassed in paras (64) to (67) are sufficient for their purposes. If, however, they wish to have the matter addressed further, then they should advise within 14 days.

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
The Civil Service Association of Western Australia Incorporated	Director General, Disability Services Commission	Wood C	PSAC 45/2007	14/12/2007	Dispute in relation to disciplinary procedures.	Concluded
The Construction, Forestry Mining and Energy Union of Workers	The Minister for Health	Wood C	C 28/2007	27/11/2007	Dispute re refusal to convene a Working Party	Concluded
The Construction, Forestry Mining and Energy Union of Workers	The Minister for Health	Wood C	C 29/2007	27/11/2007	Dispute re classification levels of union members	Concluded

PROCEDURAL DIRECTIONS AND ORDERS—**2008 WAIRC 00160****PUBLIC SERVICE AWARD 1992**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT**-v-**

DEPARTMENT OF CONSUMER AND EMPLOYMENT PROTECTION, AND OTHERS

RESPONDENTS**CORAM**COMMISSIONER P E SCOTT
PUBLIC SERVICE ARBITRATOR**DATE**

THURSDAY, 13 MARCH 2008

FILE NO/S

P 6 OF 2006, P 7 OF 2006

CITATION NO.

2008 WAIRC 00160

Result Order issued by consent**Representation****Applicant** Ms S Thomas**Respondent** Mr A Dores*Order*

WHEREAS these are applications to amend the Public Service Award 1992 and the Government Officers Salaries Allowances and Conditions Award 1989 pursuant to the Industrial Relations Act 1979; and

WHEREAS on the 7th day of February 2008 the Public Service Arbitrator convened a further conference for the purpose of conciliating between the parties; and

WHEREAS the parties have reached agreement in part settlement of the dispute and have agreed to undertake further discussions; and

WHEREAS the parties have requested that a Memorandum of Agreement be issued to reflect the agreement reached in principle and the process they intend to apply to the final resolution of the dispute;

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

THAT the terms of the attached Memorandum of Understanding set out the agreement between the parties.

[L.S.]

(Sgd.) P E SCOTT,
Commissioner,
Public Service Arbitrator.

SCHEDULE

Memorandum of Understanding CSA Specified Calling Claim P6/2006 & P7/2006

Parties

1. The Parties to this Memorandum of Understanding (MOU) are the Civil Service Association of Western Australia (CSA), the Labour Relations Division of the Department of Consumer and Employment Protection (DOCEP) and the Department of the Premier and Cabinet (DPC)

Objectives of this MOU

2. This MOU describes the terms for settlement of the CSA claims detailed in paragraphs 1 (a) and (b) of Applications P6 and P7 of 2006 in the Western Australian Industrial Relations Commission in relation to specified callings occupations. Paragraph 10 of this MOU provides a framework for the resolution matters listed in paragraphs 1 (c) to (f), inclusive, on which agreement has not yet been reached.

Agreed Matters

3. The Parties have agreed that the salary rates applicable to specified calling occupations, which are currently listed subclause (1) of Clause 12 - Salaries Specified Callings of the Public Service Award 1992 (PSA) and the Government Officers Salaries, Allowances and Conditions Award 1989 (GOSAC) will be increased by a structural adjustment as follows:
 - 13% at Level 2/4;
 - 10% at Levels 5 and 6;
 - 8% at Levels 7, 8 and 9 and Class 1, 2, 3 and 4;and amendment of the level descriptions in Column 1 of the specified calling salary schedule as detailed in Attachment 1 of this MOU or alternative level descriptions agreed by the parties.
4. Translation to the new salary rates will occur as indicated in Attachment 1 with staff retaining their existing salary increment date.
5. This MOU is in full and final settlement of all work value changes that occurred prior to the date of this MOU and all other claims in relation to specified calling rates of pay unless agreed between the parties.
6. The Parties agree that the operative date for the agreed salary increase will be 1 July 2007 for all existing specified calling occupations, except specialist title psychologists.
7. The Parties agree that the operative date for the agreed salary increase for specialist title psychologists will be 16 August 2006.
8. The Parties agree that the agreed salary increase will apply to employees employed under subclause (1) of Clause 12 of the PSA and GOSAC on the date an order of the WAIRC incorporating this MOU is issued.
9. The Parties agree that salary increases obtained through future general agreement negotiations, excluding any structural adjustments obtained through GA4, will not be discounted in any way.

Issues For Resolution

10. The Parties agree that the following issues need to be resolved in order to finalise Applications P6 and P7 of 2006. The Parties agree to participate and contribute to a review of issues including, but not limited to:
 - a) an agreed definition of "specified calling";
 - b) a procedure for the establishment of new specified callings;
 - c) any changes to existing specified callings required to meet the future needs of the public sector and the determination of an operative date for the payment of new salary rates for occupations that are established as a specified calling;
 - d) a process for identifying and dealing with the classification of positions that are incorrectly classified relative to other positions in the particular specified calling. The classification of specialist title psychologists will be subject to a review of WA public sector classification relativities, by a working group including representatives of the agencies that employ specialist title psychologists.

SPECIALIST TITLE PSYCHOLOGISTS—							
<i>continued</i>							
Existing Level Descriptor	New Level Descriptor	PSGA rates from first pay period commencing on or after 26 February 2006	New Rates After Structural Adjustment From 16 August 2006		PSGA rates from first pay period commencing on or after 26 February 2007	New Rates After Structural Adjustment first pay period commencing on or after 26 February 2007	
	COLUMN 1						
		Annual	Annual	F/N	Annual	Annual	F/N
		\$	\$	\$	\$	\$	\$
Level 5.1	LEVEL 2.1	\$58,306	\$64,137	\$2,458.93	\$60,638	\$66,702	\$2,557.27
Level 5.2	2.2	\$60,272	\$66,299	\$2,541.81	\$62,683	\$68,951	\$2,643.49
Level 5.3	2.3	\$62,316	\$68,548	\$2,628.04	\$64,809	\$71,290	\$2,733.16
Level 5.4	2.4	\$64,439	\$70,883	\$2,717.56	\$67,017	\$73,719	\$2,826.29
Level 6.1	LEVEL 3.1	\$67,850	\$74,635	\$2,861.41	\$70,564	\$77,620	\$2,975.85
Level 6.2	3.2	\$70,170	\$77,187	\$2,959.25	\$72,977	\$80,275	\$3,077.64
Level 6.3	3.3	\$72,570	\$79,827	\$3,060.46	\$75,473	\$83,020	\$3,182.88
Level 6.4	3.4	\$75,133	\$82,646	\$3,168.54	\$78,138	\$85,952	\$3,295.28
Level 7.1	LEVEL 4.1	\$79,064	\$85,389	\$3,273.70	\$82,227	\$88,805	\$3,404.66
Level 7.2	4.2	\$81,782	\$88,325	\$3,386.26	\$85,053	\$91,857	\$3,521.67
Level 7.3	4.3	\$84,741	\$91,520	\$3,508.75	\$88,131	\$95,181	\$3,649.11
Level 8.1	LEVEL 5.1	\$89,549	\$96,713	\$3,707.85	\$93,131	\$100,581	\$3,856.14
Level 8.2	5.2	\$92,994	\$100,434	\$3,850.50	\$96,714	\$104,451	\$4,004.51
Level 8.3	5.3	\$97,264	\$105,045	\$4,027.28	\$101,155	\$109,247	\$4,188.38
Level 9.1	LEVEL 6.1	\$102,598	\$110,806	\$4,248.15	\$106,702	\$115,238	\$4,418.07
Level 9.2	6.2	\$106,201	\$114,697	\$4,397.33	\$110,449	\$119,285	\$4,573.23
Level 9.3	6.3	\$110,311	\$119,136	\$4,567.51	\$114,723	\$123,901	\$4,750.20
Class 1	LEVEL 7	\$116,527	\$125,849	\$4,824.88	\$121,188	\$130,883	\$5,017.88
Class 2	LEVEL 8	\$122,744	\$132,564	\$5,082.33	\$127,654	\$137,866	\$5,285.60
Class 3	LEVEL 9	\$128,955	\$139,271	\$5,339.46	\$134,113	\$144,842	\$5,553.05
Class 4	LEVEL 10	\$135,171	\$145,985	\$5,596.87	\$140,578	\$151,824	\$5,820.73

**SPECIFIED CALLINGS OTHER THAN
SPECIALIST TITLE PSYCHOLOGISTS**

ATTACHMENT 1

Existing Level Descriptor	New Level Descriptor	PSGA rates from first pay period commencing on or after 26 February 2007	New Rates After Structural Adjustment From 1 July 2007	
	COLUMN 1			
		Annual	Annual	F/N
		\$	\$	\$
Level 2/4.1	LEVEL 1.1	\$42,017	\$47,479	\$1,820.28
Level 2/4.2	1.2	\$44,231	\$49,981	\$1,916.20
Level 2/4.3	1.3	\$46,686	\$52,755	\$2,022.56
Level 2/4.4	1.4	\$49,754	\$56,222	\$2,155.48
Level 2/4.5	1.5	\$54,510	\$61,596	\$2,361.51
Level 2/4.6	1.6	\$57,609	\$65,098	\$2,495.77
Level 5.1	LEVEL 2.1	\$60,638	\$66,702	\$2,557.27
Level 5.2	2.2	\$62,683	\$68,951	\$2,643.49
Level 5.3	2.3	\$64,809	\$71,290	\$2,733.16
Level 5.4	2.4	\$67,017	\$73,719	\$2,826.29
Level 6.1	LEVEL 3.1	\$70,564	\$77,620	\$2,975.85
Level 6.2	3.2	\$72,977	\$80,275	\$3,077.64
Level 6.3	3.3	\$75,473	\$83,020	\$3,182.88
Level 6.4	3.4	\$78,138	\$85,952	\$3,295.28
Level 7.1	LEVEL 4.1	\$82,227	\$88,805	\$3,404.66
Level 7.2	4.2	\$85,053	\$91,857	\$3,521.67
Level 7.3	4.3	\$88,131	\$95,181	\$3,649.11
Level 8.1	LEVEL 5.1	\$93,131	\$100,581	\$3,856.14
Level 8.2	5.2	\$96,714	\$104,451	\$4,004.51
Level 8.3	5.3	\$101,155	\$109,247	\$4,188.38
Level 9.1	LEVEL 6.1	\$106,702	\$115,238	\$4,418.07
Level 9.2	6.2	\$110,449	\$119,285	\$4,573.23
Level 9.3	6.3	\$114,723	\$123,901	\$4,750.20
Class 1	LEVEL 7	\$121,188	\$130,883	\$5,017.88
Class 2	LEVEL 8	\$127,654	\$137,866	\$5,285.60
Class 3	LEVEL 9	\$134,113	\$144,842	\$5,553.05
Class 4	LEVEL 10	\$140,578	\$151,824	\$5,820.73

2008 WAIRC 00168

HAIRDRESSERS AWARD 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA

APPLICANT

-v-

THE MASTERS LADIES' HAIRDRESSERS INDUSTRIAL UNION OF EMPLOYERS OF WESTERN AUSTRALIA AND OTHERS

RESPONDENT**CORAM** COMMISSIONER J L HARRISON**DATE** FRIDAY, 14 MARCH 2008**FILE NO/S** APPL 124 OF 2007**CITATION NO.** 2008 WAIRC 00168

Result	Application divided
Representation	
Applicant	Mr T Pope
Respondent	Mr O Moon as agent for the Masters Ladies' Hairdressers Industrial Union of Employers of Western Australia Mr D Jones as agent for Rosanna Epton and Bill Wilson

Order

WHEREAS on 28 November 2007 the Shop, Distributive and Allied Employees' Association of Western Australia applied to vary the *Hairdressers Award 1989 (No A 32 of 1988)* ("the Award") in relation to changes to allowances contained in the Award and clarification of the rate of pay of Adult Apprentices; and

WHEREAS the application was set down for hearing on 13 March 2008; and

WHEREAS at the hearing on 13 March 2008 on behalf of the parties for whom they had lodged warrants Mr Moon and Mr Jones consented to the allowances in the Award being varied as proposed by the applicant and also to varying the award to correct minor grammatical/numbering errors that were raised at the hearing; and

WHEREAS both Mr Moon and Mr Jones objected to the proposed variation to clarify the rate of pay of Adult Apprentices; and

WHEREAS after hearing from the parties the Commission formed the view that the application should be divided;

NOW HAVING heard Mr T Pope on behalf of the applicant, Mr O Moon as agent on behalf of the Masters Ladies' Hairdressers Industrial Union of Employers of Western Australia and Mr D Jones as agent on behalf of Rosanna Epton and Bill Wilson, the Commission, pursuant to the powers conferred under the Industrial Relations Act, 1979, hereby orders:

1. THAT application 124 of 2007 be divided into two parts to be numbered 124 of 2007 and 124A of 2007 respectively.
2. THAT application 124 of 2007 deal with proposed changes to allowances and grammatical and numbering changes in the *Hairdressers Award 1989 (No A 32 of 1988)*.
3. THAT application 124A of 2007 be that part of application 124 of 2007 which seeks to vary Clause 11. – Wages in relation to Adult Apprentices of the *Hairdressers Award 1989 (No A 32 of 1988)*.
4. THAT Mr Moon and Mr Jones are to file and serve Notices of Answer and Counter Proposal in relation to application 124A of 2007 by no later than the close of business Thursday 27 March 2008.
5. THAT programming orders will issue with respect to application 124A of 2007 at a date to be fixed.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Department of Health Medical Practitioners (Drug and Alcohol) AMA Industrial Agreement 2007 PSAAG 4/2008	3/04/2008	The Minister for Health in his incorporated capacity under s.7 of the Hospitals and Health Services Act 1927 (WA) as the Hospitals formerly comprised in the Metropolitan Health Service Board	The Western Australian Branch of the Australian Medical Association	Commissioner P E Scott	Agreement Registered
Lake Joondalup Baptist College Inc (Enterprise Bargaining) Agreement 2006 AG 2/2008	8/04/2008	The Independent Education Union of Western Australia, Union of Employees AND Lake Joondalup Baptist College	(Not applicable)	Commissioner J L Harrison	Registered
Scotch College Administrative and Technical Officers (Enterprise Bargaining) Agreement 2007 AG 3/2008	8/04/2008	The Independent Education Union of Western Australia, Union of Employees AND Scotch College	(Not applicable)	Commissioner J L Harrison	Registered

PUBLIC SERVICE APPEAL BOARD—

2008 WAIRC 00207

APPEAL AGAINST THE DECISION MADE ON 4 DECEMBER 2007 RELATING TO TERMINATION OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MRS ROSLYN WILLIAMS

APPELLANT

-v-

DONNYBROOK HOSPITAL WACHS SOUTH WEST

RESPONDENT**CORAM**

PUBLIC SERVICE APPEAL BOARD
 COMMISSIONER P E SCOTT - CHAIRMAN
 MR B HEWSON - BOARD MEMBER
 MR W GREEN - BOARD MEMBER

DATE

TUESDAY, 8 APRIL 2008

FILE NO

PSAB 2 OF 2008

CITATION NO.

2008 WAIRC 00207

Result

Appeal dismissed

Order

WHEREAS this is an appeal pursuant to Section 80I(1)(e) of the Industrial Relations Act 1979; and

WHEREAS on the 3rd day of April 2008, the Applicant advised the Public Service Appeal Board that she did not wish to pursue this application;

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

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 117/2007	Dianne Sutton	Director General of Health as delegate of the Minister for Health in his incorporated capacity under s7 of the Hospital and Health Services Act 1927 as the Metropolitan Health Service	Scott C	Reclassification Appeal Dismissed	Not Applicable
PSA 118/2007	Patricia Sneddon	Director General of Health as delegate of the Minister for Health in his incorporated capacity under s7 of the Hospital and Health Services Act 1927 as the Metropolitan Health Service	Scott C	Reclassification Appeal Dismissed	Not Applicable
PSA 119/2007	Joanne Taylor	Director General of Health as delegate of the Minister for Health in his incorporated capacity under s7 of the Hospital and Health Services Act 1927 as the Metropolitan Health Service	Scott C	Reclassification Appeal Dismissed	Not Applicable

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 120/2007	John Armstrong	Director General of Health as delegate of the Minister for Health in his incorporated capacity under s7 of the Hospital and Health Services Act 1927 as the Metropolitan Health Service	Scott C	Reclassification Appeal Dismissed	26/03/2008
PSA 121/2007	Shane Hadland	Director General of Health as delegate of the Minister for Health in his incorporated capacity under s7 of the Hospital and Health Services Act 1927 as the Metropolitan Health Service	Scott C	Reclassification Appeal Dismissed	Not Applicable
