Western Australian

Industrial Gazette

PUBLISHED BY AUTHORITY

Sub-Part 9 WEDNESDAY 23 DECEMBER, 2009 Vol. 89—Part 2

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

89 W.A.I.G.

CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Unions—Application for Alteration of Rules—

2009 WAIRC 01202

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2009 WAIRC 01202
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT
		CHIEF COMMISSIONER A R BEECH
		COMMISSIONER S M MAYMAN
HEARD	**:**	MONDAY, 2 NOVEMBER 2009
DELIVERED	**:**	MONDAY, 16 NOVEMBER 2009
FILE NO.	**:**	FBM 4 OF 2009
BETWEEN	**:**	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
		Applicant

CatchWords:

Industrial Law (WA) – Application pursuant to s 62(2) of the *Industrial Relations Act 1979* (WA) for the Full Bench to authorise registration of alteration to registered rule – qualification for membership rule – dental technicians – application made to remove any ambiguity and uncertainty – statutory criteria satisfied – application granted.

Legislation:

Industrial Relations Act 1979 (WA) – s 6, s 6(ag), s 6(e), s 55(4), s 55(4)(a), s 55(4)(b), s 55(4)(c), s 55(4)(d), s 55(5), s 62(2), s 62(4),

Result:

Order made

Representation:

Applicant	:	Mr S Farrell

Reasons for Decision

THE FULL BENCH:

1 This application was filed on 1 September 2009 and is made pursuant to s 62(2) of the *Industrial Relations Act 1979* (WA) (the Act). The applicant, as a registered organisation under the Act, seeks the authorisation of the Full Bench for the Registrar to register an alteration to its qualification for membership rule. The application is made because the applicant says an uncertainty or ambiguity in its eligibility rule has been raised by the employer of dental technicians, dental technician

apprentices and dental technician trainees. The issue raised by the employer is whether the applicant's eligibility rule enables the applicant to enrol dental technicians, dental technician apprentices and dental technician trainees employed in the Perth Dental Hospital and the Community Dental Centres. The applicant also seeks to register an alteration to the name of the union to reflect its proper name in the qualification of the membership rule.

2 The application was unopposed. At the conclusion of oral submissions made on behalf of the applicant on 2 November 2009, the Full Bench informed the applicant that the application would be granted. On 3 November 2009, an order was made that the Registrar be authorised to register the alteration to the rules of the applicant as published in the Industrial Gazette on 23 September 2009. The reasons for granting the order are as follows.

3 The alterations the applicant proposes to Rule 6(b) are:

(The proposed alterations are indicated in bold print and underlined)

'(b)**(i)** Provided that the following persons shall not be eligible for membership: Persons who are employed by an employer bound by an award made or an industrial agreement registered under the Industrial Relations Act 1979 and in force on 1st March, 1985 and to which an organization of employees registered under the aforementioned Act other than The Civil Service Association of Western Australia Incorporated is party, in the callings which on 1st March, 1985 were mentioned in any such award or agreement or in a classification, not specifically mentioned in the award or agreement as at the 1st of March, 1985 the duties of which are the same or substantially similar to any classification which was so mentioned. Notwithstanding the above, employees of the Lotteries Commission of WA, or however so named, shall be eligible for membership of ~~the Civil Service Association of WA (Incorporated)~~**The Civil Service Association of Western Australia Incorporated**.

(b)(ii) **Notwithstanding the proviso in rule 6(b)(i), and without limiting the generality of rules 6(a)(10) and 6(a)(11), dental technicians, their apprentices or their trainees employed in the Perth Dental Hospital or Community Dental Health Services or any other entity or unit however described or named which provides any of the services formerly provided by Perth Dental Hospital or Community Dental Health Services shall be eligible for membership of The Civil Service Association of Western Australia Incorporated.**

~~(bb)~~

(b)(iii) Provided further that save and except for the employees referred to in Rule 6(a)(11) and (12) all salaried employees (being professional, administrative, clerical, technical and supervisory employees) (including those listed in Schedule A to the Rules of the Hospital Salaried Officers' Association of Western Australia (Union of Workers)) employed by the Boards of any public hospital constituted under the Hospital and Health Services Act 1927 (as amended) in such hospitals or for the provision of health services in any district or area in which such board or boards are required or have a duty to provide such services shall not be eligible for membership of ~~the Civil Service Association of WA (Incorporated)~~**The Civil Service Association of Western Australia Incorporated**.'

4 In submissions made to the Full Bench, Mr Farrell on behalf the applicant informed the Full Bench that its rules cover the majority of employees employed in public dental health services. However, the Liquor, Hospitality and Miscellaneous Union, Western Australian Branch (LHMU) is able to enrol as members, dental health technicians. The applicant had been running a campaign for a significant period of time over work value in dental health services and the applicant was approached by dental technicians to join in that campaign. The applicant had discussions with the LHMU which resulted in an agreement being reached between the LHMU and the applicant to pass coverage of the dental health technicians to the applicant. Whilst the applicant formed the view that the scope of their rules covered dental technicians, it became a condition of an industrial agreement recently reached with the employer of public sector dental technicians that the applicant change it rules to remove any ambiguity as to whether the rules cover dental technicians.

The applicant's rules about alteration

5 Pursuant to s 62(4) of the Act the requirements of s 55(4) of the Act must be complied with before the Full Bench can approve a rule alteration application. Section 55(4) of the Act provides that the Full Bench shall refuse an application by the organisation under this section unless it is satisfied that –

(4) Notwithstanding that an organisation complies with section 53(1) or 54(1) or that the Full Bench is satisfied for the purposes of section 53(2) or 54(2), the Full Bench shall refuse an application by the organisation under this section unless it is satisfied that —

(a) the application has been authorised in accordance with the rules of the organisation;

(b) reasonable steps have been taken to adequately inform the members —

(i) of the intention of the organisation to apply for registration;

(ii) of the proposed rules of the organisation; and

(iii) that the members or any of them may object to the making of the application or to those rules or any of them by forwarding a written objection to the Registrar,

and having regard to the structure of the organisation and any other relevant circumstance, the members have been afforded a reasonable opportunity to make such an objection;

(c) in relation to the members of the organisation —

(i) less than 5% have objected to the making of the application or to those rules or any of them, as the case may be; or

(ii) a majority of the members who voted in a ballot conducted in a manner approved by the Registrar has authorised or approved the making of the application and the proposed rules;

(d) in relation to the alteration of the rules of the organisation, those rules provide for reasonable notice of any proposed alteration and reasons therefor to be given to the members of the organisation and for reasonable opportunity for the members to object to any such proposal; and

(e) rules of the organisation relating to elections for office —

(i) provide that the election shall be by secret ballot; and

(ii) conform with the requirements of section 56(1),

and are such as will ensure, as far as practicable, that no irregularity can occur in connection with the election.

Statutory requirements met

6 The first requirement in s 55(4)(a) of the Act is that the Full Bench shall refuse the rule alteration application unless it has been authorised by the organisation in accordance with its rules. The authority to alter the rules of the applicant is found in rule 9. Rule 9 provides:

9 - ALTERATION OF CONSTITUTION

(a) No amendment, addition to, variation, rescission, or substitution of this Constitution and Rules shall be made unless:

(i) it has been passed by a majority of two thirds of the members eligible to vote and voting at a special general meeting convened for the purpose of considering such changes, provided that the quorum for such a meeting shall be one percent (1%) of financial members at the date of calling the meeting, or

(ii) it has been approved by a simple majority of members voting in a referendum conducted in accordance with Rule 21, or

(iii) it has been passed by a majority of two thirds of the members of the Council in attendance and voting at a meeting of the Council, provided that notice of the proposed amendment, addition to, variation, rescission, or substitution has been posted to each Council member, at least twenty one (21) days prior to the meeting:

and unless a notice of the proposed alteration and the reasons therefore, is posted or delivered to each and every financial member of the Association.

(b) Should a special general meeting convened in accordance with sub-rule 9(a)(i) lapse for want of a quorum, the proposed changes shall be considered by the next meeting of Council, in accordance with sub-rule 9(a)(iii).

(c) (i) In the notice to members referred to in subrule (a) members are to be informed that they or any of them may object to the proposed alteration by forwarding a written objection to the Registrar to reach him no later than 21 days after the date of receipt of the notice.

(ii) In the notice to members referred to in subrule (a) and with respect to any proposed alteration of the rule relating to the qualification of persons for membership of the union, members are to be informed that they or any of them may object to making of the application for the proposed alteration and/or object to the proposed alteration by forwarding a written objection to the Registrar to reach him no later than 21 days after the date of receipt of the notice.

(d) No alteration to any of the rules of the Association shall be or become effective until the Registrar has given to the Association a certificate that the alteration has been registered.

(e) Any amendment, addition, variation, recession or substitution to the Constitution and Rules shall be published in the Civil Service Journal upon receipt by the Association from the Registrar of the certificate referred to in subrule (d) of this rule.

7 This application is brought under Rule 9(a)(iii). The facts supporting the applicant's submission that it has complied with rule 9(a)(iii) and the statutory requirements of the Act, are set out in a statement dated 1 September 2009 and made by Ms Toni Beverley Walkington, the General Secretary of the applicant. The evidence of Ms Walkington in her statement and attached documents establishes the following relevant matters:

a) Notice of the proposed amendment was given by letter dated 2 June, 2009 to all members of Council advising of the proposed alteration to the membership rule. The letter also informed the Council members that the proposal alteration would be discussed at the Council Meeting on 24 June 2009.

b) The agenda for the Council Meeting on 24 June 2009 referred explicitly to the proposed rule changes under Item 8.1 – General Business.

c) The minutes of the Council Meeting held 24 June 2009 record that 17 members of Council were present. The minutes also record that the President, two Vice Presidents, the Branch Assistant Secretary and 13 Councillors together with the Executive Officer were present at the meeting. The Executive Officer is not a member of the Council. However, the minutes record that at the time the relevant motion was carried only 16 members of council were present as one councillor joined the meeting after the motion was passed.

d) The minutes of the Council Meeting on 24 June 2009 record that Council unanimously passed a motion under General Business Item 9.1 that the rules be amended as proposed in this application. The minutes of the meeting state:

> Moved Jo Gaines that:
>
> '1. 6(b) is amended by changing 'the Civil Service Association of WA (Incorporated)' to "The Civil Service Association of Western Australia Incorporated' and then becomes 6(b)(i).
>
> 2. insert 6(b)(ii);
>
> 3. 6(bb) is amended by changing 'the Civil Service Association of Western Australia (Inc)' to 'The Civil Service Association of Western Australia Incorporated' and then becomes 6(b)(iii)
>
> The rule change in context is:
>
> '6(b)(i) Provided that the following persons shall not be eligible for membership: Persons who are employed by an employer bound by an award made or an industrial agreement registered under the Industrial Relations Act 1979 and in force on 1st March, 1985 and to which an organization of employees registered under the aforementioned Act other than The Civil Service Association of Western Australia Incorporated is party, in the callings which on 1st March, 1985 were mentioned in any such award or agreement or in a classification, not specifically mentioned in the award or agreement as at the 1st of March, 1985 the duties of which are the same or substantially similar to any classification which was so mentioned. Notwithstanding the above, employees of the Lotteries Commission of WA, or however so named, shall be eligible for membership of The Civil Service Association of Western Australia Incorporated.
>
> '6(b)(ii) Notwithstanding the proviso in rule 6(b)(i), and without limiting the generality of rules 6(a)(10) and 6(a)(11), dental technicians, their apprentices or their trainees employed in the Perth Dental Hospital or Community Dental Health Services or any other entity or unit however described or named which provides any of the services formerly provided by Perth Dental Hospital or Community Dental Health Services shall be eligible for membership of The Civil Service Association of Western Australia Incorporated.
>
> '6(b)(iii) Provided further that save and except for the employees referred to in Rule 6(a)(11) and (12) all salaried employees (being professional, administrative, clerical, technical and supervisory employees)(including those listed in Schedule A to the Rules of the Hospital Salaried Officers' Association of Western Australia (Union of Workers)) employed by the Boards of any public hospital constituted under the Hospital and Health Services Act 1927 (as amended) in such hospitals or for the provision of health services in any district or area in which such board or boards are required or have a duty to provide such services shall not be eligible for membership of The Civil Service Association of Western Australia Incorporated.'
>
> Seconded: Brian Dodds
>
> CARRIED UNAMINMOSLY [sic]

e) The minutes of the Council Meeting on 22 July 2009 record that the Council minutes for 24 June 2009 at Item 3.1 were confirmed.

f) Notice of the proposed alteration to the rules was published in the CSA Journal after the meeting of Council on 24 June 2009. Copies of the CSA Journal were lodged with Australia Post for distribution to members on or about 6 August, 2009 and a copy of the CSA Journal containing the notice was posted to the last known address of each member that being the current address on the applicant's register of members. The notice in the CSA Journal stated as follows:

> **Proposed amendment to CSA Rules**
>
> It is proposed that rule 6 be amended to clarify the Civil Service Association of WA (Inc.)'s coverage of employees at Perth Dental Hospital and the Community Dental Health Services
>
> The proposed amendment to Rule 6(b) is as follows:
>
> 1. 6(b) becomes 6(b)(i);
>
> 2. then insert 6(b)(ii); viz:
>
> 3. Rule 6(bb) becomes Rule 6(b)(iii)
>
> The rule change in context is:
>
> '(b)(i) Provided that the following persons shall not be eligible for membership: Persons who are employed by an employer bound by an award made or an industrial agreement registered under the Industrial Relations Act 1979 and in force on 1st March, 1985 and to which an organization of employees registered under the aforementioned Act other than The Civil Service Association of Western Australia Incorporated is party, in the callings which on 1st March, 1985 were mentioned in any such award or agreement or in a classification, not specifically mentioned in the award or

agreement as at the 1st of March, 1985 the duties of which are the same or substantially similar to any classification which was so mentioned. Notwithstanding the above, employees of the Lotteries Commission of WA, or however so named, shall be eligible for membership of The Civil Service Association of Western Australia Incorporated.

(b)(ii) Notwithstanding the proviso in rule 6(b)(i), and without limiting the generality of rules 6(a)(10) and 6(a)(11), dental technicians, their apprentices or their trainees employed in the Perth Dental Hospital or Community Dental Health Services or any other entity or unit however described or named which provides any of the services formerly provided by Perth Dental Hospital or Community Dental Health Services shall be eligible for membership of The Civil Service Association of Western Australia Incorporated.'

'(b)(iii) Provided further that save and except for the employees referred to in Rule 6(a)(11) and (12) all salaried employees (being professional, administrative, clerical, technical and supervisory employees)(including those listed in Schedule A to the Rules of the Hospital Salaried Officers' Association of Western Australia (Union of Workers)) employed by the Boards of any public hospital constituted under the Hospital and Health Services Act 1927 (as amended) in such hospitals or for the provision of health services in any district or area in which such board or boards are required or have a duty to provide such services shall not be eligible for membership of The Civil Service Association of Western Australia Incorporated.'

Rationale

The changes make it clear that all employees at Perth Dental Hospital or the Community Dental Health Services, including dental technicians, apprentices or trainees are covered by the CSA, and eligible for membership. The re-numbering of the rule has been made consequentially, and a consistent reference to the name of the CSA has been made throughout to reflect its proper name.

Objections

In accordance with the Rules of the Association any objection to the proposed alteration should be forwarded to the Registrar, Western Australia Industrial Relations Commission, 111 St Georges Tce, Perth, WA 6000. The objection should be received by the Registrar no later than 21 days after receipt of this notice.

g) Prior to Council passing the resolution relied upon in these proceedings Ms Walkington wrote to the Secretaries of the LHMU and the Health Services Union of Western Australia (Union of Workers) (HSU) to inform them of proposed rule change. A response was received from the LHMU in a letter dated 16 June 2009 in which the applicant was advised that the LHMU supports the applicant's amended application for eligibility rule change for coverage of dental technicians, dental technician apprentices and dental technician trainees. The statement of Ms Walkington does not expressly say whether a response was received from the HSU.

8 At the hearing before the Full Bench on 2 November 2009, Mr Farrell on behalf of the applicant informed the Full Bench that that he had spoken to a representative of the HSU who had informed him that the HSU did not object to the proposed rule change.

9 The minutes of the Council Meeting of 22 July 2009 also record there was a quorum present at the meeting on 24 June 2009. Rule 12(j)(iii) provides that a quorum for a Council Meeting is a 'majority of those entitled to attend and vote at the meeting'. Sixteen Council members attended the meeting at the time the resolution was unanimously passed. The number of members of Council is determined by operation of Rule 12(a)(vi) which provides that the Council includes Councillors: 'who are members of the electorate they represent, elected by the financial members in such electorate[.]'. Ms Walkington attached to her statement a list of Councillors who are members of Council. This list contains names of 28 Councillors who are entitled to attend and seven proxy Councillors who can stand in their stead. Mr Farrell informed the Full Bench that this list was current at the time the resolution was passed. If there are 28 members of Council and 16 members of Council attended the meeting and passed the resolution then it is clear there was a quorum at the time the proposed amendments to the rules were passed. We are also satisfied that when the resolution was passed by the members of Council that rule 9(a)(iii) was complied with as:

(a) Notice of the amendment was given to the members of Council 21 days prior to the meeting of council held on 24 June 2009;

(b) The resolution was passed by a majority of two-thirds of the members of Council present at the meeting on 24 June 2009 as 16 members of 28 members of Council passed the resolution;

(c) Notice of the proposed alteration was posted to each financial member.

10 We are also satisfied that s 55(4)(b), s 55(4)(c) and s 55(4)(d) of the Act has been complied with as it is clear that adequate notice of the proposed change to the rules was given to members and that they have had a reasonable opportunity to make an objection to the change. It is notable that no objection had been forthcoming.

11 The final requirement the Full Bench must consider arises under s 55(5) of the Act. Pursuant to s 55(5), unless the Full Bench is satisfied that there is good reason, consistent with the objects prescribed in s 6 of the Act, it must refuse an application by an organisation to alter its rules, if the alteration would enable the organisation to enrol as members, persons who are eligible to be members of another organisation. This issue is squarely raised in this matter as the rules of the LHMU enable it to enrol as members, persons who are the subject of this application. Section 6(e) of the Act provides that one of the principal objects of the Act is: 'to encourage the formation of representative organisations of employers and employees and their registration under this Act and to discourage, so far as practicable, overlapping of eligibility for membership of such organisations'. Overlapping

eligibility should be discouraged so far as practicable to avoid demarcation disputes between registered organisations. In this matter no such dispute arises, nor should it arise in the future as the LHMU has given an unequivocal undertaking that it supports the application for the change to the eligibility rules to enable the applicant to enrol as members, dental technicians, dental technician apprentices and dental technician trainees. Another principal object of the Act under s 6 is also: 'to encourage employers, employees and organisations to reach agreements appropriate to the needs of enterprises within industry and the employees in those enterprises' (s 6(ag)). Pursuant to rule 6(10) of the applicant's rules it can enrol as members salaried employees (being professional, administrative, clerical, technical and supervisory employees) employed in the Perth Dental Hospital and Community Dental Health Services and their successors. This rule was made following an agreement made on 30 May 2005 with the HSU. In our opinion it is appropriate that dental technicians, dental technician apprentices and dental technician trainees should be able to join in industrial campaigns with other professional groups in the public dental health industry as it is obvious that they would share common needs with those groups and the employers of those groups would share some common needs in respect of all occupational groups employed in dental health services. For these reasons we are satisfied when making the order to authorise alteration of the applicant's rules that there was good reason to do so consistent with the objects prescribed in s 6 of the Act Those reasons are, that there is no prospect of any demarcation dispute arising in the future with any other registered organisation in respect of the occupational group the subject of this application and the proposed rule change is consistent with object s 6(ag) of the Act, which provides that the provisions of the Act should be utilised to encourage employers, employees and organisations to reach agreements that are appropriate to the needs of enterprises and employees in those enterprises.

2009 WAIRC 01153

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-and-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 3 NOVEMBER 2009
FILE NO/S	FBM 4 OF 2009
CITATION NO.	2009 WAIRC 01153

Decision	Application granted
Appearances	
Applicant	Mr S Farrell and Mr W Claydon

Order

This matter having come on for hearing before the Full Bench on 2 November 2009, and having heard Mr S Farrell on behalf of the applicant, the Full Bench orders that:—

The Registrar is hereby authorised to register the alteration to the rules of the applicant as published in the Western Australian Industrial Gazette on 23 September 2009.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

2009 WAIRC 01307

APPLICATION PURSUANT TO SECTION 62 - ALTERATION OF REGISTERED RULES - RULE 6 - MEMBERSHIP

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MASTER BUILDERS' ASSOCIATION OF WESTERN AUSTRALIA (UNION OF EMPLOYERS) PERTH
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S WOOD
HEARD	MONDAY, 30 NOVEMBER 2009
DELIVERED	THURSDAY, 10 DECEMBER 2009
FILE NO.	FBM 5 OF 2009
CITATION NO.	2009 WAIRC 01307

CatchWords	Industrial Law (WA) – Application pursuant to s 62(2) of the *Industrial Relations Act 1979* (WA) for the Full Bench to authorise registration of alteration to registered rule for qualification of membership rule – Whether relevant rule about qualification for membership – Proposed rule about qualities, conditions or characteristics of persons who might become members – Statutory criteria satisfied – Application granted
Legislation	*Industrial Relations Act 1979* (WA) s 55(4), s 55(4)(a), s 55(4)(b), s 55(4)(c), s 55(4)(d), s 55(4)(e), s 56(1), s 62(2), s 62(3), s 62(4), s 71(2), s 71(5).
Result	Order made
Representation	
Applicant	Mr S Kemp (of counsel)

Reasons for Decision

THE FULL BENCH:

The Application:

1 This application was filed on 13 October 2009 and is made pursuant to s 62(2) of the *Industrial Relations Act 1979* (WA) (the Act). The applicant, as a registered organisation under the Act, seeks the authorisation of the Full Bench of the Commission to register an alteration to its qualifications for membership rule. The eligibility rule before the Full Bench in this application is rule 6 of the applicant's rules. The applicant says that it has made the application out of what might be described as an abundance of caution as the proposed amendments to rule 6 do not alter the applicant's rules with respect to the qualifications of a person's membership and therefore the Registrar has jurisdiction to register the amendments without the requirement for authorisation by a Full Bench. Alternatively, the applicant says that if it is the view of the Full Bench that the proposed alteration is one which needs to be authorised by a Full Bench in accordance with s 62(2) of the Act before it can be registered by the Registrar, the proposed amendments ought to be allowed as the relevant statutory requirements have been satisfied.

2 At the conclusion of the hearing on 30 November 2009, the Full Bench informed the applicant that the proposed alteration to rule 6 was one that required the authorisation of the Full Bench. The applicant was also informed that the application would be granted. On 30 November 2009, an order was made that the Registrar be authorised to register the alteration to the rules of the applicant as published in the *Western Australian Industrial Relations Gazette* on 28 October 2009.

3 The following paragraphs set out the reasons why we concluded that the order should be made.

Do the proposed alterations to Rule 6 relate to qualifications of persons for membership?

4 In ***The Independent Education Union of Western Australia, Union of Employees*** (2008) 88 WAIG 2230, Ritter AP sets out two alternative methods for the Commission to authorise the registration of alterations to the rules of organisations under s 62 of the Act. He points out that a rule alteration must be authorised by the Full Bench where the rule or rules sought to be altered relates to an association or organisation's name, qualifications of persons for membership or a matter rising under s 71(2) or s 71(5) of the Act relating to State branches of Federal organisations. Other alterations to rules are registered by the Registrar after consulting with the President (see s 62(3)).

5 In ***The Independent Education Union of Western Australia, Union of Employees***, Ritter AP explained what was meant by the term 'qualifications of persons for membership' in s 62(2) of the Act and the importance of such alterations being dealt with by a Full Bench. At [7] - [9] His Honour explained

7 The word 'qualification' has a somewhat broad and flexible meaning. It is defined in *The Macquarie Dictionary* (3rd ed, 1991) in this way:

> '**qualification** *noun* 1**.** a quality, accomplishment, etc., which fits for some function, office, etc. **2.** a required circumstance or condition for acquiring or exercising a right, holding an office, or the like. **3.** the act of qualifying. **4.** the state of being qualified. **5.** modification, limitation, or restriction, an instance of this: *to assert a thing without any qualification*.'

8 It might be argued that the proposed rule alters the qualification for membership in that there will be a change to the things which a putative member can and needs to do to be considered for and in that sense 'qualify' for membership. I do not however favour the argument. In my opinion the proposed rule alteration seeks to amend the mechanics for the making and processing of membership applications as opposed to the qualities, conditions or characteristics of the employees who might become members. In my opinion it is the latter which falls within s62(2) of the Act.

9 The Act, as a whole, legislates for the Commission to have fairly tight control over the constitution, registration, rules and compliance with the rules of an organisation. (See *Stacey v Civil Service Association of Western Australia Incorporated* (2007) 87 WAIG 1229 at [264]-[266]). The content of and division between the alternative methods of authorisation in s62(2) and s62(3) of the Act are consistent with this. The division is based upon the legislature's perception of those types of alterations which are sufficiently serious to warrant the scrutiny, consideration and authorisation of the Full Bench. For example an alteration to qualification for membership is clearly a matter of importance, not only for the organisation and their existing and possible future members, but for other organisations and employers and the functioning of *the Act* as a whole. The present proposed alteration is not of this ilk; instead it is about, as I have said, the mechanics of becoming a member.

6 In ***The Independent Education Union of Western Australia, Union of Employees*** it was clearly apparent that the alterations sought to the eligibility rules of the Union did not deal with qualifications for membership but the mechanics of becoming a member. A new sub-rule was sought to be inserted into the Union's rules which dealt specifically with the form by which a member could make an application, the means by which that application could be served on the Union, the means by which the application could be approved by the Secretary of the Union, how notice would be given of the financial obligations arising from membership and the manner and circumstances in which a member could resign.

7 The alterations sought to rule 6 in this matter are of a different character to the alterations to rules sought in ***The Independent Education Union of Western Australia, Union of Employees***. The amendments sought to rule 6 of the applicant's rules are set out in the following:

Existing Rule 6

6 – MEMBERSHIP

(a) The Association shall comprise the following grades of membership:-

(i) Builder Members - shall be persons, partnerships, companies, corporations, or organisations operating as Builders and/or Civil Engineering Contractors as principal contractors and where required by the Builders' Registration Act to be registered are so registered.

(ii) Project/Construction Manager Members - shall be persons, partnerships, companies, corporations, or organisations operating, practising or carrying on business in the Project Management or Construction management field or activity within the Building Industry as defined by these Rules.

(iii) Associate Members - shall be any person, firm or company carrying on business in connection with the Building Industry as defined in these Rules, and is a supplier of any goods and/or services to the Industry, or is other than a principal contractor and who is not otherwise eligible under this clause to apply for membership.

(iv) Honorary Members - shall be persons upon whom the Council may confer membership for reasons deemed by the Council to enhance the Status of the Association. Honorary Members shall be entitled to attend all meetings of the Association and receive a copy of the Association's official journal but shall not be entitled to hold any office in the Association nor vote on any matter.

(v) Life Member - shall be a Member who has rendered exceptional service to the Association as determined by the Council. Such Member shall have all the privileges of membership including the right to vote at meetings but will not be liable for any fees or subscriptions or levies.

(vi) Social Member - shall be a member who ceases to carry on the business of a Builder and is thereby ineligible for membership under (i) hereof. Such a member may with the approval of Council become a Social member. Such Member shall have all the privileges of membership but shall not be entitled to vote at any meeting thereof nor shall he be liable for any levy or fee other than the membership fee determined.

(b) No Associate Member shall:-

(i) be eligible for election to any office in the Association, or

(ii) nominate any candidate for election to any office, or

(iii) nominate or second a nomination of any candidate for membership of the Association other than a candidate for Associate Membership.

(c) Trade sections covering the various sectors for the building and construction industry may be constituted within the Association by the Council if in the opinion of the Council it is in the best interests of the Association or Members engaged in the particular sector of the industry so to do.

(d) A person shall not be a member of the Association who is not an employer (except in the capacity of an honorary member) or a member who or whose personal representative is entitled to some financial benefit or financial assistance under the Rules of the Association while not being an employer.

Proposed new Rule 6

6 – MEMBERSHIP

(a) The Association shall comprise the following categories of membership:-

(i) Builder Members - shall be any persons, partnerships, companies, corporations, firms or organisations carrying on business in the Building Industry who or which:

A. employ persons in their business;

B. as principal contractors, carry out administration and supervision necessary to enable the construction of entire building projects; and

C. where required by the Builders Registration Act to be registered, are so registered.

Builder Members may vote at all General Meetings and in all elections and may nominate and stand for election as an Officer.

(ii) Subcontractor Members – shall be any persons, partnerships, companies, corporations, firms or organisations carrying on business in the Building Industry who or which:

A. employ persons in their business;

B. as secondary contractors, provide labour or labour and materials to enable the construction of components of building projects; and

C. are not eligible for membership as Builder Members.

Subcontractor Members may vote at General Meetings but shall not be eligible to stand for, nominate any candidate for, or vote in any elections for any position as an Officer.

(iii) Associate Members - shall be any persons, partnerships, companies, corporations, firms or organisations carrying on business in connection with the Building Industry, who are suppliers of any goods and/or services to the Building Industry, and who are not otherwise eligible under this Rule to apply for membership. No Associate Member shall:

(a) be eligible to stand for, nominate any candidate for, or vote in any elections for any position as an Officer; or

(b) nominate or second a nomination of any candidate for membership of the Association other than a candidate for Associate Membership.

(iv) Honorary Members - shall be persons upon whom the Board may confer membership for reasons deemed by the Board to enhance the status of the Association. No Honorary Member shall:

(a) be eligible to stand for, nominate any candidate for, or vote in any elections for any position as an Officer; or

(b) nominate or second a nomination of any candidate for membership of the Association other than a candidate for Associate Membership.

(v) Life Members - shall be Members who have rendered exceptional service to the Association as determined by the Board. Such Members shall have all the privileges of membership including the right to vote at meetings and in elections but will not be liable for any fees or subscriptions or levies.

(vi) Social Members - shall be Members who cease to carry on business in the Building Industry and thereby are ineligible for membership. Such a Member may with the approval of the Board become a Social Member. No Social Member shall:

(a) be eligible to stand for, nominate any candidate for, or vote in any elections for any position as an Officer; or

(b) nominate or second a nomination of any candidate for membership of the Association other than a candidate for Associate Membership; or

(c) be liable for levy or fee other than the membership fee so determined by the Board from time to time.

(b) Trade sections covering the various sectors for the Building Industry may be constituted within the Association by the Board if in the opinion of the Board it is in the best interests of the Association or Members engaged in the particular sector of the industry so to do.

8 It is clear that when one analyses the form of rule 6 and the alterations proposed to rule 6 that there are a number of changes which relate to the qualifications of persons for membership of the applicant. In particular a number of the changes sought are matters which go to the qualities, conditions or characteristics of persons who might become members of the applicant.

9 In our opinion the variation sought to rule 6(a)(i) in respect of builder members potentially changes the scope of persons who could apply to become a member of the applicant in this category of membership. What was provided for in this grade were members who operate as Builders and/or Civil Engineering contractors as principal contractors. This grade is to be deleted and

what is to be substituted is a category of builder members who carry on business in the building industry as principal contractors who carry out administration and supervision necessary to enable the construction of entire building projects. The requirement to be a Builders and/or Civil Engineering contractor is removed (although in practice it is likely to be difficult to have a principal contractor who is not a Builders and/or Civil Engineering contractor). What is now required is to be a principal contractor who carries out the administration and supervision necessary to enable the construction of entire building projects. It may be that is what a principal contractor does. The point is that the change to the wording potentially changes who may be a builder member. Also rule 6(a)(ii) currently provides for a grade of membership of Project/Construction Manager who operates, practises or carries on business in the project management or construction management field or activity within the building industry as defined in the rules. This grade of membership is currently restricted to Project/Construction Managers. However, this grade is to be deleted and what is to be substituted is a general category of Subcontractor Members who carry on business in the building industry as a secondary contractor to provide labour or labour and materials to enable the construction of components of building projects and who will not be eligible for membership as Builder Members. Consequently there are two changes which could be said to be a variation of the characteristics of persons who might be enrolled under this category of membership. Firstly, this category is extended from project and construction managers to Subcontractor Members who provide labour and materials to enable the construction of components of building projects. This category potentially will not be restricted to project and construction managers. Secondly, if it was possible for a person to be eligible for membership as either a Builder Member or as a Project/Construction Manager Member, the change makes it clear that a Subcontractor Member is not a person who is eligible for membership as a Builder Member.

10 For these reasons we formed the opinion that the Registrar could not register the alteration to rule 6 unless the alteration has been authorised by a Full Bench in accordance with s 62(2) of the Act.

Statutory requirements which need to be satisfied before the Full Bench can authorise registration of an alteration to eligibility rules

11 Pursuant to s 62(4) of the Act, the requirements of s 55(4) of the Act must be complied with before the Full Bench can approve a rule alteration application. Section 55(4) of the Act provides that the Full Bench shall refuse an application unless it has been authorised in accordance with the rules of the organisation. At the time the applicant considered the proposal to alter rule 6, rule 36 of the rules provided:

> No amendment, repeal or alteration of the Rules of the Association shall be made unless and until the amendment repeal or alteration has been passed and approved by a vote of the majority of the Members of the Association present in person at the General Meeting of the Association called for the purpose of which seven (7) days previous notice specifying the time, place and objects of the meeting has been given, by publishing a copy of a notice thereof in a newspaper circulating generally in the district in which the registered office of the Association is situated and by posting a copy of the notice in a conspicuous place outside such registered office.

12 Rule 36 made it plain that the following four conditions had to be satisfied before the rules of the applicant could be varied:

(a) A vote must be taken at a General meeting called for that purpose;

(b) Seven days notice of the time, place and objects of the meeting of the General Meeting must be given;

(c) The notice published in a newspaper and a copy of the notice must be placed outside the registered office of the applicant; and

(d) The alteration of the rules must be passed and approved by a vote by the majority of the Members of the applicant who are present at the General Meeting.

13 Documents attached to the statutory declaration of Charles David Anderson, the Contracts and Administration Manager of the applicant, evidences that:

(a) On 31 October 2008, the applicant sent its members a notice that a General Meeting would be held on 11 November 2008 to consider and vote on the changes to the applicant's rules.

(b) On 1 November 2008, a notice was published in The West Australian newspaper specifying the time, place and objects of the General Meeting.

(c) On 3 November 2008, the applicant posted a copy of the notice published in The West Australian newspaper outside its registered office at 4th Floor, Construction House, 35-37 Havelock Street in West Perth.

(d) The General Meeting held on 11 November 2008 was attended by 25 of the applicant's members. When the vote regarding a proposed amendment to the rules was held a simple majority of the members present voted in favour of the proposed amendments by way of a show of hands. None of the members present in person or by proxy demanded a poll. The result of the vote was recorded in the minutes of the meeting, a copy of which is annexed to the statutory declaration as Annexure CDA-10.

14 At the time the vote was taken, rule 22 of the applicant's rules provided that 15 members present in person or by proxy at any General Meeting, shall form a quorum. Consequently, a quorum was present on 11 November 2008 as 25 members of the Association attended the General Meeting.

15 At the material time rule 23 of the applicant's rules set out the manner of voting at General Meetings. Rule 23(a) provided that every question submitted to a General Meeting shall be decided in the first instance by a show of hands in which every member present shall have one vote. A poll was only required when demanded by at least three (3) members. No members at the General Meeting on 11 November 2008 demanded a poll.

16 Consequently we are satisfied that the application had been authorised in accordance with the rules of the organisation as required by s 55(4)(a) of the Act.

17 Section 55(4) of the Act also requires that reasonable steps be taken to adequately inform the members of the proposal for the alteration and the reasons therefore and that the members or any of them may object to the proposed alteration by forwarding a written objection to the Registrar of the Commission. This provision also requires that members must have been afforded a reasonable opportunity to object to the alteration.

18 Mr Anderson's statutory declaration evidences that on 19 December 2008, the applicant sent to its members either by email or by post a circular (Circular 229/2008) giving members notice of the fact that the application to amend the rules was to be lodged with the Commission in late January 2009 and that members could object in writing to the Registrar of the Commission. Members were advised in that notice that if they wished to lodge an objection they should do so within 28 days of the date of the notice. Mr Anderson in his statutory declaration also says that on or about 19 December 2008, he instructed a note to be added to the home page of the Association's website which stated that the General Meeting of 11 November 2008 voted to change the rules of the Association and the Association is now applying to the Industrial Relations Commission to authorise changes. The note also stated that any member objecting to the changes may do so in writing to the Commission. Also posted on the website was a copy of the proposed amended rules.

19 We are satisfied that s 55(4)(b), s 55(4)(c), and s 55(4)(d) of the Act has been complied with as it is clear that adequate notice of the proposed alteration to the rules was given to the members of the Association and that they had had reasonable opportunity to make an objection to the change. It is notable that no objection has been forthcoming. Consequently it is clear that s 55(4)(c) does not apply. In addition it is plain that the procedure set out in Rule 36 of the rules which was followed by the applicant satisfied the requirement of s 55(4)(d) of the Act.

20 Section 55(4)(e) and s 56(1) of the Act relates to procedural rules for election for office, including secret ballots. The applicant's rules currently provide for the procedures required by these provisions of the Act and the alterations sought to rule 6 do not deal with the matters specified in these provisions of the Act.

21 The applicant in its written submissions also refers to rule 41 of the applicant's current rules which replaced rule 36. The applicant in its written submissions contends that this provision has also been complied with. However, we are of the view that it is not necessary to consider whether this rule has been complied with as it did not have effect at the time the alteration of the rules was considered by the Association.

2009 WAIRC 01257

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MASTER BUILDERS' ASSOCIATION OF WESTERN AUSTRALIA (UNION OF EMPLOYERS) PERTH
	APPLICANT
	-and-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S WOOD
DATE	MONDAY, 30 NOVEMBER 2009
FILE NO/S	FBM 5 OF 2009
CITATION NO.	2009 WAIRC 01257

Decision	Application granted
Appearances	
Applicant	Mr S Kemp, of counsel

Order

This matter having come on for hearing before the Full Bench on 30 November 2009, and having heard Mr S Kemp on behalf of the applicant, the Full Bench orders that:-

> The Registrar is hereby authorised to register the alteration to the rules of the applicant as published in the Western Australian Industrial Gazette on 28 October 2009.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

FULL BENCH—Unions—Cancellation of registration—

2009 WAIRC 01305

CANCELLATION OF REGISTRATION OF ORGANISATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE REGISTRAR
	APPLICANT
	-v-
	MURDOCH UNIVERSITY ACADEMIC STAFF ASSOCIATION
	RESPONDENT
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER J L HARRISON
HEARD	WEDNESDAY, 25 NOVEMBER 2009
DELIVERED	WEDNESDAY, 9 DECEMBER 2009
FILE NO.	FBM 3 OF 2009
CITATION NO.	2009 WAIRC 01305

CatchWords:	Industrial Law (WA) - Application by the Registrar to cancel the registration of an organisation on the application of the Registrar that the organisation has in the manner prescribed requested that its registratrion be cancelled - Principles applied - Registration cancelled
Legislation:	*Industrial Relations Act 1979* (WA), s 73(12)(b), s 73(12)(c), s 73(12a), s 73(13)
	Industrial Relations Regulations 2005 (WA), Reg 75, Reg 76
Result:	Order made
Representation:	
Applicant	Mr R Andretich (of counsel)
Respondent	Dr M Kemp

Reasons for Decision

THE FULL BENCH:

The Application and the requirements of the Act

1 This application to cancel the registration of the Murdoch University Academic Staff Association (the Association) came before the Full Bench pursuant to s 73(12)(c) of the *Industrial Relations Act 1979* (WA) (the Act). Section 73(12)(c) of the Act provides that the Full Bench shall cancel the registration of an association if it is satisfied on the application of the Registrar that the association has, in the manner prescribed, requested that its registration be cancelled. Pursuant to s 73(12a) of the Act, the Registrar is required to make an application under subsection (12) in every case where it appears to him or her that there are sufficient grounds for doing so. Section s 73(13) also relevantly provides that proceedings for the cancellation of the registration of an association, or any of its rights under the Act, shall not be instituted otherwise than under this section. These provisions raise a mandatory obligation on the Registrar to bring an application where he or she is satisfied of the requisite matters and it is only the Registrar who can bring such an application.

2 Pursuant to reg 75 of the *Industrial Relations Commission Regulations 2005* (WA) (the Regulations) any request by an association to cancel its registration must be made to the Registrar in the form of Form 22. Requests must clearly state the grounds on which the request is made and contain sufficient evidence to satisfy the Registrar that the cancellation has the consent of the majority of the total numbers of members of the organisation or association.

3 Regulation 76 of the Regulations provides for the procedure that the Registrar must comply with when an application for cancellation of registration of an association is made.

4 The application was unopposed by the respondent. At the conclusion of the hearing on 25 November 2009 the Full Bench informed the parties that the grounds of the application had been made out and that an order would be made to cancel the registration of the Association. On 25 November 2009 an order was made that the registration of the Association be cancelled as and from 25 November 2009. The reasons for making the order are as follows.

5 If the Full Bench is satisfied on the application of the Registrar that the Association has, in the manner prescribed, requested that its registration be cancelled, the Full Bench is required by the use of the mandatory word "shall" in s 73(12) to cancel the registration of that organisation (see the discussion in ***The Registrar v Master Hairdressers' Association of WA, Industrial Union of Employers*** (2004) 84 WAIG 2190 in relation to an application made under s 73(12)(b)). Consequently if the Full Bench is satisfied that the matters which are prescribed have been complied with then the Full Bench is required to grant the application as its decision is not discretionary.

6 As required by reg 75 of the Regulations, the respondent made a request to cancel its registration by filing a Form 22 on 22 June 2009 (the request). In the Schedule attached to the request the respondent says it has been in existence since 1975 and since that time the National Tertiary Education Industry Union (NTEU) has come into existence. The NTEU was an organisation registered under the *Workplace Relations Act 1996* (Cth) and is now recognised as an organisation under the *Fair Work Act 2009* (Cth). The NTEU has constitutional coverage of both academic staff and non-academic staff employed by Murdoch University. The respondent, however, has constitutional coverage of academic staff. All members of the respondent are also members of the NTEU. Pursuant to reg 75, a request must not only state clearly the grounds on which the request is made but contain sufficient evidence to satisfy the Registrar that the cancellation has the consent of the majority of the total number of members of the organisation or association. The respondent in its Schedule addresses this issue and states that:

(a) all members of the respondent request the cancellation of the association;

(b) the members will not be disadvantaged by this cancellation as they will still be able to be collectively bargain through the NTEU.

7 In a statutory declaration made on 19 August 2009 by John Arthur Spurling, the Registrar of the Commission, he sets out the grounds upon which he was satisfied that the cancellation has the consent of the majority of the total number of members of the Association. In particular he states that the request for cancellation has been made in accordance with the Act and reg 75 and the application has been made in the prescribed form. The Registrar also addresses a number of documents which are set out as annexures to his statutory declaration which he says support his contention that the application has been properly made in accordance with the provisions of the Act and the Regulations.

Evidence that the Cancellation of Registration has the Consent of a Majority of the Total Number of Members of the Association

8 To determine whether the Association's request has the consent of the majority of the total number of members of the Association requires an examination of the rules of the Association. Rule 32 of the Association's rules provides that:

> Subject to the laws of Western Australia the Association may be dissolved by resolution of a three quarters majority vote of members present at a special general meeting called solely for the purpose of considering dissolution of the Association.

9 A special general meeting can be convened pursuant to Rule 20 of the Association's Rules. Rule 20(3) provides:

> A special general meeting shall be called by the Secretary within 14 days at the request of the Committee or on the receipt of a request for such a meeting signed by at least 10 per centum of the members or by twenty (20) members (whichever is the lesser) and stating the purpose for which the meeting is to be convened. Notice of any such meeting shall state the business for which the meeting is convened.

10 The Registrar's statutory declaration refers to and annexes a statutory declaration made on 16 June 2009 by the President of the respondent, Dr Marian Elizabeth Frances Kemp (Annexure B). Attached to her statutory declaration are a number of material documents which are attached as Attachments 1 to 9. Attachment 5 to Dr Kemp's statutory declaration contains the minutes of a special general meeting of the Association held on 27 November 2008 at which it was resolved to dissolve the association and cancel the registration of the Association.

11 It is clear from Attachments 1, 2, 3 and 4 of Dr Kemp's statutory declaration that the special general meeting held on 27 November 2008 was convened at the request of the Committee of Management of the Association. A request to convene the special general meeting was carried unanimously by the Committee of Management on 12 November 2008 (Attachment 1). Rule 10(6) of the Rules states that the quorum for Committee of Management meetings must be five. Attachment 1 of Dr Kemp's statutory declaration records that all five members of the Committee of Management attended the meeting and made the request for a special general meeting. In accordance with Rule 20(3) the special general meeting was held within 14 days following the request being made by the Committee of Management. Pursuant to Rule 20(4), notice in writing of the special general meeting of the Association was given by the Secretary of the Association to each member of the Association at least seven days prior to the meeting of 27 November 2008 (attachment 2 of Dr Kemp's statutory declaration).

12 Attachment 2 to the statutory declaration of Dr Kemp records that a copy of the agenda for the special general meeting was sent to all members of the Association on 13 November 2008. In that document members of the Association were advised that the special general meeting would take place on 27 November 2008. The statutory declaration made by Dr Kemp also records that the notices containing the agenda were individually labelled for each member and delivered to the secretary of the relevant school to place in each member's mail box; or if a member was not part of a school, the agenda was placed inside an envelope and sent to each member directly to their campus address. Dr Kemp in her statutory declaration also states that more than three days' notice of the proposed meeting was provided to members as required by Rule 20(4). Dr Kemp points out in her statutory declaration that the notices were served in accordance with Rule 30 of the Association's rules and that an email was sent to all members of the association on Monday, 24 November 2008 reminding them of the special general meeting.

13 The minutes of the special general meeting held on 27 November 2008 (Attachment 5 to the Statement of Dr Kemp) records that 20 members were in attendance at that meeting and that the following resolutions were passed unanimously:

MOTION 1

That this Special General Meeting of members of MUASA supports the dissolution of the Association subject to the laws of Western Australia

MOTION 2

That, if Motion 1 is found in the affirmative, this Special General Meeting of members of MUASA supports application being made to the WA Industrial Relations Commission to cancel registration of MUASA

MOTION 3

That, in the case of the cancellation of the registration of MUASA, this Special General Meeting of members of MUASA directs the Treasurer to transfer funds in MUASA accounts to the National Tertiary Education Industry Union Murdoch Branch account

14 On 29 April 2009 all members of the Association were sent a memorandum by internal mail and email in which it was stated on behalf of the Association that the resolutions had been passed at the special general meeting on 27 November 2008 and that an application was going to be made to the Commission to dissolve the Association (Attachment 6 to the statutory declaration of Dr Kemp). Members were asked to complete and return a blue form to the respondent which contained a request to each member to indicate either their support or opposition to the dissolution of the Association. The blue form also contained advice that if any member wished to object to the dissolution of the Association, they needed to return the form or lodge a complaint within 21 days of the date of the notice. Members of the Association were later sent reminder notices requesting that they return the blue forms (attachment 9 of the statutory declaration of Dr Kemp).

15 Dr Kemp in her statutory declaration states:

(a) the current membership of the association is 214;

(b) A total of 113 blue forms were returned by members and of these 110 members indicated support for dissolving the association;

(c) In addition three emails were received by the respondent from members of the association who indicated their support for the dissolution of the association;

(d) Three blue forms were received from members who indicated they were against dissolution and of these only one member provided a written objection.

16 Dr Kemp in her statutory declaration says when regard is had to the material contained in the responses it is clear that a majority of the current membership of the Association have indicated their support for the dissolution of the Association and the requirement in reg 75 that a majority of members be in favour of the deregistration of the Association is satisfied.

17 When regard was had to the evidence provided to the Registrar we were satisfied that he correctly concluded that the request for cancellation has the consent of the majority of the total numbers of the Association as required by reg 75(2) of the Regulations, as 113 of 214 members of the Association have stated in writing that they consent to the dissolution. We were also satisfied that the requirements of the rules of the Association, the Act and the Regulations had been complied with. For these reasons we formed the opinion that the application should be granted and an order be made that the Association be dissolved.

2009 WAIRC 01231

CANCELLATION OF REGISTRATION OF ORGANISATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE REGISTRAR
	APPLICANT
	-v-
	MURDOCH UNIVERSITY ACADEMIC STAFF ASSOCIATION
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 25 NOVEMBER 2009
FILE NO/S	FBM 3 OF 2009
CITATION NO.	2009 WAIRC 01231

Result	Application granted
Representation	
Applicant	Mr R Andretich, of counsel
Respondent	Dr M Kemp

Order

This matter having come on for hearing before the Full Bench on the 25th day of November 2009 and having heard Mr R Andretich, on behalf of the applicant, and Dr M Kemp, on behalf of the respondent, the Full Bench orders that:-

The registration of the Murdoch University Academic Staff Association be and is hereby cancelled as and from the 25th day of November 2009.

By the Full Bench

(Sgd.) J H SMITH,

[L.S.] Acting President.

PRESIDENT—Unions—Matters dealt with under Section 66—

2009 WAIRC 01282

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PRESIDENT

CITATION	**:**	2009 WAIRC 01282
CORAM	**:**	THE HONOURABLE M T RITTER, ACTING PRESIDENT
HEARD	**:**	FRIDAY, 23 OCTOBER 2009
FINAL WRITTEN SUBMISSIONS RECEIVED: THURSDAY, 19 NOVEMBER 2009		
DELIVERED	**:**	THURSDAY, 3 DECEMBER 2009
FILE NO.	**:**	PRES 5 OF 2009
BETWEEN	**:**	ROBERT MCJANNETT

APPLICANT

-v-

KEVIN REYNOLDS, SECRETARY - THE CONSTRUCTION FORESTRY MINING & ENERGY UNION OF WORKERS

FIRST RESPONDENT

IAN BOTTERILL RETURNING OFFICER WA ELECTORAL COMMISSION

SECOND RESPONDENT

-and-

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS

INTERVENER

CatchWords:

Industrial Law (WA) – Substantive Application for Election Inquiry under s66(2)(e) of the *Industrial Relations Act 1979* (WA) – Application for summary dismissal under s27(1)(a) of the *Industrial Relations Act 1979* (WA) – Whether applicant asserting he is not a member of an organisation – Whether non-members voted in election – Whether application seeks to re-litigate issues previously decided – Scope of inquiry – Applicability of *Anshun* estoppel to election inquiries –Application for summary dismissal of the application allowed – Substantive application dismissed

Legislation:

Industrial Relations Act 1979 (WA): s7; s27(1)(a); s27(1)(a)(ii); s66(1)(a); s66(2); s66(2)(e); s66(2)(f); s71; s73(12)(a)

Result:

Application for summary dismissal of the application allowed; substantive application dismissed

Representation:

Counsel:

Applicant:	In person
First Respondent	No appearance
Second Respondent	No appearance
Intervener:	Mr R Kenzie QC, by leave

Solicitors:

Intervener:	Slater & Gordon Lawyers

Case(s) referred to in reasons:

Appeal by United Firefighters' Union of Australia (2009) 181 IR

Application by Transport Workers' Union of New South Wales for A Determination of the Question of an Invalidity under s288 of the Industrial Relations Act 1996 [2008] NSWIRComm 35

Aon Risk Services Australia Ltd v Australian National University (2009) 83 ALJR 951

Australian Education Union v Lawler (2008) 169 FCR 327

Bailey v Krantz (1984) 13 IR 326

DP World Australia Ltd v Fremantle Port Authority [2009] WASCA 16

Habib v Radio 2UE Sydney Pty Ltd [2009] NSWCA 231

King v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union (2000) 109 FCR 447

Mcjannett v Reynolds (2009) 89 WAIG 633

Macchia v The Public Trustee [2008] WASCA 241

Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589

Quall v Northern Territory [2009] FCA 18

R v Holmes, Ex parte Public Service Association of New South Wales (1977) 140 CLR 63

Re Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union, Victorian Branch (2000) 99 IR 224

Re Australasian Meat Industry Employees' Union (WA Branch); Ex Parte Ferguson (1986) 67 ALR 491

Re Election for Office in Transport Workers Union of Australia, Western Australian Branch (1992) 40 IR 245

Rogers v The Queen (1994) 181 CLR 251

Spalla v St George Finance Ltd (No 6) [2004] FCA 1699

Stacey v Civil Service Association of WA (Inc) (2007) 87 WAIG 1229

Stuart v Sanderson (2001) 175 ALR 681

Thompson v Reynolds (2009) 184 IR 186; (2009) 89 WAIG 287

West v Jackson McDonald [2001] WASC 198

Western Australian Principals' Federation v State School Teachers' Union of Western Australia (Inc) (2008) 88 WAIG 1812

Case(s) also cited:

Administration of the Territory of Papua New Guinea v Daera Guba (1973) 130 CLR 353

Batistatos v Roads and Traffic Authority of New South Wales (2006) 226 CLR 256

Bryant v Commonwealth Bank of Australia (1995) 57 FCR 287

Con-Stan Industries v Norwich Winterthur Insurance (Aust) Ltd (1985)160 CLR 226

Egan v Maher (1978) 35 FLR 197

Hunter v Chief Constable of the West Midlands Police (1982) AC 529

Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd (2009) 260 ALR 34

Johnson v Gore Wood &Co [2002] 2 AC 1

Kuligowsky v Metrobus (2004) 220 CLR 363

Leary v Australian Builders' Labourers' Federation (1961) 2 FLR 342

Leveridge v Shop Distributive and Allied Employees' Association (1977) FLR 385

McParland v The Construction, Forestry, Mining and Energy Union of Workers (2002) 82 WAIG 2894

Mcjannett, in the matter of an application for an inquiry in relation to an election for offices in the Construction, Forestry, Mining and Energy Union, Western Australian Branch (No 2) [2009] FCA 1015

Miller v University of New South Wales (2002) 200 ALR 565

Pearce v The Queen (1998) 194 CLR 610

PNJ v R (2009) 83 ALJR 384

R v Commonwealth Industrial Court; Ex parte Amalgamated Engineering Union, Australian Section (1960) 103 CLR 368

Re Collins; Ex parte Hockings (1989) 167 CLR 522

Re Keely; ex Parte Kingham (1995) 1 IRCR 311

Rebenta Pty Ltd v Wise [2009] NSWCA 212 (24 July 2009)

Robe River Iron Associates v Federated Engine Drivers and Firemen's Union of Workers' of Western Australia (1987) 67 WAIG 315

Robertson v Civil Service Association of Western Australia Inc (2003) 83 WAIG 3938

Seamen's Union of Australia v Matthews (1957) 96 CLR 529

Somodaj v Australian Iron & Steel Ltd (1963) 109 CLR 285

Walton v Gardiner (1993) 177 CLR 378

Reasons for Decision

RITTER AP:

Introduction

1 The substantive application in this proceeding seeks an inquiry into an election for offices in the intervener; which I will refer to as the CFMEUW. The application is made pursuant to s66(1)(a) and s66(2)(e) of the *Industrial Relations Act 1979* (WA) (*the Act*). The election was held earlier this year because of orders I made in *Thompson v Reynolds* (2009) 184 IR 186; (2009) 89 WAIG 287. The election was conducted by the second respondent. The applicant unsuccessfully stood for the position of assistant secretary.

2 As I will set out later there has been, in the proceeding to date, some variation in the basis of the applicant's claim. Essentially however, he asserts that there has been an "irregularity" in connection with the election. This is because the electoral roll included people who ought not to have been electors, as they had not been properly enrolled as members of the CFMEUW. Accordingly people did vote, or at least may have voted, in the election when they were not entitled to do so.

Section 66 of *the Act*

3 Section 66(1)(a) of *the Act* permits a member or past member of an organisation, registered under *the Act*, to make an application for an order under the section. Section 66(2)(e) gives the President of the Commission the jurisdiction to "inquire into any election for an office in the organisation if it is alleged that there has been an irregularity in connection with that election". It is that jurisdiction which the applicant seeks to invoke, on the basis of being a member of the CFMEUW. It is not in question that the CFMEUW is an organisation registered under *the Act*. Section 66(2)(e) and s66(2)(f) of *the Act* give the President broad powers to deal with any established irregularity. Irregularity is defined in s7 of *the Act* in the following way:

> "***irregularity***, in relation to an election for an office, includes a breach of the rules of an organisation, and any act, omission, or other means by which the full and free recording of votes, by persons entitled to record votes, and by no other persons, or a correct ascertainment or declaration of the results of the voting is, or is attempted to be, prevented or hindered; …"

4 I will later say something more about the meaning of irregularity in the present context.

Summary Dismissal Application

5 The present application to be determined is one filed by the CFMEUW on 15 September 2009, for the summary dismissal of the substantive application. The CFMEUW seeks to persuade the Commission to exercise its powers under s27(1)(a) of *the Act* to dismiss the substantive application because an inquiry is "not necessary or desirable in the public interest" (s27(1)(a)(ii)) or for "any other reason" (s27(1)(a)(iv)).

6 The summary dismissal application was filed after the applicant had, as directed, filed affidavits in support of the substantive application. At a directions hearing on 16 September 2009, orders were made for the filing and service of submissions in support of, or against, the summary dismissal application. These were complied with and the hearing of the summary dismissal application took place on 23 October 2009.

7 The summary dismissal application is supported by the first respondent who has adopted the submissions made by the CFMEUW. Counsel for the first respondent, with my assent, did not appear at the hearing. The second respondent, understandably and appropriately, has not taken a position on the summary dismissal application. Again, counsel for the second respondent did not appear at the hearing.

Grounds of the Summary Dismissal Application

8 In summary, the CFMEUW relies upon three grounds to support the summary dismissal application. They are:

(a) The argument of the applicant in the substantive application, if accepted, leads to the conclusion that he is not a member of the CFMEUW. At the same time however he makes this application under s66(1)(a) of *the Act* on the basis that he is a member of the CFMEUW. It is submitted that the applicant should not be allowed to "approbate and reprobate". Accordingly the application should be dismissed.

(b) The application involves an attack on the findings I made in *Thompson v Reynolds*. Accordingly, it is an abuse of process to seek to re-litigate the issues there decided.

(c) As an alternative to (b), it is argued that the application is an abuse of process of the type described by the High Court in *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589. This is usually referred to as *Anshun* estoppel. The CFMEUW asserts that, if the matters which the applicant now wishes to argue were not decided in *Thompson v Reynolds*, it was unreasonable of him not to have then raised them. Accordingly the applicant should not now be permitted to proceed with the substantive application. The

applicant applied to become a party in *Thompson v Reynolds*, but after that application was stood over during most of the course of that proceeding, it was ultimately dismissed with the consent of the applicant. I will later set out additional details of this.

9 A theme central to both (a) and (b) above is that an inquiry is unnecessary and pointless, as the applicant's claim does not assert any irregularity not dealt with in *Thompson v Reynolds*.

The Substantive Application, Evidence and Information

10 The proceeding was commenced by the filing of an application under s66 of *the Act* on 29 June 2009. The grounds of the application were set out in an attached schedule 1. I will later refer to the detail of schedule 1. After directions hearings a substituted application was filed on 8 September 2009. That application also relied upon what was described as an "attached schedule 1". There was however no schedule 1 attached to the substituted application. It was accepted that the applicant still sought to rely upon schedule 1 as attached to the original application.

11 In the present application, the applicant relies upon the following documents, evidence and information:

(a) Schedule 1.

(b) An affidavit of the applicant sworn on 9 August 2009. (The applicant's first affidavit).

(c) An affidavit of the applicant sworn on 7 September 2009. (The applicant's second affidavit).

(d) An affidavit of the applicant sworn on 12 October 2009. (The applicant's third affidavit).

(e) An affidavit of Mr Terrence McParland sworn on 15 September 2009.

(f) An affidavit of Mr Paul Schultz sworn on 15 September 2009.

(g) An affidavit of Mr Joshua Daley sworn on 7 September 2009.

(h) An affidavit of Mr Stuart Robey sworn on 1 October 2009.

12 The CFMEUW relies upon:

(a) Seventeen attachments to its Outline of Submissions for Summary Dismissal dated 30 September 2009. It is unnecessary to separately list these attachments, although some will be later referred to.

(b) Two attachments to its Outline of Submissions in Response to the Applicant's Submissions, dated 20 October 2009. Again it is unnecessary to list these attachments.

(c) Five documents which were tabled during the hearing of the summary dismissal application on 23 October 2009. These were:

(i) An extract of the transcript in *Thompson v Reynolds* about CFMEUW membership application forms and cards.

(ii) A Schedule of Admissions made by the CFMEUW in *Thompson v Reynolds*.

(iii) A document which was marked JJM9 and formed part of exhibit 4 in *Thompson v Reynolds*. The part of the document which is relied upon is headed "Application for CFMEU membership". This is a form addressed to the CFMEUW and the "CFMEU: Construction, Forestry, Mining and Energy Union". This organisation, it is agreed, is the Construction, Forestry, Mining and Energy Union, Construction and General Division, Western Australian Divisional Branch, which is the state branch of a federally registered organisation. I will refer to this organisation as "the CFMEU". (More detail about the CFMEU is provided in my reasons in *Thompson v Reynolds*). I will refer to the form as "the joint application form".

(iv) The Outline of Submissions of the CFMEUW in *Thompson v Reynolds*, dated 11 December 2008.

(v) A copy of the application for membership cards of the applicant, Mr Schultz, Mr Daley and Mr Robey. The contents of these cards will be later described.

13 The applicant and the CFMEUW both provided detailed outlines of submissions which were elaborated on at the hearing.

Additional Submissions

14 The five documents tabled by the CFMEUW at the hearing of the summary dismissal application were only received by the applicant at that hearing. Accordingly, on the first working day after the hearing, the applicant wrote to my associate seeking the opportunity to make additional submissions about these documents. At my direction, my associate then corresponded about this issue with the CFMEUW and the applicant. The outcome was that on 30 October 2009 I made an order permitting the applicant to file and serve additional written submissions about the documents by 4:00pm on 6 November 2009, with the CFMEUW having seven days after that to reply. (I will refer to these as additional submissions). That order was complied with.

Ballot Papers and Materials

15 Although the Election Report by the Western Australian Electoral Commission for the 2009 CFMEUW "General Election" dated 19 June 2009 was attached to the Outline of Submissions of the CFMEUW, the ballot papers for the election were not.

Accordingly, after the hearing my associate requested that the second respondent provide to the Commission, the other parties and the CFMEUW, the following documents which were sent to electors:

(a) Ballot papers.

(b) Ballot paper envelopes and declarations.

(c) Reply paid envelopes.

16 These documents were provided and the parties and the CFMEUW were given the opportunity to make submissions about them. The applicant and the CFMEUW did so.

17 The Election Report at [7] said that these documents were mailed to electors on 22 May 2009. I will later describe their contents.

The Elections

18 The 2009 CFMEUW Election Report disclosed that the only offices where the number of nominations was greater than the number of vacant positions, and therefore an election was required, were those of secretary and assistant secretary ([5]). There were two nominations received for the office of secretary and three nominations for the two assistant secretary vacancies. The first respondent and Mr Peter Bruce were the nominees for secretary. Mr Graham Pallot, Mr Joe McDonald and the applicant were the nominees for assistant secretary.

19 The certified electoral roll was provided by the first respondent to the second respondent on 30 March 2009 ([6]). There were 9,958 members ([6]). Ballot papers were duly returned by electors and placed into a ballot box. The ballot box was opened on 19 June 2009. A total of 3,212 voting papers were returned with declarations completed. This gave a "participation rate" of 32.25% of members ([9], [14]). The result of the count of formal votes for secretary was: the first respondent – 2,529; Mr Bruce – 575. The result of the count of formal votes for assistant secretary was: Mr Pallot – 2,750; Mr McDonald – 2,468; the applicant – 662 ([12]). Accordingly, the first respondent, Mr Pallot and Mr McDonald respectively were declared elected ([13] and Appendix 4 to the Election Report).

20 As described in *Thompson v Reynolds* at [4]–[5], elections for offices in the CFMEU took place in 2008, with the results being declared on 21 November 2008.

Determining the Summary Dismissal Application

21 I proceed on the basis that the power to summarily dismiss an application under s27(1)(a) of *the Act* should not be exercised other than in a clear case. This is because an applicant should not be lightly prevented from fully litigating the claims made in his or her application.

22 In order to determine the summary dismissal application it is necessary to consider the basis of the applicant's claim that there has been an irregularity in connection with the election. As mentioned earlier and described fully below, this has not been consistent throughout the proceedings.

The Substituted Application

23 In the substituted application, the applicant asserted that there was "abundant evidence indicating there are less than 200 bona fide members of the CFMEUW and ballot papers were sent to over 9,000 persons. Members on the electoral roll were substituted from another union". The application then referred to schedule 1 and the applicant's first affidavit.

Schedule 1

24 Schedule 1 said that the election had concluded on 19 June 2009. The applicant said that after noticing some possible irregularities in connection with the compilation of the union membership roll, he read the reasons for decision in *Thompson v Reynolds*. The applicant said he "formed the opinion that the CFMEUW has no legal basis for existence". The applicant said the CFMEUW had "very few and possibly zero bona fide members enrolled in accordance with the union rules". The schedule said the CFMEUW had not been "collecting joining applications, joining fees or subscriptions in accordance with the act [sic] and union rules but instead has been attempting to substitute those with members [sic] records from a separate union operating and registered in a separate jurisdiction". This is clearly a reference to the CFMEU. The schedule said that the evidence adduced in *Thompson v Reynolds* "strenuously suggests the CFMEUW has no members but instead has been used as a vehicle to hide or cloak approximately $25 million worth of assets obtained from previous members of now de-registered unions". The schedule concluded that there was "no legal basis to conduct elections for officers of the CFMEUW as the union has less than 200 members …". (That is a reference to s73(12)(a) of *the Act* which, in combination with s53, obliges the Full Bench to cancel the registration of an organisation with less than 200 members).

The Applicant's First Affidavit

25 In the applicant's first affidavit he explained that he moved to Western Australia from Queensland in September 2004. He then transferred his membership of the "Federal CFMEU to the Western Australian branch and was issued a ticket in the name of the CFMEU Construction & General Division Western Australian Divisional Branch". The applicant said he was not informed that he was becoming a member of two unions and had not been charged a joining fee, six monthly subscriptions, or issued with a receipt or ticket by the CFMEUW at any time between 2004 and 2009. The applicant said he had maintained his membership of the CFMEU since 2004.

26 The applicant deposed that he had been a shop steward of the CFMEU and had conducted business under that "banner" and not the CFMEUW. The applicant asserted he was not aware that the CFMEUW existed until nominations for the election of offices were called in 2008. (That election was halted by an order I made during the course of the proceedings in *Thompson v Reynolds* and then superseded by the election which was ordered in determining that inquiry).

27 The applicant said that in "recent times" he had interviewed approximately 100 "CFMEU C & G division WA Divisional Branch members" whose names had appeared on the CFMEUW electoral roll. He said he did not find a member that understood he or she was joining two unions when he or she had joined the CFMEU. The applicant asserted that none of these "members" had "applied to join the CFMEUW in accordance with the rules nor were any of them charged joining fees, subscriptions, or issued a ticket in the name of the CFMEUW". The applicant named eight people he had interviewed on these issues, including Mr Schultz and Mr Robey. He also named eight "former union members" that he had interviewed, including Mr McParland and Mr Daley. The applicant did not say if he had been informed as to whether any of the "approximately … 100 … CFMEU members" had received ballot papers and voted in the 2009 CFMEUW election.

28 The applicant's first affidavit then referred in detail to the reasons in *Thompson v Reynolds*. It is unnecessary to set that out.

29 The applicant asserted that as no certificate had been issued under s71 of *the Act* for the CFMEU and CFMEUW, that "the CFMEUW is and was obligated to operate as a totally separate organisation and in accordance with its rules". The applicant said there was "no available evidence that shows any member has filled out a joining application in the form of the schedule attached to the [CFMEUW] union rules. It follows therefore that there are no members of the CFMEUW". The schedule is referred to in rule 10(1) of the rules of the CFMEUW. Rule 10(1) provides that a "candidate for membership of the Union shall forward or cause to be forwarded to the Secretary of the Union the entrance fee together with an application on the form prescribed for that purpose in the Schedule hereto stating the full name and address of the candidate and bearing the signature of the candidate and that of a witness to the candidate's signature". The schedule to the rules is in the following form:

> "**THE SCHEDULE**
>
> APPLICATION BY CANDIDATE FOR MEMBERSHIP
>
> I .....
>
> of .....
>
> HEREBY APPLY to become a member of The Construction, Forestry, Mining and Energy Union of Workers, an Organisation of Employees registered under the Industrial Relations Act (WA) 1979.
>
> DATED the ..... day of ....., 20……
>
> Date of receipt by Secretary: the ..... day of .....,
>
> 20……
>
> Signature of Secretary .....
>
> Signature of Applicant .....
>
> Signature of Witness ....."

30 In a later paragraph of the affidavit the applicant asserted there were "no records of members of the CFMEUW just as there are no members of the CFMEUW". The applicant said that a bank account of the CFMEUW had been set up in 2001 but membership subscriptions had not been paid into the account "in recent years". The applicant contended that it followed from this that there were "no members of the CFMEUW in accordance with its rules". That assertion was repeated in subsequent paragraphs of the affidavit.

31 Other assertions made in the first affidavit are not relevant. Some of these involved aspersions against the first respondent.

32 The applicant deposed that the "onus" was on the CFMEUW administration to ensure that all new members were fully aware that they were also joining the CFMEUW in addition to the CFMEU and that they had filled in a "formal joining application whilst charging them a joining fee and six monthly subscriptions". The applicant said that "[b]y and large this has not occurred as the evidence clearly shows very few if any, members have been recruited into the CFMEUW in accordance with the rules". The applicant also referred to a practice of waiving joining fees by some union organisers. The applicant said there was nothing in the CFMEUW or CFMEU rules which authorised this and "those that did pay joining fees understood they were joining one union". The applicant also asserted that the entire membership of the CFMEU had been "transposed onto" the CFMEUW union roll with "scant regard to the rules of the CFMEUW …". The applicant then repeated that there were "in fact no members of the CFMEUW or certainly less than 200 members".

33 The applicant described and annexed correspondence with the CFMEUW and its solicitors about obtaining access to the books and register of members of the CFMEUW under rule 33 of its rules. Access to the books was later granted and this was referred to in the applicant's second affidavit.

The Applicant's Second Affidavit

34 At the commencement of the second affidavit the applicant said he could not "ascertain if [he was] a member of the CFMEUW". The applicant then repeated some of his evidence about interviewing members of the CFMEU about membership

of both the CFMEU and CFMEUW. The applicant asserted that he had not been charged a joining fee or issued a receipt by the CFMEUW and "91 members" he interviewed had said the same thing. The applicant also asserted the "91 members" had informed him that they had not received union tickets from the CFMEUW. The applicant did not say whether these "91 members" had received ballot papers and voted in the 2009 CFMEUW election.

35 The applicant said that on 26 August 2009 he attended at the registered office of the CFMEUW to inspect the records which he had requested. The applicant was provided with a "sample box of about 200 cards and a copy of the 2008 financial statement for the union".

36 The applicant said that he observed three variations of the card. Firstly, there were green cards with application details on one side and blank on the other. Secondly, there were green cards with the same application details on the front but also "eftpos and credit card payment details on the back". Thirdly, there were green cards with a "black and white photocopy of the same application format glued down over the original card". The applicant asserted that none of the cards contained the wording of the schedule to the rules of the CFMEUW. The applicant did not say in this affidavit whether the cards contained the same or similar wording to the joint application form.

37 The applicant also said that he took six cards from the box and checked the names against a print out of the 2009 electoral roll that he had in his possession. None of these six people were on the roll. The applicant also referred to an offer by the solicitor for the CFMEUW to inspect computer records. With assistance, the applicant said that he checked three names and only one of those appeared on the 2009 electoral roll.

38 The applicant asserted he was not shown any records of the nature that he had requested in his letter to the union dated 14 July 2009, pursuant to rule 33 of the CFMEUW rules. In summary the letter requested, for all members:

(a) Receipts and banking records of the CFMEUW showing the payment of joining fees in accordance with rule 10.

(b) Receipts and banking records showing the payment of half yearly contributions at the date of joining in accordance with rule 10.

(c) Approved membership applications in accordance with rule 10 and the schedule.

(d) The register of members showing bona fide financial members of the CFMEUW.

39 The applicant said in his second affidavit that it followed that "there are no records and no members of the CFMEUW". It was again asserted that the members and finances of the CFMEUW had been substituted from the CFMEU.

The Applicant's Third Affidavit

40 The applicant's third affidavit was filed together with his Outline of Submissions. In it he asserted he was a "member of the CFMEUW by way of substitution of my records from the [CFMEU] into the records of the CFMEUW".

41 The applicant attached to his affidavit a copy of two posters. The applicant noted that both posters only mentioned the CFMEU and showed that the "union [was] trading as the Federal Union only". A letter from the first respondent to the applicant dated 11 July 2008, on CFMEU letterhead, was also attached. The applicant also attached a copy of a letter on CFMEUW letterhead, dated 12 March 2008, written by the first respondent in his capacity as secretary of the CFMEUW. The applicant said that in the letter the first respondent was "controversially using a Federal union record to obtain State union transitional registration". The letter was addressed to the Registrar of the Australian Industrial Relations Commission and enclosed the CFMEUW's application for transitional registration in accordance with "Schedule 10, section (2)" of the then *Workplace Relations Act 1996* (Cth).

42 The applicant also referred to a copy of a letter written by the first respondent to a member, whose name had been blanked out, dated 10 February 2009. The letter was on CFMEUW letterhead from the first respondent in his capacity as secretary. That letter was written as a consequence of the orders I made in *Thompson v Reynolds*. The applicant asserted the letter was "the only known written correspondence between the CFMEUW and its Rank & File members between 2001 and 26 August 2009".

Affidavit of Mr McParland

43 Mr McParland said he was a former paid official of the Western Australian Builders' Labourers', Painters' and Plasterers' Union of Workers (BLPPU). The relevance of the BLPPU to the formation of the CFMEUW is set out in the reasons in *Thompson v Reynolds* at [105]-[109]. Mr McParland said that whilst an organiser with the BLPPU he joined up new members as if they were joining one union and did not distinguish between state and federal unions. He said he could only recall the union being run as one entity by the first respondent.

44 It is appropriate to note at this point that as the evidence of Mr McParland is about the BLPPU I do not think it relevant to determining whether an inquiry should be held into the 2009 CFMEUW election.

Affidavit of Mr Schultz

45 Mr Schultz deposed that he had joined the CFMEU in 2000 when he attended its former office in Perth. He said he believed he was joining just one union and was issued a ticket in the name of the CFMEU. He said that every ticket sent to him since then had been issued by the CFMEU. Attached to his affidavit was a copy of the schedule to the rules of the CFMEUW. Mr Schultz said he had not to his knowledge filled out "this application form or any similar form". Mr Schultz said he was not told he was joining two unions and did not know he was a member of two unions until the "recent elections". He said he did

not understand how he could become a member of a union without his signature or authorisation. He also said that he had not heard of the CFMEUW and had not been issued a ticket, receipt or any other material in the name of the CFMEUW, apart from the recent ballot forms sent by the second respondent and a letter from the CFMEUW recently advising of a rule change.

46 Mr Schultz did not say whether he voted in the 2009 CFMEUW election.

Affidavit of Mr Daley

47 Mr Daley deposed that he was an unfinancial member of the CFMEU. He said that when he joined the CFMEU he did not pay a joining fee. He was told this was a "common practice to entice members to join the union".

48 Mr Daley said that he had been shown a joining application form for the CFMEUW by the applicant. Mr Daley said that he had not seen this application form before and had not signed "a form like this before". (Although the application form was not attached to the affidavit of Mr Daley, I infer that the form was in accordance with the schedule to the rules. In their submissions, neither the applicant nor the CFMEUW contended otherwise.)

49 Mr Daley said he had not been issued a receipt or union ticket in the name of the CFMEUW. He understood that he had joined one union and was not told he was joining two unions. He said that he had not seen any evidence of belonging to two unions.

50 Mr Daly did not say whether he received a ballot paper or voted in the 2009 CFMEUW election. If he was an "unfinancial member" of the CFMEU however, as he deposed, he would not have received ballot papers.

Affidavit of Mr Robey

51 The affidavit of Mr Robey contained similar information. He said that he joined the CFMEU in 2002. He believed he was joining just one union and was issued with a ticket in the name of the CFMEU. All tickets subsequently sent to him had been issued by the CFMEU. Mr Robey said that he had been shown by the applicant an application form to join the CFMEUW. (Again I infer that the form was in accordance with the schedule to the rules). Mr Robey said he had not, to his knowledge, filled out that application form or any similar form. Mr Robey asserted that he was not told he was joining two unions and did not know he was a member of two unions until the "recent elections". He said he did not understand how he could become a member of a union without his signature or authorisation. Mr Robey deposed that until recently he had not heard of the CFMEUW or been issued with a ticket, receipt or other material in the name of the CFMEUW, apart from the recent ballot forms sent by the second respondent and a recent letter from the CFMEUW advising of a rule change.

52 Mr Robey did not say whether he voted in the 2009 CFMEUW election.

The Applicant's Written Submissions – Basis of Application and Evidence

53 In his Outline of Submissions opposing the summary dismissal application, the applicant made the following assertions about the basis of his claim and the evidence:

(a) The application for an inquiry is not based upon the allegation that the CFMEUW has no members. Instead, the assertion is that there are probably less than 200 bona fides members of the union. Accordingly there were "several thousand persons on the electoral roll who [had] no right to be there or … the CFMEUW had no right to place them on the roll".

(b) The applicant and "possibly several thousand others have apparently become members of the CFMEUW unlawfully …".

(c) The CFMEUW has made the applicant and approximately 10,000 other persons members, by and large, without their knowledge or authorisation.

(d) The acceptance of the applicant's nomination for office in the 2008 (non completed) election and 2009 election proves he is or was a member of the CFMEUW "despite allegations that it is all illegitimate".

(e) The issues raised in the present proceeding were not determined in *Thompson v Reynolds*.

(f) In particular, *Thompson v Reynolds* did not decide that the CFMEUW was authorised to ignore rule 10 of its rules in enrolling members.

(g) The question of whether the CFMEUW has any members was not squarely an issue in *Thompson v Reynolds*.

(h) At the inspection of documents by the applicant, no records were produced of members filling in a joint application form to join both the CFMEU and the CFMEUW.

(i) It is now a "known fact that by and large the persons appearing on the CFMEUW membership roll were not even made aware they were joining the CFMEUW and most deny knowing the existence of the union despite being alleged members of it". During the course of previous proceedings, insufficient facts were available to make an application in the form of the present application. That situation has changed due to the recent availability of the evidence relied upon by the applicant.

(j) The applicant was not a party in *Thompson v Reynolds*, did not adduce any evidence or cross-examine any witnesses. Although he indicated a willingness for *Thompson v Reynolds* to proceed to conclusion, that does not determine that the present application is proceeding on the same basis.

(k) The present application is proceeding on a different basis, with different evidence and as such the issues in the application were not determined in *Thompson v Reynolds*.

(l) The applicant "was either not so aggrieved at these earlier times as to warrant an application or possessed insufficient evidence to bring the matter on".

(m) "There was a period between the calling of nominations in 2008 and the completion of the 2009 election when the applicant assumed (albeit not without suspicions to the contrary) that he must have become a member of the CFMEUW by some lawful means such as a certificate under s71 [of *the Act*] or an authorising signature on a joining application which indicated the name of the union and the jurisdiction under which it operates."

(n) A person cannot lawfully become a member of an organisation without "applying in writing to become a member and being alerted as to the existence of the rules of the organisation".

Summary of Applicant's Position Before the Hearing

54 From what is set out above it is clear that the applicant's claim that there were no, or not many, members of the CFMEUW was based on assertions about the non-completion by purported members of an application form in accordance with the schedule to the rules and a lack of awareness that they were, or intention to become, a member of the CFMEUW. This is apparent from the contents of the affidavits. It is also supported by the type of records which the applicant sought to inspect, as set out in his letter dated 14 July 2009.

55 As I will describe, the basis of the applicant's claim changed during the course of the hearing.

Applicant's First Submission at the Hearing

56 At the hearing the CFMEUW made submissions about what was decided in *Thompson v Reynolds*. This included, correctly as set out below, that I had there determined that a person could become a member of the CFMEUW by the signing and submission of the joint application form. It was submitted that this issue should not be re-litigated.

57 After this submission was made, the applicant responded to the point. He submitted that what he relied on was not that a person could not become a member by the submission of the joint application form, but that the joint application form had not been filled in by a majority of members (T15). The applicant submitted the joint application form "doesn't exist" and even if it did, it would not be legitimate because it did not outline the jurisdiction in which the CFMEUW operates and "point out the separate union rules" (T15). The applicant supported this contention by quoting from the affidavits of Mr Schultz, Mr Robey and Mr Daley, where they said in effect they did not fill in a form in terms of the schedule to the rules, or know they were members of the CFMEUW. I note here that the affidavits did not mention whether the deponents had signed the joint application form.

58 The applicant said that "this matter is calling up the [CFMEUW] to provide corroborating evidence as to the enrolment of" its members (T17). The applicant reiterated his assertion that the majority of "members" thought they were joining one organisation and it was not pointed out to them that they were also joining a different and separate organisation (T18).

59 Counsel for the CFMEUW then responded to this submission, before continuing with his other submissions. It was during this response that counsel tabled the membership cards I earlier mentioned.

The Tabled Application Cards

60 As I have said, the CFMEUW tabled the application for membership cards of the applicant, Mr Schultz, Mr Daley and Mr Robey. The application cards of the applicant, Mr Daley and Mr Robey were dated 6 April 2005, 26 June 2008 and 1 April 2004 respectively. They are, like the joint application form, addressed to both the CFMEUW and the CFMEU. Also, like the joint application form these cards thereafter referred to membership of a "union" singular and not plural. Additionally, the membership cards like the joint application form have spaces for the insertion of an applicant's name, address and contact details, trades, date of birth, prior membership of the "union", currency of a "green card" or "safety awareness training" ticket, employer's name, site, acknowledgement that no threats or the like were made to the person to become a member of the union, joining date and signature. There is also a section to be completed by apprentice members. Unlike the joint application form, the cards do not contain a "direct debit request". This is not problematic for the membership of the applicant, Mr Daley, Mr Robey, or anyone else, because as I discussed in *Thompson v Reynolds*, the rules of the CFMEUW do not permit the payment of membership contributions by direct debit instalments.

61 The application card of Mr Schulz was addressed to "the Western Australian Builders' Labourers', Painters' and Plasterers' Union of Workers, Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers' Union". The card is dated 11 April 2000. As this card is not addressed to the CFMEU or CFMEUW I do not think it is relevant to the determination of the summary dismissal application.

62 In his additional submissions, the applicant said that the form of the cards of himself, Mr Daly and Mr Robey were typical of the cards he had inspected on 26 August 2009. He also reiterated that apart from the heading the cards referred to a "union" singular. He also attached examples of the "union" tickets of himself and Mr Schultz which were only in the name of the CFMEU. Tickets of Mr McParland were also attached. These were for other organisations related to the CFMEU, but issued before the commencement of the CFMEUW in 2001. (See *Thompson v Reynolds* at [109]). Accordingly I do not think they are relevant to the present application.

The Applicant's Submissions at the Hearing after the Tabling of the Application Cards

63 When making submissions after the tabling of the application cards, the applicant's position was refined again.

64 The refinement was, in effect, that a person signing the joint application form (or card) could not properly join the CFMEUW without knowing of that organisation, consenting and agreeing to becoming a member of it and being "pointed" to its rules. The applicant argued that Mr Daley, Mr Schultz and Mr Robey were examples of people where these criteria were not satisfied.

65 The applicant said the issue was that members were not informed they were joining two organisations and still believed they were members of one organisation (T42-43). It was argued that members had not had it pointed out to them that they were joining separate unions with separate jurisdictions and rules (T43). The applicant said:

> "What I'm running now is an argument that not only was rule 10 not complied with, but the members themselves do not approve of any of this. The members do not approve of their details being transferred from one union into another without their signature or approval and without their knowledge …" (T43)

66 The applicant also said the CFMEUW could have, but did not, rely on the joint application cards to counter his claims at the beginning of the proceeding (T44). I then tried to clarify what the case of the applicant was. I asked whether he was saying that "people who have been enrolled as members in the election are not members because they haven't signed a form [sic] in the schedule to the rules." The applicant said "no" and then elaborated:

> "… to answer your question. I'm saying they're not members because they were never informed that they were members and there is an onus upon the Union to inform the persons that they are joining a state registered union that is separate and a different organisation to the federal registered union and it has a separate set of rules and advise them where they can get the rules." (T44)

67 The applicant also said the signing of a card in the form of those tabled was insufficient to comply with this (T45). He later argued that the Commission should enquire into the membership of all of the approximately 10,000 purported members of the CFMEUW (T49). The applicant also said he was not a member of the CFMEUW by way of having "agreed to become a member" (T50).

68 The applicant submitted the present issues were not decided in *Thompson v Reynolds* as "one of the issues raised is that members don't know that they've been joined to the union" (T56).

69 I take what the applicant said, as summarised in the last five paragraphs, as being that upon which he ultimately sought to base his claim that there should be an election inquiry.

The Applicant's Prior Conduct

70 I now turn to consider the applicant's involvement in *Thompson v Reynolds* and other s66 applications. This was comprehensively summarised in the Outline of Submissions of the CFMEUW, supported in some instances by attachments. The following is relevant:

(a) PRES 2 of 2008

71 This application was filed on 29 August 2008. The applicant there described himself as "member CFMEUW" [sic]. Amongst other things the applicant sought an interlocutory order, because of an alleged breach of rule 23 about the election of the executive and organisers, to postpone the closing of nominations for the CFMEUW election then scheduled to be held. That application was not successful. The substantive application was discontinued by the applicant through his then solicitors on or about 8 September 2008.

(b) PRES 3-6 of 2008

72 These proceedings were those which culminated in the decision in *Thompson v Reynolds*. On 17 September 2008 the applicant applied to be joined as a party to that application. In the joinder application the applicant described himself as a "candidate in the present CFMEUW elections". For the reasons set out in the application for joinder, the applicant sought the opportunity to argue against the postponing of the 2008 election.

73 There was a directions hearing of the joinder application on 22 September 2008. At that hearing the applicant referred to himself as a "union member" and a "candidate" (T37). From the context it is clear that these references were to the CFMEUW. The application for joinder was adjourned to the first day of the substantive hearing of *Thompson v Reynolds* on 25 September 2008. The course of the proceedings on 25 September 2008 is described in my reasons in *Thompson v Reynolds* at [42]-[44] and [98]. Evidence adduced on that day led to what I colloquially described as opening a "can of worms". (This is described in *Thompson v Reynolds* at [98]-[100]). The evidence led to the broadening of the inquiries then pending. One aspect of that evidence was the joint application form. A list of Questions for the Inquiry and Schedule of Possible Irregularities were later settled with the assistance of the parties. In referring to the "can of worms" I said on 25 September 2008 that there may be "no financial members" of the CFMEUW because "every payment from every member has been to and received by" the CFMEU (*Thompson v Reynolds* at [100]).

74 The applicant was present in court at that time and spoke about the prospect of the hearing of the then pending applications being deferred so that the inquiry could properly deal with the "can of worms". The applicant said that the issues involved in the "can of worms" "should be dealt with" (T125). The applicant said that "what needs to be tested is the membership card and how many of those members actually signed a membership card …". The applicant also said that "the $79 question lies on the joining card of the union …" (T126). Earlier, when addressing the "can of worms", the applicant described himself in the following way: "Now, I'm not a legal expert, although I may be the most informed person on the issues relating to that can of worms and I may possibly be the most experienced person whose running State and Federal Union elections in this room and if not the entire State" (T125). The application for joinder was adjourned to the following day, 26 September 2008, when additional evidence was to be given in PRES 3-6 of 2008. At the conclusion of that day, PRES 3-6 of 2008 and the joinder application were adjourned to 30 September 2008.

75 On 30 September 2008, after discussion with the parties, PRES 3-6 of 2008 was adjourned to 27 October 2008. The present applicant did not make any submissions on 30 September 2008. The applicant did not then appear at the hearing which commenced on 27 October 2008. For the reasons described in *Thompson v Reynolds* at [5], [6] and [51], the applicants in PRES 3-6 of 2008 made applications on 27 November 2008 to discontinue their substantive applications. A directions hearing on the discontinuance applications took place on 5 December 2008. The applicant appeared at the hearing. The applicant there agreed to the dismissal of his joinder application on the basis that the inquiry, as then framed, would proceed (T517-518).

(c) PRES 7 of 2008

76 This was an application by the applicant filed on 2 October 2008. He sought, amongst other things, an order in the nature of an asset preservation order against the CFMEUW. In an affidavit sworn on 8 October 2008, in support of the application, the applicant said he was a candidate for the CFMEUW elections and made the application "on behalf of the members" ([2]). The issue of alleged destruction of documents, within that application, was resolved by the secretary of the CFMEUW providing an undertaking in the favour of the applicant. The application adjourned sine die on 10 October 2008 and then discontinued on 16 October 2008.

(d) PRES 2 of 2009

77 This was an application by the applicant filed on 23 February 2009. The applicant described himself as a member of the CFMEUW. The applicant sought an inquiry on the basis that the Western Australian Electoral Commission had unfairly assisted other candidates in the election which I had ordered in *Thompson v Reynolds*. In that application, the applicant did not raise any issue as to whether the CFMEUW had any members. The application was dismissed pursuant to s27(1) of *the Act* on 24 April 2009 (*Mcjannett v Reynolds* (2009) 89 WAIG 633).

(e) The Applicant's Letter

78 In its Outline of Submissions, the CFMEUW also referred to the letter which the applicant had sent to it dated 14 July 2009, about the inspection of documents pursuant to rules 32 and 33. The CFMEUW pointed out that the basis of the request was that the applicant was a member of the CFMEUW.

***Thompson v Reynolds*, the Joint Application Form and Membership**

79 For the purpose of determining the summary dismissal application it is necessary to consider what was decided in *Thompson v Reynolds*.

80 In the Schedule of Possible Irregularities in *Thompson v Reynolds*, paragraph 4(a) referred to rule 10(1), "insofar as applications for membership may not be in the form prescribed for that purpose in the schedule to the rules". Possible irregularity 4(b) also referred to rule 10(1) "insofar as entrance fees and contributions may not have been forwarded to or receipted by the CFMEUW". (The Questions for the Inquiry and Schedule of Possible Irregularities in *Thompson v Reynolds* are set out at [54] and [56] of my reasons).

81 As later elaborated upon the CFMEUW formally admitted that its application forms were not in accordance with the schedule to the rules. However in its Outline of Submissions in *Thompson v Reynolds*, the CFMEUW argued that a person could validly become a member even if they signed the joint application form and not a document in the form of the schedule to the rules. The CFMEUW argued that the content of rule 10 was directory and facilitative.

82 The submissions referred to *R v Holmes, Ex parte Public Service Association of New South Wales* (1977) 140 CLR 63 at 73, where Gibbs J (with whom Stephen J agreed) said that "union" rules "should not be restrictively construed". It was also argued that the joint application form contained the "key information" in the form in the schedule to the rules. It was submitted that the failure to comply strictly with rule 10, when a joint application form was signed, did not vitiate purported membership. The CFMEUW said the rules did not "demand" that result ([22]). It argued that to hold otherwise would be a victory for "form over substance" ([27]).

83 The CFMEUW also contended in *Thompson v Reynolds* that the use of the joint application form was evidence that a member intended to join both the CFMEU and the CFMEUW.

84 I accepted this submission, in that in *Thompson v Reynolds* at [193] I decided the joint application form was an application to join both the CFMEU and the CFMEUW. This was despite the fact that in the body of the joint application form there is reference to only a union singular; and tickets which were issued only mentioned the CFMEU. I noted the former in my

reasons in *Thompson v Reynolds* at [87]. It is also apparent from my reasons that I took into account that the joint application form was not in the form of the schedule of the rules to the CFMEUW. This was set out at [26] and [87] of my reasons. The joint application form does however contain the name and address of the person applying to become a member, as required by the schedule. At [210] I held that, amongst other things, what was contained in paragraphs 4(a) and 4(b) of the Schedule of Possible Irregularities did not constitute irregularities. It was therefore at least implicit in my reasons that a person could lawfully become a member of the CFMEUW by signing the joint application form, even though that document was not in the form of the schedule to the rules of the CFMEUW. The same necessarily applies to the cards signed by the applicant, Mr Daley, Mr Robey and others which are for all relevant purposes the same as the joint application form.

85 In its submissions in *Thompson v Reynolds*, the CFMEUW also cited *Re Election for Office in Transport Workers Union of Australia, Western Australian Branch* (1992) 40 IR 245. There, French J at 253 cited *Holmes* and said the preferred approach was to construe "union" rules "not technically or narrowly but broadly and liberally". Consistently with this, the failure by a registered organisation to strictly comply with its rules before taking an action does not lead to the conclusion that the action is invalid, absent a statutory requirement to the contrary, unless that is the intention of the rules when considered as a whole, (*Australian Education Union v Lawler* (2008) 169 FCR 327 at [312]; *Appeal by United Firefighters' Union of Australia* (2009) 181 IR 6 at [45]; *Application by Transport Workers' Union of New South Wales for A Determination of the Question of an Invalidity under s288 of the Industrial Relations Act 1996* [2008] NSWIRComm 35 at [13]; cf *Western Australian Principals' Federation v State School Teachers' Union of Western Australia (Inc)* (2008) 88 WAIG 1812).

86 This principle was applied in *Thompson v Reynolds*. Rule 10 and the completion of the form in the schedule to the rules are about the mechanics of becoming a member. They are not about the qualification or status of a person who may become a member. As I have said, in *Thompson v Reynolds* I held that the failure to comply with these aspects of the rules did not mean a person could not validly become a member when a joint application form was completed. Completion of the joint application form was sufficient to become a member.

87 It was my opinion that it is not the intention of the rules of the CFMEUW, considered as a whole, to prevent a person becoming a member if their application form was not precisely in accordance with the schedule. This is particularly so in the case of the joint application form and the tabled cards, which contain the information about a prospective member required by the form in the schedule to the rules.

88 At [191]-[196] of my reasons in *Thompson v Reynolds* I considered the effect of the payment of membership funds into an account operated by the CFMEU, in determining who were the financial members of the CFMEUW. At [193] I said that from the available evidence, contributions were paid by members of the CFMEUW to representatives or employees of the CFMEU and/or the CFMEUW for the purpose of becoming a member or maintaining financial membership of both organisations. I then described the evidence which supported that. At [194] I referred to the evidence of the present first respondent that the payment of contributions were received as payments to both the CFMEU and the CFMEUW. I then referred to the reasons of Gray J in *Bailey v Krantz* (1984) 13 IR 326 at 383-384. I quoted from his Honour's reasons as follows:

> "A member paying one sum of money, which he or she believed was all that he or she was obliged to pay, would expect that all obligations arising under both sets of rules would be met from that sum of money, and that any further decisions made to spend that sum of money would be made in accordance with both sets of rules."

89 At [196] I said that it was unnecessary to determine whether there had been any contravention of the rules of the CFMEUW by the depositing of contributions of members into an account held by the CFMEU. I then said: "What is relevant is that I accept that payments made by members, deposited into the [CFMEU's] account, were payments made and received as contributions towards financial membership of the CFMEUW".

90 The orders which I made in *Thompson v Reynolds* for the conducting of an election proceeded on the basis that there were financial members of the CFMEUW. In my reasons at [165]-[169] I described what was required for a member to be financial for the purpose of being entitled to vote under the rules of the CFMEUW. I also ordered that the CFMEUW write to a particular category of members, there described, to advise them as to their financial status and eligibility to vote in the election.

Irregularity

91 I reiterate that the application seeks an inquiry into an alleged irregularity in connection with the 2009 CFMEUW election. I discussed the meaning of irregularity in *Thompson v Reynolds* at [200]-[208]. There is no need to repeat that discussion.

92 An assertion that people who had voted in an election for offices in an organisation were not entitled to vote, in accordance with the rules of that organisation, would be an irregularity (as defined in *the Act*) in connection with that election.

93 I will now consider the grounds upon which the CFMEUW have asserted that the application should be summarily dismissed.

Approbation and Reprobation – Is There any Point to the Inquiry?

94 The first step in this ground is the argument that the logical extension of the applicant's contentions is that he is not a member of the CFMEUW. As can be seen from my review of the applicant's documents, there has been some variation in his position on this point. He has claimed that the CFMEUW has no members (schedule 1, first affidavit, second affidavit) which would therefore mean he is not a member; he does not know if he is a member (second affidavit); he has become a member by the substitution of his records from the CFMEU to the CFMEUW (third affidavit); and he is a member albeit unlawfully (Outline

of Submissions). At the hearing the applicant maintained that he was a member of the CFMEUW, albeit unlawfully because he had not agreed to become a member (T50, T51). He said that he became aware of the existence of the CFMEUW and that he was regarded as a member of it when nominations were called for the then to be held 2008 CFMEUW elections (T50, T51). I note however that the applicant's response to this was to nominate for office in that election, although he submitted he did not then know that his membership of the CFMEUW was unlawful (T51).

95 It is that membership which, although the applicant asserts it is unlawful, he relies upon to support his nominations for office, capacity to apply to the Commission under s66 of *the Act* in past and the present proceedings, seek to join the proceedings in *Thompson v Reynolds*, and to request (as a member) the inspection of documents held by the CFMEUW. At the same time however the applicant asserts that there was an election irregularity because there were people, like him, who had been made members of the CFMEUW without their knowledge, intention or consent. The applicant is clearly, to put it colloquially, "having a bob each way".

96 There is a logical flaw in the applicant's argument, even if it could be otherwise accepted. If a person could become a member of an organisation, by the "unlawful" process the applicant relies upon, such that they may nominate for election and invoke the jurisdiction under s66 of *the Act*, then there is no reason to think a person could not by way of the same process become a member for the purpose of voting in an election.

97 On the other hand if people had become "unlawful" members of the CFMEUW, in the circumstances the applicant relies upon, such that they could not vote, then that would also apply to him. He could not therefore have validly nominated for office or bring the present s66 application.

98 Accordingly I accept the first step in the argument of the CFMEUW. If the applicant's contentions about people voting when not being entitled are accepted, this also applies to him, with the consequence that he is not a member.

99 The next step is to assert that the Commission ought not to allow the applicant to "approbate and reprobate". That is, he ought not to be allowed to continue with proceedings which, if his contentions are accepted, would lead to the conclusion just mentioned.

100 I also accept this contention. It would be pointless to proceed with an inquiry under s66 of *the Act* in which an applicant in effect asserts that they are not a member of the subject organisation when they rely upon that membership to have standing to bring a s66 application in the first place. If, as the applicant asserts, he has become a member of the CFMEUW unlawfully and he does not want to be, then his remedy is simple. He can resign his membership of the CFMEUW.

101 Additionally, I think there is a fallacy in the applicant's case, as refined in his submissions at the hearing of the summary dismissal application. For there to be a possible irregularity in the present proceeding there needs to be evidence of people voting in the election who were not entitled to vote. The applicant contends, in effect, that this could have occurred because people were included on the electoral roll when they should not have been. He argues that they should not have been because they were not members of the CFMEUW. In turn this is based upon people being included as members without signing an application form as required by the rules and being included as a member of the CFMEUW without their knowledge, consent or agreement. Putting the membership form issue to one side for the moment, any person who did not believe that they were or want to be a member of the CFMEUW did not need to vote in the election and could take steps to resign their purported membership. If however, having received a ballot paper they knowingly decided to vote in the CFMEUW election, this would be an affirmation of and reliant upon their membership of that organisation. If a person knowingly voted in the CFMEUW election that would entirely undercut any argument that they were not a member because they did not know they were, nor intended nor desired to be so. As a result there is no possibility of an irregularity on that basis. I do not accept that there is a reasonable possibility that a significant body of people who voted in the 2009 CFMEUW election did not realise they were members of that organisation. There is certainly no evidence of this.

102 Furthermore, there are at least three pieces of evidence to the contrary. Firstly, as required by the orders made in *Thompson v Reynolds*, the CFMEUW was obliged to send a letter to members who had paid contributions by instalments, to say that they may be unfinancial under the rules and therefore not entitled to vote. The letter had to explain what the member was required to pay to become financial. A sample copy of the letter was attached to the Outline of Submissions of the CFMEUW. The letter was dated 10 February 2009 and headed "Re: 2009 Election for Offices in the Construction, Forestry, Mining and Energy Union of Workers ("CFMEUW") (The State Union Election)". The letter referred to my orders, the election, the roll of voters and what the member was required to pay to become financial by the closure of the roll, given that their contributions had been paid by instalments. The CFMEUW said in its Outline of Submissions, without objection, that a letter in this form was sent to over 500 members. Whilst this is only approximately 5% of the membership, the people who received the letter could have been in no doubt about the existence of the CFMEUW, and that they were regarded as a member of it.

103 Secondly, as stated in the Election Report, the second respondent published an "election notice" in the West Australian newspaper on 27 March 2009. This was in accordance with rule 23(6) of the rules of the CFMEUW. A copy of the notice was also sent to the CFMEUW office (Election Report at [4]). A copy of the notice was appended to the election report. The notice was headed "CFMEU". Underneath this were the words "Construction, Forestry, Mining and Energy Union of Workers". It referred to the election of office bearers pursuant to s69(4) of *the Act* and called for nominations for the offices there set out. The notice said nomination forms were to be completed in accordance with the rules of the CFMEUW and were available from the second respondent or the CFMEUW. It contained the date by which nomination forms were to be lodged. Finally, the notice said that if members had a new address they should so advise the CFMEUW. The notice was issued in the name of the second respondent which was printed next to the logo of and the words "Western Australian Electoral Commission".

104 Thirdly, and most significantly, the ballot papers for the contested elections for secretary and assistant secretary were both headed "Construction, Forestry, Mining and Energy, Union of Workers 2009 General Election for the election of" secretary/assistant secretary. The declaration which an elector was required to sign to validly vote was also headed "Construction, Forestry, Mining and Energy Union of Workers 2009 General Election". The reply paid envelope contained instructions about the placement of the ballot paper in the ballot paper envelope, the signing of the "Voter's Declaration", the placement of the ballot paper envelope in the reply paid envelope and then posting it. The reply paid envelope was addressed to the "Returning Officer, Construction, Forestry, Mining and Energy Union of Workers, Western Australian Electoral Commission".

105 At the hearing I put to the applicant that if people voted in the 2009 CFMEUW election it could not be asserted that they did not know they were members (T46). The applicant replied that they would not know they were members of two "separate unions" and the CFMEUW is a "state registered union under a state jurisdiction" (T46, T47). He also submitted the ballot papers did not explain that "this is a state union", under state jurisdiction (T47). The same point was made in the applicant's written submissions about the ballot paper and other documents I requested and received from the second respondent. He submitted the ballot papers did not say the CFMEUW was a different organisation to the CFMEU and that this was a separate election to that of the CFMEU. Despite this, I do not accept that people receiving the voting documents could be in any reasonable doubt that they were regarded as a member of the CFMEUW and were entitled to vote in the election. These documents made no mention of the CFMEU. Moreover they were received within approximately six months of the well publicised, high profile CFMEU election. As I have said, if a person then voted in the 2009 CFMEUW election this was on the basis of and an affirmation of their membership of that organisation.

106 What also needs to be taken into account is the margins in the 2009 CFMEUW elections. The first respondent defeated Mr Bruce by 1,954 votes. Mr McDonald, the lowest polling successful candidate for assistant secretary, received 1,806 more votes than the applicant. Given all of the above, I cannot accept there is any reasonable prospect that there were enough voters who did not know they were, agree to or affirm and rely upon their status as members when recording their vote, to possibly change the result of the elections.

107 As to the membership form issue, that was determined in *Thompson v Reynolds*. As I have said earlier, I there held that a person signing the joint application form, albeit it was not in the form of the schedule to the rules of the CFMEUW, could nevertheless become a member of that organisation as well as the CFMEU. Based on my reasons in *Thompson v Reynolds*, the CFMEUW was entitled, and indeed required by those reasons, to treat people who had signed a joint application form or card as members of the CFMEUW. Accordingly, if financial they were entitled to vote and ought to have been included on the electoral roll.

108 For all of these reasons. in my opinion the first basis in support of the summary dismissal application has been established. I do not accept there are any good grounds to support the conducting of an inquiry. In the terms of s27(1)(a)(ii) it is not necessary or desirable in the public interest to do so. An order dismissing the substantive application should therefore be made.

109 It is not strictly necessary to consider the alternative bases which are relied upon in support of the summary dismissal application. In deference to the arguments made however I will consider them.

Attempt to Re-litigate Issues Decided in *Thompson v Reynolds*

110 The CFMEUW submitted that an attempt to re-litigate what was decided in *Thompson v Reynolds* would be an abuse of process; and that where there is an abuse of process it is not in the public interest to continue with a proceeding.

111 In my opinion it would ordinarily be contrary to the public interest to re-litigate questions which had already been decided in a s66 proceeding. I say ordinarily because I put to one side for present purposes a situation where, for example, there was credible evidence that witnesses who could have given evidence relevant to the determination of a question had been unlawfully prevented from doing so. That is not, of course, the present situation.

112 The CFMEUW tabled its Schedule of Admissions and Outline of Submissions from *Thompson v Reynolds*, as described in [12](c)(ii) and (iv) above, to support its submission that the applicant was attempting to re-litigate what had already been decided. In the Schedule of Admissions the CFMEUW formally admitted, at (a), that "[a]pplications for membership are not in the form prescribed for that purpose in the schedule to the rules". In his additional submissions the applicant asserted that the Schedule of Admissions as tabled was incomplete because only the narrative next to (a), (c) and (g) was reproduced and not that next to (b), (d)-(f) and (h)-(l). The point was also made that some words of the narrative had been scored through. Given the applicant was not a party in *Thompson v Reynolds*, these concerns are understandable. They are however unfounded. The Schedule tabled was in the same form as that provided in *Thompson v Reynolds*. There was only narrative next to (a), (c) and (g) because these were the only paragraphs of point 4 of the Schedule of Possible Irregularities, in *Thompson v Reynolds*, about which admissions were made. (The Schedule of Possible Irregularities is set out in *Thompson v Reynolds* at [56]). The Schedule of Admissions had lines scored through some words as it was an amended document. The words which were scored through were those deleted from the earlier version of the document.

113 In his additional submissions at [22] the applicant directly attacked the arguments of the CFMEUW in its Outline of Submissions in *Thompson v Reynolds*. He submitted that from the "ordinary meaning and interpretation of rule 10", the failure to fill out an application in accordance with the schedule which was signed and witnessed, meant that a person could not become a member ([14]). The applicant also argued that the joint application form did not include all the key information in

the form in the schedule. This was because in that form there was "the naming of the jurisdiction under which the union is operating" ([16]). This is a reference to the scheduled form stating that the CFMEUW was registered under *the Act*. This information is not contained in either the joint application form or card.

114 In its additional submissions the CFMEUW asserted that this direct attack by the applicant on its submissions in *Thompson v Reynolds* clearly showed that he was attempting to re-litigate what had there been decided.

115 As earlier set out, in *Thompson v Reynolds* I decided that a person signing the joint application form and paying membership contributions, believing that was all that needed to be done to join and maintain membership of both the CFMEU and the CFMEUW, was and continued to be a member of both organisations. I did not consider in *Thompson v Reynolds* a situation which is agitated in the present case, of a person not intending to become a member of the CFMEUW by the signing of the joint application form and the payment of a single contribution. Despite not deciding that issue in *Thompson v Reynolds*, there is in my opinion no public interest in litigating it in the present proceeding, for the reasons I have earlier outlined. That is, there is no realistic prospect or evidence that a person who voted in the 2009 CFMEUW election did not thereby reaffirm their membership of, and show their intention to be, a member of the CFMEUW.

116 I also accept that I did not expressly consider, in *Thompson v Reynolds*, the validity of a signed joint application form not being witnessed, or that the joint application form did not say the CFMEUW was registered under *the Act*. These points do not however change my opinion that a person could validity become a member by the signing of the joint application form. The witnessing of a prospective member's signature, whilst an understandable requirement of rule 10, is to large extent a technicality. I do not think the intention of the rules is to omit a person from being a member if this requirement is not satisfied. I have the same opinion about the joint application form not saying that the CFMEUW was registered under *the Act*. Both the CFMEU and the CFMEUW are mentioned in the heading to the joint application form and cards. It would be open for a prospective member to make an enquiry about the act of parliament under which the organisations were registered, if they wished to do so.

117 I add that my finding in *Thompson v Reynolds* does not mean that the CFMEUW should not require new members to fulfil the requirements of rule 10 and sign a form in accordance with the schedule. This should have occurred in the past and should occur in the future. Additionally, even if a joint application form was used it should not have referred in its body to a "union" singular. This was symptomatic of the way in which the CFMEUW was wrongly not administered separately from the CFMEU. My conclusion in *Thompson v Reynolds* was simply that, despite the deficiencies of the joint application form, its signing could nevertheless lead to valid membership.

118 I do not accept the applicant's argument that before a person could become a member of the CFMEUW, the organisation needed to specifically inform them that this was a separate organisation to the CFMEU, operated in a different jurisdiction and "point" them to the rules of the CFMEUW. There is nothing in the rules of the CFMEUW or *the Act* which requires this to occur. The joint application form and the tabled cards are addressed to both the CFMEUW and the CFMEU. New members could have sought clarification about what this meant if they so desired. A person, when or after signing the form or card, could also have requested a copy of the rules of the CFMEUW if they wanted one. The signing of the application form was, and could be taken by the CFMEUW to be, the manifestation of an intention to join both organisations. This argument does not in my opinion constitute a claim that an irregularity has occurred in connection with the 2009 CFMEUW election, because people may have voted who were not entitled to.

119 I also do not accept that there should be an inquiry into the basis of membership of each of the approximately 10,000 members of the CFMEUW. The applicant's bald assertion, without evidence, that most would not have signed a joint application form, or similar, does not provide a good reason to have an inquiry. It might be different if there was credible evidence that people had been placed on the electoral roll and voted when they had not signed the joint application form or card, but there is none. The affidavits of the applicant, Mr Schultz, Mr Daley and Mr Robey do not contain such evidence in light of the tabled application cards. As mentioned earlier, the CFMEUW also tabled at the hearing, without objection, an extract from the transcript in *Thompson v Reynolds*. This contained evidence from the first respondent (at T370 and T425) that people had become members of both the CFMEU and CFMEUW by either filling in the joint application form or a joint membership card, and paying their subscription. There is nothing which credibly undermines this evidence and forms a good ground to have an inquiry.

120 As to the tickets issued to members only mentioning the CFMEU, this was at large in *Thompson v Reynolds*. (See for example the reasons at [63] and [71]). Again a separate ticket should have been issued in the name of the CFMEUW. But my finding in *Thompson v Reynolds*, implicitly if not explicitly, was that the failure to do so did not mean the person was not a member of the CFMEUW. There is nothing in the rules which leads to this conclusion.

The Applicant's Additional Submissions

121 I will now address other points made by the applicant in his additional submissions. It is not necessary to refer to general complaints or allegations of impropriety not relevant to the present application for an inquiry, as particularised. At one point in his additional submissions the applicant referred to the general powers of the Commission in s66(2) of *the Act*. It has been held however that s66(2)(e) and (f) of *the Act* contain a code of the circumstances in which an election inquiry will be held, and the President's jurisdiction and powers therein. (See *Thompson v Reynolds* at [200] and the authorities there cited).

122 Also, the applicant asserted there should be a full inquiry into the operation of the CFMEUW and the CFMEU as one organisation. That would not however be an inquiry into an irregularity in connection with the 2009 CFMEUW election and therefore could not occur in the present application. The applicant also complained about there not being a bank account of the CFMEUW or even a joint account with the CFMEU, but just an account in the name of the latter. That issue was referred to in

Thompson v Reynolds at [191]. As in that case however, the present application for an inquiry does not require determination of whether that state of affairs involved any breach of the rules of the CFMEUW. This is because, even if a breach of the rules, it would not preclude the full and free recording of votes in the election by persons entitled to do so. (See *Thompson v Reynolds* at [201]-[202]).

123 It was also argued by the applicant that because the CFMEUW had not, as requested, produced the "10,005 joining cards of any description", they could not do this and there was an irregularity in connection with the compilation of the electoral roll ([15]).

124 I do not accept that the CFMEUW not providing an inspection of all of these cards is a good reason to conduct an inquiry. They provided a sample of application cards. The applicant accepts that these were in the form of the tabled cards which in turn are for all relevant purposes the same as the joint application form. There is no credible evidence that the approximately 10,000 people who were included on the electoral roll did not sign a form or card of the type which I held in *Thompson v Reynolds* could lead to valid membership. The applicant said I should have called for the production of the 10,005 membership cards in *Thompson v Reynolds*. There was however no good reason to do so. The CFMEUW admitted its application forms were not in the form of the schedule to the rules and were as per the joint application form or cards. There was no evidence to suggest otherwise. I took into account that admission in making my decision.

125 Moreover, given my reasons and orders in *Thompson v Reynolds* it would have been an irregularity if people who had signed a joint application form or card and were financial, were *not* included on the electoral roll. This is because my reasoning in *Thompson v Reynolds* made it clear that as valid members they should have been. This point was made by senior counsel for the CFMEUW (T14).

126 Mention was also made by the applicant of the evidence of non payment of joining fees by "members" of the CFMEUW. This was a reference to the affidavit of Mr Daley. As to Mr Daley's evidence that he had not paid a joining fee, this could not have lead to an irregularity in connection with the election. Mr Daley is only one member and he said he was unfinancial. It can thus be inferred, in the absence of any evidence to the contrary, that he did not receive ballot papers.

127 Mr Daley also gave hearsay evidence about the non payment of a membership joining fee as being a "common practice". This general comment is an insufficient basis upon which to conduct an inquiry. My reasons in *Thompson v Reynolds* set out that to vote a member needed to be financial, and what was required to have that status. There is no cogent evidence that other than financial members voted in the 2009 CFMEUW election.

Conclusion on Attempt to Re-litigate Argument

128 In summary, I accept that the issue of whether there was an irregularity in connection with the 2009 CFMEUW election, because members did not sign a membership form in accordance with the schedule to the rules, was, in effect, decided in *Thompson v Reynolds.* I there held that a person had validly joined the CFMEUW by the signing of the join application form. The same applies to the joint application card in the form of those tabled at the hearing of the summary dismissal application, inspected by the applicant and referred to by the first respondent in his evidence in *Thompson v Reynolds.* Based on my reasons and orders in *Thompson v Reynolds,* if the names of financial members who had joined the CFMEUW by signing the joint application form or card were not included in the electoral roll, then that would have been an irregularity; not the other way round. As I have already said there is no realistic prospect that a person who voted in the CFMEUW election did not do so in the knowledge that they were regarded as a member of that organisation. Having considered the arguments of the applicant, I am not satisfied that there is any good reason to re-litigate the issues decided in *Thompson v Reynolds.* Accordingly I accept the second and alternative ground for the summary dismissal of the substantive application.

129 Additionally, there is no good reason to have an inquiry on the basis of the other arguments of the applicant. This is because of their lack of substance.

***Anshun* Estoppel**

130 This was an alternative to the second basis on which it was asserted the proceeding should be summarily dismissed. It was contended that if the issues which the applicant now wishes to agitate were not decided in *Thompson v Reynolds*, then the applicant should nevertheless be prevented from litigating them now because it was unjustifiably unreasonable of him not to have sought to litigate them in those proceedings. Accordingly, the present application constitutes an abuse of process and it is not in the public interest to proceed with it.

131 The CFMEUW cited a number of authorities which discuss the basis and elements of *Anshun* estoppel. These included *Anshun* itself, *Macchia v The Public Trustee* [2008] WASCA 241, *Stuart v Sanderson* (2001) 175 ALR 681 at 686 and *West v Jackson McDonald* [2001] WASC 198 at [19]-[30]. To these authorities may be added the recent reasons of French CJ in *Aon Risk Services Australia Ltd v Australian National University* (2009) 83 ALJR 951 at [33]-[34], *Spalla v St George Finance Ltd (No 6)* [2004] FCA 1699 and *DP World Australia Ltd v Fremantle Port Authority* [2009] WASCA 16 per Newnes JA at [73]-[87]. In *DP World*, after a review of the authorities, Newnes JA said at [86]-[87]:

> "[86] It is clear, however, that Anshun estoppel does not operate simply because a party is asserting a cause of action which could have been, but was not, raised in a previous proceeding in which that party was asserting a different cause of action based on substantially the same facts against the same party. The touchstone is reasonableness; the question is whether it was

> unreasonable for the party asserting the cause of action in the second proceeding to have refrained from raising it in the earlier proceeding.
>
> [87] Whether it was unreasonable not to bring the claim in the earlier proceedings depends upon an examination of all the relevant circumstances, focussing on the issue of reasonableness. There can be no hard and fast rules. As the High Court pointed out (602) in *Anshun*, a party may legitimately refrain from litigating an issue in earlier proceedings for a variety of reasons such as expense, the importance of the particular issue, and motives extraneous to the actual litigation."

132 As described by Madgwick J in *Stuart v Sanderson* at 686, the *Anshun* principle is founded upon the need to restrain costs between parties, the avoidance of conflicting judgments, to ensure the finality of litigation, to prevent parties from gaining an advantage in the use of the court's time, and to preserve the orderly administration of justice. To this may be added the undue oppression of the party against whom a subsequent claim is made (*Spalla* at [69]-[70]).

133 It is also clear from the authorities that the *Anshun* principle can apply to people who were not parties in the first action, although the circumstances in which this may occur might be rare (*Rogers v The Queen* (1994) 181 CLR 251 at 287; *Quall v Northern Territory* [2009] FCA 18 at [100] and *Habib v Radio 2UE Sydney Pty Ltd* [2009] NSWCA 231 at [83]). This is relevant given that the applicant was not a party in *Thompson v Reynolds.*

134 None of the authorities relied upon by the CFMEUW involved an election inquiry into a registered organisation in either state or federal jurisdictions. The election inquiry jurisdiction held by the Commission is part of its supervisory role over registered organisations (*Stacey v Civil Service Association of WA (Inc)* (2007) 87 WAIG 1229 at [271]-[274]). There is a public element to an election inquiry under s66 of *the Act*. This was commented upon by Toohey J in *Re Australasian Meat Industry Employees' Union (WA Branch); Ex Parte Ferguson* (1986) 67 ALR 491. The context was an election inquiry under the former *Conciliation and Arbitration Act 1904* (Cth) and an application to re-open to adduce additional evidence. At 494 his Honour said that in an election inquiry "wider interests [are] involved than those of the applicant and the union". His Honour said there are also those whose offices are under challenge, the members and "the wider public interest in the integrity of union elections". With respect to the application before him Toohey J said that given the nature of an election inquiry the "prevailing consideration is that the court reaches a satisfactory conclusion in regard to those irregularities that have been mentioned and that appear to warrant consideration" (494). In my opinion these observations are relevant to the present issue.

135 The course of an election inquiry under s66 of *the Act* does not solely depend upon the conduct of the parties and the issues which they wish to raise. *Thompson v Reynolds* is a good example. There, because of the evidence which emerged, the inquiry became broader than the claims of the applicants. An inquiry is not therefore inter partes litigation (*King v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union, Victorian Branch* (2000) 109 FCR 447 per Gyles J at [54], citing Finkelstein J in *Re Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union, Victorian Branch* (2000) 99 IR 224 at [24]-[26]; *Ex Parte Ferguson* at 494).

136 Given these considerations, I have some difficulty in readily applying the *Anshun* principle to election inquiries under s66 of *the Act*. If there was a good reason to inquire into whether there had been an irregularity in connection with an election, I do not necessarily think that the inquiry should not proceed because a party, proposed party or intervener to an earlier inquiry had unreasonably not then raised the issue. It would in my opinion ordinarily remain the responsibility of the Commission to ensure that the election of offices in a registered organisation occurred without irregularity.

137 The application of the *Anshun* principle involves an evaluative judgment (*Spalla* at [64]-[65] and *Habib* at [82]). The evaluative judgment will take into account all of the facts and circumstances, including the unreasonableness of the prior conduct, the nature of the litigation and issues sought to be litigated and the degree of oppression to the other parties to the litigation.

138 In the present case such an evaluative judgment is unnecessary because, as I have set out earlier, the application does not raise any substantive issue of an irregularity which should be considered by the Commission.

139 If I were to undertake such an evaluative judgment, I would accept that there has been some unreasonableness in the way in which the applicant has conducted himself. The issue of whether he had become a member of the CFMEUW without his knowledge, intent and agreement could have been raised by him in *Thompson v Reynolds.* As stated he was aware that issues of membership were to be considered and the importance of the terms of a membership card to that issue. The applicant has asserted that, at that time, he did not have evidence from other "members" of the CFMEUW which he could have led. Whilst that might be so, the applicant could have raised the issue with me and I could have made directions allowing the applicant to gather the relevant evidence.

140 As I have said however it is unnecessary and undesirable to say anything further about the applicability of the *Anshun* principle in the present case.

Conclusion and Minute of Order

141 For the reasons I have set out, in my opinion a clear case has been established for the summary dismissal of the application. Accordingly the following orders should be made:

1. The application by the intervener for the summary dismissal of the application is allowed.

2. The application is dismissed.

142 To strictly comply with s35 of *the Act*, a minute of proposed order should issue in the above terms. Any party or the CFMEUW who wishes to make submissions about the terms of the minute, should do so in writing within three days.

2009 WAIRC 01283

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PRESIDENT

BETWEEN **:** ROBERT MCJANNETT

APPLICANT

-v-

KEVIN REYNOLDS, SECRETARY - THE CONSTRUCTION FORESTRY MINING & ENERGY UNION OF WORKERS

FIRST RESPONDENT

IAN BOTTERILL RETURNING OFFICER WA ELECTORAL COMMISSION

SECOND RESPONDENT

-and-

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS

INTERVENER

CORAM: THE HONOURABLE M T RITTER, ACTING PRESIDENT

DATE: THURSDAY, 3 DECEMBER 2009

FILE NO: PRES 5 OF 2009

CITATION NO.: 2009 WAIRC 01283

PLACE: PERTH

CORRIGENDUM

1. Under the heading "Representation" on page two of the Reasons for Decision of Ritter AP dated 3 December 2009, delete the words "Mr R Kenzie QC, by leave" and insert in their place the words "Mr R Kenzie QC, by leave, and with him Mr T Dixon (of Counsel), by leave".

[L.S.]

(Sgd.) M T RITTER,
Acting President.

Dated: 3 December 2009

2009 WAIRC 01306

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ROBERT MCJANNETT

APPLICANT

-v-

KEVIN REYNOLDS, SECRETARY - THE CONSTRUCTION FORESTRY MINING & ENERGY UNION OF WORKERS

FIRST RESPONDENT

IAN BOTTERILL RETURNING OFFICER WA ELECTORAL COMMISSION

SECOND RESPONDENT

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS

INTERVENER

CORAM	THE HONOURABLE M T RITTER, ACTING PRESIDENT
DATE	WEDNESDAY, 9 DECEMBER 2009
FILE NO/S	PRES 5 OF 2009
CITATION NO.	2009 WAIRC 01306

Result	Application for summary dismissal allowed, application dismissed
Representation	
Applicant	In person
First Respondent	No appearance
Second Respondent	No appearance
Intervener	Mr R Kenzie QC, by leave, and with him Mr T Dixon (of Counsel), by leave

Order

The application for summary dismissal of the application having come on before me on 23 October 2009, and having heard Mr R Mcjannett on his own behalf as the applicant and Mr R Kenzie QC, by leave, and with him Mr T Dixon, of Counsel, by leave on behalf of the intervener and there being no appearances on behalf of the first and second respondents, it is this day, Wednesday, 9 December 2009, ordered that:

1. The application by the intervener for the summary dismissal of the application is allowed.
2. The application is dismissed.

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

2009 WAIRC 01189

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE REGISTRAR

APPLICANT

-and-

MR PHIL WOODCOCK

THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH

RESPONDENT

CORAM	THE HONOURABLE M T RITTER, ACTING PRESIDENT
DATE	THURSDAY, 12 NOVEMBER 2009
FILE NO	PRES 7 OF 2009
CITATION NO.	2009 WAIRC 01189

Decision	Application adjourned
Appearances	
Applicant	Mr R Andretich (of Counsel), by leave
Mr Phil Woodcock	Mr J Nolan (of Counsel), by leave
The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch	Mr P Momber (of Counsel), purportedly, by leave

Order

It is this day, 12 November 2009, ordered by consent that:

1. The directions hearing listed for 13 November 2009 be adjourned sine die.

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

AWARDS/AGREEMENTS—Variation of—

2009 WAIRC 01220

PRISON OFFICERS' AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS
	APPLICANT
	-v-
	THE MINISTER FOR CORRECTIVE SERVICES
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DELIVERED	FRIDAY, 20 NOVEMBER 2009
FILE NO.	APPL 53 OF 2009
CITATION NO.	2009 WAIRC 01220

CatchWords	Award - Award variation - Allowances - Principle 6 Adjustment of Allowances and Service Increments, Statement of Principles 2009 - Industrial Relations Act 1979 (WA), s 40
Result	Award varied
Representation	
Applicant	Mr J Walker, by correspondence
Respondent	Mr P Budd, by correspondence

Reasons for Decision

1 On 10 September 2009, the Western Australian Prison Officers' Union of Workers ("the Union") filed an application to vary allowances in the Prison Officers' Award ("the Award") pursuant to Principle 6 – Adjustment of Allowances and Service Increments of the 2009 State Wage order (2009) 89 WAIG 747 at 760. Clause 60 – Special Provisions is also sought to be varied in accordance with Principle 6.

2 On 29 September 2009, the Minister for Corrective Services ("the Minister") filed a Notice of Answer stating that he did not object to the intent of the proposed variation to the Award, subject to the parties agreeing to the correct variations to each allowance.

3 On 10 November 2009, the Union filed an amended application correcting some of the calculations of the allowances. On 16 November 2009, the Minister wrote to the Commission advising that it did not have any comments about the amended application.

4 The allowances sought to be varied are in Clause 52 – Motor Vehicle Allowance, Clause 54 – Removal Allowance, Schedule D – District Allowance, Schedule F – Motor Vehicle Allowance, Schedule G – Motor Vehicle Allowance, Schedule H – Motor Cycle Allowance and Schedule I – Travelling, Transfer and Relieving Allowance.

5 Under Clause 61 – Movement of Allowances of the Award, these allowances are to be varied in line with movements in the same allowances or schedules in the Public Service Award 1992 or its successor. However, the amendments to Schedule D – District Allowance are to be varied in accordance with Government Circular No. 8 of 2008, which is an administrative increase to the District Allowance.

6 Both parties agreed to have the application dealt with on the papers and on 17 November 2009 a Minute of Proposed Order was sent to the parties in terms of the Union's amended application and by 18 November 2009 both parties had responded to advise they agreed with the Minute.

7 I am satisfied that the award should be amended in the terms sought. The union advises that apart from the proposed amendment to Clause 60 – Special Provisions, the proposed allowance increases are already being paid administratively by the Minister in accordance with Clause 61 – Movement of Allowances.

8 The Union has amended its schedule to correct certain minor errors which were drawn to its attention and the amendment is not opposed by the Minister.

9 Order accordingly.

2009 WAIRC 01219

PRISON OFFICERS' AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS
	APPLICANT
	-v-
	THE MINISTER FOR CORRECTIVE SERVICES
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	FRIDAY, 20 NOVEMBER 2009
FILE NO/S	APPL 53 OF 2009
CITATION NO.	2009 WAIRC 01219
Result	Award varied

Order

HAVING heard by correspondence from both Mr J Walker on behalf of the Western Australian Prison Officers' Union of Workers and Mr P. Budd on behalf of The Minister for Corrective Services, the Commission, pursuant to the powers conferred on it under s 40 of the *Industrial Relations Act 1979*, hereby orders -

THAT the Prison Officers' Award be varied in accordance with the following schedule and that such variations shall have effect from the first pay period commencing on or after the 20th day of November 2009.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

SCHEDULE

1. Clause 52. – Motor Vehicle Allowance: Delete subclause 52.5 of this clause and insert the following in lieu thereof:

52.5 Allowance for towing Departmental caravan or trailer

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

2. Clause 54. – Removal Allowance: Delete this clause and insert the following in lieu thereof:

54. - REMOVAL ALLOWANCE

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

(1) The actual reasonable cost of conveyance of the Officer and dependants.

(2) The actual cost (including insurance) of the conveyance of an Officer's household furniture effects and appliances up to a maximum volume of 45 cubic metres provided that a larger volume may be approved by the Commissioner in special cases.

(3) An allowance of $546.00 for accelerated depreciation and extra wear and tear on furniture, effects and appliances for each occasion that an Officer is required to transport their furniture, effects and appliances provided that the Commissioner is satisfied that the value of household furniture, effects and appliances moved by the Officer is at least $3,273.00.

(4) Reimbursement of reasonable expenses in kennelling and transporting of domestic pet or pets up to a maximum amount of $171.00.

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

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

54.2 An Officer who is transferred solely at their own request or on account of misconduct must bear the whole cost of removal unless otherwise determined by the Employer prior to removal.

54.3 An Officer shall be reimbursed the full freight charges necessarily incurred in respect of the removal of the Officer's motor vehicle. If authorised by the Commissioner to travel to a new locality in the Officer's own motor vehicle, reimbursement shall be as follows:

(1) Where the Officer will be required to maintain a motor vehicle for use on official business at the new headquarters, reimbursement for the distance necessarily travelled shall be on the basis of the appropriate rate prescribed by subclause 52.2 of Clause 52 - Motor Vehicle Allowance of this Award.

(2) Where the Officer will not be required to maintain a motor vehicle for use on official business at the new headquarters reimbursement for the distance necessarily travelled shall be on the basis of one half (½) of the appropriate rate prescribed by subclause 52.4 of Clause 52 - Motor Vehicle Allowance of this Award.

(3) Where an Officer or their dependants have more than one vehicle, and all the vehicles are to be relocated to the new residence, the cost of transporting or driving up to two vehicles shall be deemed to be part of the removal costs.

(4) Where only one vehicle is to be relocated to the new residence, the employee may choose to transport a trailer, boat or caravan in lieu of the second vehicle. The Officer may be required to show evidence of ownership of the trailer, boat or caravan to be transported.

(5) If the Officer tows the caravan, trailer or boat to the new residence, the additional rate per kilometre is to be 3.5 cents per kilometre for a caravan or boat and 2 cents per kilometre for a trailer.

54.4 The Officer shall, before removal is undertaken obtain quotes from at least two carriers which shall be submitted to the Commissioner, who may authorise the acceptance of the more suitable: provided that payment for a volume amount beyond 45 cubic metres by the Department shall not occur without the prior written approval of the Commissioner.

54.5 The Commissioner may, in lieu of conveyance, authorise payment to compensate for any loss in any case where an Officer, with prior approval of the Commissioner, disposes of their household furniture effects and appliances instead of removing them to the new headquarters: provided that such payments shall not exceed the sum which would have been paid if the Officer's household furniture effects and appliances had been removed by the cheapest method of transport available and the volume was 45 cubic metres.

54.6 Where an Officer is transferred to Government owned or private rental accommodation, where furniture is provided, and as a consequence the Officer is obliged to store furniture, the Officer shall be reimbursed the actual cost of such storage up to a maximum allowance of $1015.00 per annum. Actual cost is deemed to include the premium for adequate insurance coverage for the value of the furniture stored. An allowance under this subclause shall not be paid for a period in excess of four years without the approval of the Commissioner.

54.7 Receipts must be produced for all sums claimed.

54.8 New appointees to the Corrective Services shall be entitled to receive the benefits of this clause if they are required by the Employer to participate in any training course prior to being posted to their respective positions in the service. This entitlement shall only be available to Officers who have completed their training and who incur costs when moving to their first posting.

3. Clause 60. – Special Provisions: Delete this clause and insert the following in lieu thereof:

60. - SPECIAL PROVISIONS

60.1 Where an Officer occupies quarters provided by the Minister, the Minister shall pay the water rates for such quarters. Where the quarters are in an area served by the *Country Areas Water Supply Act, 1947* the Minister shall pay for a reasonable quantity of water. Officers stationed and residing in their own accommodation north of the 26 degree south parallel, shall have paid by the Minister a reasonable quantity of water.

60.2 An Officer who prior to 28 June 1990 was qualified as prescribed in the Prisons Regulations for promotion to the classification of Senior Prison Officer or Chief Officer and who has not been appointed to such position, shall be paid $7.50 per week and $11.00 per week respectively. Officers who qualify after 28 June 1990 shall not be entitled to these allowances.

60.3 Officers other than Prison Officers (Vocational and Support) whose duties may include driving vehicles, engaged in driving duties for more than two hours per shift, shall be paid an allowance of $4.86 for each shift so worked.

60.4 An Officer who is delegated to be Officer in Charge of a shift shall receive $21.40 for each shift so worked. This subclause shall also apply to Officers in Charge of a shift at the Special Operations Unit.

60.5 (1) Officers employed at Pardelup Prison Farm and Karnet Prison who do not live in quarters, shall be paid a travelling allowance of $5.23 and $4.39 respectively for each shift worked.

(2) Officers employed at Wooroloo Prison who do not live in quarters and reside 16 kilometres or more away from the Institution, shall be paid a travelling allowance of $4.39 per shift.

(3) Officers who were stationed at Geraldton Regional Prison on 3 May 1984 and who by reason of the relocation of the facilities thereat to the Greenough Regional Prison and who do not live in quarters, shall be paid $4.39 per shift.

60.7 An Officer who is in charge of and required to use explosives, shall be paid $4.68 for each shift so worked.

60.8 Officers appointed to a Prison Officer (Vocational and Support) position who have completed 12 months or more service since the end of their probationary period shall be paid the Prison Officer (Vocational and Support) rate which is equal to, if no comparative rate exists, the next higher rate from the date of appointment to that Prison Officer (Vocational and Support) position. Where the Officer's rate exceeds the "thereafter rate" for the Prison Officer (Vocational and Support) position the Officer shall be paid the "thereafter rate" from the date of taking up duty in that Prison Officer (Vocational and Support) position.

4. Schedule D – District Allowance: Delete this schedule and insert the following in lieu thereof:

SCHEDULE D - DISTRICT ALLOWANCE

(a) Officers Without Dependants (subclause 50.3(1) of this Award):

COLUMN I	COLUMN II	COLUMN III	COLUMN IV
DISTRICT NO	STANDARD RATE	EXCEPTIONS TO STANDARD RATE TOWN OR PLACE	RATE
	$ p.a.		$ p.a.
6	4,570	Nil	Nil
5	3,285	Fitzroy Crossing	6,743
		Halls Creek	4,854
		Nullagine	5,022
		Marble Bar	5,799
		Karratha	3,868
		Port Hedland	3,599
4	2,822	Warburton Mission	4,688
		Carnarvon	1,677
		Denham	2,609
		Eucla	4,353
3	2,667	Meekatharra	2,202
		Leonora	3,086
2	2,452	Kalgoorlie/Boulder	1,100
		Ravensthorpe	2,499
		Esperance	1,354
1	Nil	Jerramungup	2,452

(b) Officers with dependants (subclause 50.3(2) of this Award):

Double the appropriate rate as prescribed in (a) above for Officers without dependants.

The allowances prescribed in this schedule shall operate from the beginning of the first pay period commencing on or after July 1, 2008.

5. Schedule F – Motor Vehicle Allowance: Delete this schedule and insert the following in lieu thereof:

SCHEDULE F - MOTOR VEHICLE ALLOWANCE

NOTE: This applies to Officers required to supply and maintain a motor vehicle for use when travelling on approved official business. (Clause 52.2 of this Award).

As from the first pay period commencing on or after 15 July 2008.

Area Details	Rate (cents) per kilometre Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc to 2600cc	1600cc and under
Metropolitan Area			
First 4000 kilometres	185.5	127.4	101.0
Over 4000 up to 8000 kms	80.7	58.8	48.9
Over 8000 up to 16000 kms	45.8	35.9	31.5
Over 16000 kms	50.6	38.1	32.4
South West Land Division			
First 4000 kilometres	187.4	128.6	102.2
Over 4000 up to 8000 kms	82.2	59.6	49.7
Over 8000 up to 16000 kms	47.1	36.6	32.2
Over 16000 kms	51.9	38.7	33.0

Area Details—*continued*	Rate (cents) per kilometre Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc to 2600cc	1600cc and under
North of 23.5° South Latitude			
First 4000 kilometres	203.9	139.4	110.7
Over 4000 up to 8000 kms	89.1	64.3	53.5
Over 8000 up to 16000 kms	50.8	39.3	34.4
Over 16000 kilometres	53.9	40.4	34.5
Rest of State			
First 4000 kilometres	194.7	133.1	105.3
Over 4000 up to 8000 kms	85.2	61.6	51.1
Over 8000 up to 16000 kms	48.7	37.7	33.1
Over 16000 kilometres	52.7	39.4	33.6

6. Schedule G – Motor Vehicle Allowance: Delete this schedule and insert the following in lieu thereof:

SCHEDULE G - MOTOR VEHICLE ALLOWANCE

NOTE: This applies to Officers who agree to use their own motor vehicle for travel on approved official business. (Clause 52.4 of this Award).

As from the first pay period commencing on or after 15 July 2008

Area Details	Rate (cents) per kilometre Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc to 2600cc	1600cc and under
Metropolitan Area	89.5	64.5	53.2
South West Land Division	91.0	65.4	54.0
North of 23.5° South Latitude	98.6	70.6	58.3
Rest of the State	94.3	67.5	55.6

7. Schedule H – Motor Cycle Allowance: Delete this schedule and insert the following in lieu thereof:

SCHEDULE H - MOTOR CYCLE ALLOWANCE

NOTE: This applies to Officers who agree to use their own motor cycle for travel on approved official business. (Clause 52.4 of this Award).

As from the first pay period commencing on or after 15 July 2008

Distance travelled during a year on Official Business	Rate Cents per Kilometre
Rate per kilometre	31.0

8. Schedule I – Travelling, Transfer and Relieving Allowance: Delete this schedule and insert the following in lieu thereof:

SCHEDULE I - TRAVELLING, TRANSFER AND RELIEVING ALLOWANCE

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 53.2(2) of this Award, TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 55.3 of this Award)	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 53.2(2) of this Award)
ALLOWANCE TO MEET INCIDENTAL EXPENSES				
		$		
(1)	WA - South of 26° South Latitude	13.60		
(2)	WA - North of 26° South Latitude	20.45		
(3)	Interstate	20.45		

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 53.2(2) of this Award, TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 55.3 of this Award)	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 53.2(2) of this Award)
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL				
		$	$	$
(4)	WA - Metropolitan Hotel or Motel	285.60	142.80	95.20
(5)	Locality South of 26° South Latitude	195.25	97.65	65.10
(6)	Locality North of 26° South Latitude:			
	Broome	396.95	198.50	132.30
	Carnarvon	246.30	123.15	82.10
	Dampier	325.70	162.85	108.55
	Derby	302.70	151.35	100.90
	Exmouth	284.45	142.25	94.80
	Fitzroy Crossing	358.95	179.50	119.65
	Gascoyne Junction	211.45	105.75	70.50
	Halls Creek	199.45	99.75	66.50
	Karratha	502.95	251.50	167.65
	Kununurra	310.30	155.15	103.45
	Marble Bar	268.45	134.25	89.50
	Newman	299.45	149.75	99.80
	Onslow	267.45	133.70	89.15
	Pannawonica	286.35	143.15	95.45
	Paraburdoo	260.80	130.40	86.95
	Port Hedland	344.90	172.45	114.95
	Roebourne	230.35	115.15	76.80
	Shark Bay	186.45	93.25	62.15
	Tom Price	297.95	149.00	99.30
	Turkey Creek	199.45	99.75	66.50
	Wickham	417.95	209.00	139.30
	Wyndham	250.45	125.25	83.50
(7)	Interstate - Capital City			
	Sydney	288.60	144.30	96.20
	Melbourne	278.95	139.45	92.95
	Other Capitals	251.50	125.75	83.75
(8)	Interstate – Other than Capital City	195.25	97.65	65.10

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 53.2(2) of this Award, TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 55.3 of this Award)	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 53.2(2) of this Award)
ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL				
(9)	WA - South of 26° South Latitude	88.60		
(10)	WA - North of 26° South Latitude	121.85		
(11)	Interstate	121.85		
TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMMODATION ONLY IS PROVIDED.				
(12)	WA - South of 26° South Latitude:			
	Breakfast	16.10		
	Lunch	16.10		
	Dinner	42.75		
(13)	WA - North of 26° South Latitude:			
	Breakfast	19.90		
	Lunch	31.80		
	Dinner	49.75		
(14)	Interstate:			
	Breakfast	19.90		
	Lunch	31.80		
	Dinner	49.75		
DEDUCTION FOR NORMAL LIVING EXPENSES (CLAUSE 55.5(1))				
(15)	Each Adult	25.95		
(16)	Each Child	4.45		
MIDDAY MEAL (CLAUSE 56.11)				
(17)	Rate per meal	6.30		
(18)	Maximum reimbursement per pay period	31.50		

The allowances prescribed in this schedule shall operate from the beginning of the first pay period commencing on or after 17th June 2009.

2009 WAIRC 01284

PUBLIC TRANSPORT AUTHORITY RAIL CAR DRIVERS (TRANSPERTH TRAIN OPERATIONS) AWARD 2006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL TRAM AND BUS INDUSTRY UNION OF EMPLOYEES W.A. BRANCH
	APPLICANT
	-v-
	PUBLIC TRANSPORT AUTHORITY
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	3 DECEMBER 2009
FILE NO	APPL 55 OF 2009
CITATION NO.	2009 WAIRC 01284

Result	Award varied
Representation	
Applicant	Mr G Ferguson
Respondent	Mr S Majeks

Order

HAVING HEARD Mr G Ferguson on behalf of the applicant and Mr S Majeks on behalf of the respondent, and by consent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the Public Transport Authority Rail Car Drivers (Transperth Train Operations) Award 2006 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 1 October 2009.

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

SCHEDULE

1. Clause 4.3 – Suburban Electric Railcar Allowance: Delete subclause 4.3.1(a) of this clause and insert the following in lieu thereof:

4.3.1 (a) An employee qualified in the operation of electric suburban railcars and who, for any shift or part of a shift is rostered to work as driver on the suburban rail system shall, for the whole of that shift, be paid the following rate of allowance in addition to the appropriate rate of pay.

		Rate per week
(1)	First Year	$35.10
(2)	Thereafter	$35.40
(3)	Special Case	$35.90

2. Clause 5.1 – Shift Work: Delete paragraphs (a), (b), (c) and (d) of this clause and insert the following in lieu thereof:

(a) On an afternoon shift which commences before 1800hrs and the ordinary time of which concludes at or after 1830hrs, an employee will be paid an allowance of $2.33 an hour on all time paid at ordinary rate.

(b) On a night shift, which commences at or between 1800, and 0359 hours, an employee will be paid an allowance of $2.70 an hour on all time paid at ordinary rate.

(c) On an early morning shift, which commences at or, between 0400 and 0530, an employee will be paid an allowance of $2.33 an hour on all time paid at ordinary rate.

(d) In addition to the hourly shift work allowance, an employee will be paid an allowance of $2.70 for any shift where the ordinary time commences or finishes at or between 0101 hours and 0359 hours.

AWARDS/AGREEMENTS AND ORDERS—Application for variation of—No variation resulting—

2009 WAIRC 01209

HOTEL AND TAVERN WORKERS' AWARD, 1978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	WESTERN AUSTRALIAN HOTELS AND HOSPITALITY ASSOCIATION INCORPORATED (UNION OF EMPLOYERS) AND OTHERS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 17 NOVEMBER 2009
FILE NO/S	APPLA 19 OF 2006
CITATION NO.	2009 WAIRC 01209

Result Discontinued

Order

WHEREAS this is an application to vary the *Hotel and Tavern Workers' Award (*"the Award"); and

WHEREAS this application resulted from an order that issued on 24 March 2006 which divided application Appl 19 of 2006 into two parts being application Appl 19 of 2006 and ApplA 19 of 2006; and

WHEREAS Appl 19 of 2006 was finalised by an order that issued on 24 March 2006; and

WHEREAS the Commission contacted the applicant on numerous occasions about the status of the application; and

WHEREAS on 25 July 2006 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS following the conference the parties were given time for further discussions; and

WHEREAS the Commission set down a further conference on 29 August 2006 however the listing was vacated at the request of the parties to allow time for further discussions; and

WHEREAS the Commission contacted the applicant on a number of occasions about the status of this matter; and

WHEREAS on 4 December 2008 the Commission wrote to the applicant requesting that the applicant contact the Commission by no later than the close of business on 31 December 2008 to advise its intention with respect to this matter; and

WHEREAS as the applicant did not contact the Commission the matter was listed For Mention on 11 June 2009; and

WHEREAS following the hearing on 11 June 2009 the application was adjourned until mid September 2009 to allow the parties to have further discussions; and

WHEREAS on 6 October 2009 the Commission wrote to the applicant requesting the applicant advise the Commission of the status of the application and its intentions in relation to this matter by no later than the close of business on 23 October 2009; and

WHEREAS on 21 October 2009 the applicant advised the Commission that it did not wish to proceed with this application; and

WHEREAS on 23 October 2009 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS the Commission understands there is no objection to this application being discontinued;

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

THAT this application be, and is hereby discontinued

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

2009 WAIRC 01208

RESTAURANT, TEAROOM AND CATERING WORKERS' AWARD, 1979

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	RESTAURANT AND CATERING INDUSTRY ASSOCIATION OF EMPLOYERS OF WESTERN AUSTRALIA INC AND OTHERS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 17 NOVEMBER 2009
FILE NO/S	APPLA 17 OF 2006
CITATION NO.	2009 WAIRC 01208

Result Discontinued

Order

WHEREAS this is an application to vary the *Restaurant, Tearoom and Catering Workers' Award* ("the Award"); and

WHEREAS this application resulted from an order that issued on 24 March 2006 which divided application Appl 17 of 2006 into two parts being application Appl 17 of 2006 and ApplA 17 of 2006; and

WHEREAS Appl 17 of 2006 was finalised by an order that issued on 24 March 2006; and

WHEREAS the Commission contacted the applicant on numerous occasions about the status of the application; and

WHEREAS on 25 July 2006 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS following the conference the parties were given time for further discussions; and

WHEREAS the Commission set down a further conference on 29 August 2006 however the listing was vacated at the request of the parties to allow time for further discussions; and

WHEREAS the Commission contacted the applicant on a number of occasions about the status of the matter; and

WHEREAS on 4 December 2008 the Commission wrote to the applicant requesting that the applicant contact the Commission by no later than the close of business on 31 December 2008 to advise its intention with respect to this application; and

WHEREAS as the applicant did not contact the Commission the matter was listed For Mention on 11 June 2009; and

WHEREAS following the hearing on 11 June 2009 the application was adjourned until mid September 2009 to allow the parties to have further discussions; and

WHEREAS on 6 October 2009 the Commission wrote to the applicant requesting the applicant advise the Commission of the status of the application and its intentions in relation to this application by no later than the close of business on 23 October 2009; and

WHEREAS on 21 October 2009 the applicant advised the Commission that it did not wish to proceed with this application; and

WHEREAS on 23 October 2009 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS the Commission understands there is no objection to this application being discontinued;

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

THAT this application be, and is hereby discontinued

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

NOTICES—Award/Agreement matters—

2009 WAIRC 01267

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 63 of 2009

APPLICATION FOR A NEW AGREEMENT ENTITLED

"THE CONGREGATION OF THE MISSIONARY OBLATES OF THE MOST HOLY AND IMMACULATE VIRGIN MARY NON-TEACHING STAFF ENTERPRISE BARGAINING AGREEMENT, 2009"

NOTICE is given that an application was made to the Commission, on 5 November 2009, by The Independent Education Union of Western Australia, Union of Employees, under the Industrial Relations Act 1979, for registration of the above named Agreement.

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

5. - SCOPE

(1) This Agreement shall apply to those employees as defined in Clause 6. – Definitions of this Agreement employed in Western Australia by the employer as perscribed in Appendix A who are members of or are eligible to be members of the Unions party to this agreement.

(2) This Agreement provides for all conditions contained within the following Awards;

(a) Independent Schools Administrative and Technical Officers Award 1993;

(b) Independent Schools (Boarding House) Supervisory Staff Award;

(c) Independent Schools Psychologists and Social Workers Award 1996;

(d) Nurses' (Independent Schools) Award 1962.

(3) The number of employees covered by this Agreement is 26.

6. – DEFINITIONS

This Enterprise Bargaining Agreement covers the following classifications:

(1) Administrative and Technical Officers as defined in Part III, Clause 38. – Classifications of this Agreement;

(2) Boarding House Supervisors as defined in Part IV, Clause 43. – Classifications of this Agreement;

(3) Nurses as defined in Part V, Clause 48. – Wages of this Agreement;

(4) Psychologists and Social Workers in Part VI, Clause 53. – Salaries and Classifications of this Agreement.

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

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

27 November 2009

2009 WAIRC 01268

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 45 of 2009

APPLICATION FOR A NEW AGREEMENT ENTITLED

"THE CONGREGATION OF THE PRESENTATION SISTERS NON-TEACHING STAFF ENTERPRISE BARGAINING AGREEMENT, 2009"

NOTICE is given that an application was made to the Commission, on 5 November 2009, by The Independent Education Union of Western Australia, Union of Employees, under the Industrial Relations Act 1979, for registration of the above named Agreement.

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

5. - SCOPE

(1) This Agreement shall apply to those employees as defined in Clause 6. – Definitions of this Agreement employed in Western Australia by the employer as perscribed in Appendix A who are members of or are eligible to be members of the Unions party to this agreement.

(2) This Agreement provides for all conditions contained within the following Awards;

(a) Independent Schools Administrative and Technical Officers Award 1993;

(b) Independent Schools (Boarding House) Supervisory Staff Award;

(c) Independent Schools Psychologists and Social Workers Award 1996;

(d) Nurses' (Independent Schools) Award 1962.

(3) The number of employees covered by this Agreement is 44.

6. – DEFINITIONS

This Enterprise Bargaining Agreement covers the following classifications:

(1) Administrative and Technical Officers as defined in Part III, Clause 38. – Classifications of this Agreement;

(2) Boarding House Supervisors as defined in Part IV, Clause 43. – Classifications of this Agreement;

(3) Nurses as defined in Part V, Clause 48. – Wages of this Agreement;

(4) Psychologists and Social Workers in Part VI, Clause 53. – Salaries and Classifications of this Agreement.

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

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

27 November 2009

2009 WAIRC 01269

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 62 of 2009

APPLICATION FOR A NEW AGREEMENT ENTITLED

"THE EDMUND RICE EDUCATION AUSTRALIA NON-TEACHING STAFF ENTERPRISE BARGAINING AGREEMENT, 2009"

NOTICE is given that an application was made to the Commission, on 5 November 2009, by The Independent Education Union of Western Australia, Union of Employees, under the Industrial Relations Act 1979, for registration of the above named Agreement.

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

5. - SCOPE

(1) This Agreement shall apply to those employees as defined in Clause 6. – Definitions of this Agreement employed in Western Australia by the employer as perscribed in Appendix A who are members of or are eligible to be members of the Unions party to this agreement.

(2) This Agreement provides for all conditions contained within the following Awards;

(a) Independent Schools Administrative and Technical Officers Award 1993;

(b) Independent Schools (Boarding House) Supervisory Staff Award;

(c) Independent Schools Psychologists and Social Workers Award 1996;

(d) Nurses' (Independent Schools) Award 1962.

(3) The number of employees covered by this Agreement is 115.

6. – DEFINITIONS

This Enterprise Bargaining Agreement covers the following classifications:

(1) Administrative and Technical Officers as defined in Part III, Clause 38. – Classifications of this Agreement;

(2) Boarding House Supervisors as defined in Part IV, Clause 43. – Classifications of this Agreement;

(3) Nurses as defined in Part V, Clause 48. – Wages of this Agreement;

(4) Psychologists and Social Workers in Part VI, Clause 53. – Salaries and Classifications of this Agreement.

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

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

27 November 2009

2009 WAIRC 01270

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 59 of 2009

APPLICATION FOR A NEW AGREEMENT ENTITLED

"THE INSTITUTE OF THE BLESSED VIRGIN MARY NON-TEACHING STAFF ENTERPRISE BARGAINING AGREEMENT, 2009"

NOTICE is given that an application was made to the Commission, on 5 November 2009, by The Independent Education Union of Western Australia, Union of Employees, under the Industrial Relations Act 1979, for registration of the above named Agreement.

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

5. - SCOPE

(1) This Agreement shall apply to those employees as defined in Clause 6. – Definitions of this Agreement employed in Western Australia by the employer as perscribed in Appendix A who are members of or are eligible to be members of the Unions party to this agreement.

(2) This Agreement provides for all conditions contained within the following Awards;

(a) Independent Schools Administrative and Technical Officers Award 1993;

(b) Independent Schools (Boarding House) Supervisory Staff Award;

(c) Independent Schools Psychologists and Social Workers Award 1996;

(d) Nurses' (Independent Schools) Award 1962.

(3) The number of employees covered by this Agreement is 1.

6. – DEFINITIONS

This Enterprise Bargaining Agreement covers the following classifications:

(1) Administrative and Technical Officers as defined in Part III, Clause 38. – Classifications of this Agreement;

(2) Boarding House Supervisors as defined in Part IV, Clause 43. – Classifications of this Agreement;

(3) Nurses as defined in Part V, Clause 48. – Wages of this Agreement;

(4) Psychologists and Social Workers in Part VI, Clause 53. – Salaries and Classifications of this Agreement.

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

(Sgd.) J SPURLING,
Registrar.

[L.S.]

27 November 2009

2009 WAIRC 01280

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 43 of 2009

APPLICATION FOR A NEW AGREEMENT ENTITLED

"THE JOHN XXIII COLLEGE NON-TEACHING STAFF ENTERPRISE BARGAINING AGREEMENT, 2009"

NOTICE is given that an application was made to the Commission, on 5 November 2009, by The Independent Education Union of Western Australia, Union of Employees, under the Industrial Relations Act 1979, for registration of the above named Agreement.

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

5. - SCOPE

(1) This Agreement shall apply to those employees as defined in Clause 6. – Definitions of this Agreement employed in Western Australia by the employer as perscribed in Appendix A who are members of or are eligible to be members of the Unions party to this agreement.

(2) This Agreement provides for all conditions contained within the following Awards;

(a) Independent Schools Administrative and Technical Officers Award 1993;

(b) Independent Schools (Boarding House) Supervisory Staff Award;

(c) Independent Schools Psychologists and Social Workers Award 1996;

(d) Nurses' (Independent Schools) Award 1962.

(3) The number of employees covered by this Agreement is 27.

6. – DEFINITIONS

This Enterprise Bargaining Agreement covers the following classifications:

(1) Administrative and Technical Officers as defined in Part III, Clause 38. – Classifications of this Agreement;

(2) Boarding House Supervisors as defined in Part IV, Clause 43. – Classifications of this Agreement;

(3) Nurses as defined in Part V, Clause 48. – Wages of this Agreement;

(4) Psychologists and Social Workers in Part VI, Clause 53. – Salaries and Classifications of this Agreement.

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

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

27 November 2009

2009 WAIRC 01271

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 60 of 2009

APPLICATION FOR A NEW AGREEMENT ENTITLED

"THE NORBERTINE CANONS NON-TEACHING STAFF ENTERPRISE BARGAINING AGREEMENT, 2009"

NOTICE is given that an application was made to the Commission, on 5 November 2009, by The Independent Education Union of Western Australia, Union of Employees, under the Industrial Relations Act 1979, for registration of the above named Agreement.

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

5. - SCOPE

(1) This Agreement shall apply to those employees as defined in Clause 6. – Definitions of this Agreement employed in Western Australia by the employer as perscribed in Appendix A who are members of or are eligible to be members of the Unions party to this agreement.

(2) This Agreement provides for all conditions contained within the following Awards;

(a) Independent Schools Administrative and Technical Officers Award 1993;

(b) Independent Schools (Boarding House) Supervisory Staff Award;

(c) Independent Schools Psychologists and Social Workers Award 1996;

(d) Nurses' (Independent Schools) Award 1962.

(3) The number of employees covered by this Agreement is 27.

6. – DEFINITIONS

This Enterprise Bargaining Agreement covers the following classifications:

(1) Administrative and Technical Officers as defined in Part III, Clause 38. – Classifications of this Agreement;

(2) Boarding House Supervisors as defined in Part IV, Clause 43. – Classifications of this Agreement;

(3) Nurses as defined in Part V, Clause 48. – Wages of this Agreement;

(4) Psychologists and Social Workers in Part VI, Clause 53. – Salaries and Classifications of this Agreement.

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

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

27 November 2009

2009 WAIRC 01272

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 51 of 2009

APPLICATION FOR A NEW AGREEMENT ENTITLED

"THE ROMAN CATHOLIC BISHOP OF BROOME NON-TEACHING STAFF ENTERPRISE BARGAINING AGREEMENT, 2009"

NOTICE is given that an application was made to the Commission, on 5 November 2009, by The Independent Education Union of Western Australia, Union of Employees, under the Industrial Relations Act 1979, for registration of the above named Agreement.

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

5. - SCOPE

(1) This Agreement shall apply to those employees as defined in Clause 6. – Definitions of this Agreement employed in Western Australia by the employer as perscribed in Appendix A who are members of or are eligible to be members of the Unions party to this agreement.

(2) This Agreement provides for all conditions contained within the following Awards;

(a) Independent Schools Administrative and Technical Officers Award 1993;

(b) Independent Schools (Boarding House) Supervisory Staff Award;

(c) Independent Schools Psychologists and Social Workers Award 1996;

(d) Nurses' (Independent Schools) Award 1962.

(3) The number of employees covered by this Agreement is 26.

6. – DEFINITIONS

This Enterprise Bargaining Agreement covers the following classifications:

(1) Administrative and Technical Officers as defined in Part III, Clause 38. – Classifications of this Agreement;

(2) Boarding House Supervisors as defined in Part IV, Clause 43. – Classifications of this Agreement;

(3) Nurses as defined in Part V, Clause 48. – Wages of this Agreement;

(4) Psychologists and Social Workers in Part VI, Clause 53. – Salaries and Classifications of this Agreement.

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

(Sgd.) J SPURLING,
Registrar.

[L.S.]

27 November 2009

2009 WAIRC 01273

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 61 of 2009

APPLICATION FOR A NEW AGREEMENT ENTITLED

"THE ROMAN CATHOLIC BISHOP OF BUNURY NON-TEACHING STAFF ENTERPRISE BARGAINING AGREEMENT, 2009"

NOTICE is given that an application was made to the Commission, on 5 November 2009, by The Independent Education Union of Western Australia, Union of Employees, under the Industrial Relations Act 1979, for registration of the above named Agreement.

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

5. - SCOPE

(1) This Agreement shall apply to those employees as defined in Clause 6. – Definitions of this Agreement employed in Western Australia by the employer as perscribed in Appendix A who are members of or are eligible to be members of the Unions party to this agreement.

(2) This Agreement provides for all conditions contained within the following Awards;

(a) Independent Schools Administrative and Technical Officers Award 1993;

(b) Independent Schools (Boarding House) Supervisory Staff Award;

(c) Independent Schools Psychologists and Social Workers Award 1996;

(d) Nurses' (Independent Schools) Award 1962.

(3) The number of employees covered by this Agreement is 138.

6. – DEFINITIONS

This Enterprise Bargaining Agreement covers the following classifications:

(1) Administrative and Technical Officers as defined in Part III, Clause 38. – Classifications of this Agreement;

(2) Boarding House Supervisors as defined in Part IV, Clause 43. – Classifications of this Agreement;

(3) Nurses as defined in Part V, Clause 48. – Wages of this Agreement;

(4) Psychologists and Social Workers in Part VI, Clause 53. – Salaries and Classifications of this Agreement.

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

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

27 November 2009

2009 WAIRC 01274

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 47 of 2009

APPLICATION FOR A NEW AGREEMENT ENTITLED

"THE ROMAN CATHOLIC BISHOP OF GERALDTON NON-TEACHING STAFF ENTERPRISE BARGAINING AGREEMENT, 2009"

NOTICE is given that an application was made to the Commission, on 5 November 2009, by The Independent Education Union of Western Australia, Union of Employees, under the Industrial Relations Act 1979, for registration of the above named Agreement.

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

5. - SCOPE

(1) This Agreement shall apply to those employees as defined in Clause 6. – Definitions of this Agreement employed in Western Australia by the employer as perscribed in Appendix A who are members of or are eligible to be members of the Unions party to this agreement.

(2) This Agreement provides for all conditions contained within the following Awards;

(a) Independent Schools Administrative and Technical Officers Award 1993;

(b) Independent Schools (Boarding House) Supervisory Staff Award;

(c) Independent Schools Psychologists and Social Workers Award 1996;

(d) Nurses' (Independent Schools) Award 1962.

(3) The number of employees covered by this Agreement is 63.

6. – DEFINITIONS

This Enterprise Bargaining Agreement covers the following classifications:

(1) Administrative and Technical Officers as defined in Part III, Clause 38. – Classifications of this Agreement;

(2) Boarding House Supervisors as defined in Part IV, Clause 43. – Classifications of this Agreement;

(3) Nurses as defined in Part V, Clause 48. – Wages of this Agreement;

(4) Psychologists and Social Workers in Part VI, Clause 53. – Salaries and Classifications of this Agreement.

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

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

27 November 2009

2009 WAIRC 01275

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 58 of 2009

APPLICATION FOR A NEW AGREEMENT ENTITLED

"THE SERVITE COLLEGE COUNCIL NON-TEACHING STAFF ENTERPRISE BARGAINING AGREEMENT, 2009"

NOTICE is given that an application was made to the Commission, on 5 November 2009, by The Independent Education Union of Western Australia, Union of Employees, under the Industrial Relations Act 1979, for registration of the above named Agreement.

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

5. - SCOPE

(1) This Agreement shall apply to those employees as defined in Clause 6. – Definitions of this Agreement employed in Western Australia by the employer as perscribed in Appendix A who are members of or are eligible to be members of the Unions party to this agreement.

(2) This Agreement provides for all conditions contained within the following Awards;

(a) Independent Schools Administrative and Technical Officers Award 1993;

(b) Independent Schools (Boarding House) Supervisory Staff Award;

(c) Independent Schools Psychologists and Social Workers Award 1996;

(d) Nurses' (Independent Schools) Award 1962.

(3) The number of employees covered by this Agreement is 22.

6. – DEFINITIONS

This Enterprise Bargaining Agreement covers the following classifications:

(1) Administrative and Technical Officers as defined in Part III, Clause 38. – Classifications of this Agreement;

(2) Boarding House Supervisors as defined in Part IV, Clause 43. – Classifications of this Agreement;

(3) Nurses as defined in Part V, Clause 48. – Wages of this Agreement;

(4) Psychologists and Social Workers in Part VI, Clause 53. – Salaries and Classifications of this Agreement.

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

(Sgd.) J SPURLING,
Registrar.

[L.S.]

27 November 2009

2009 WAIRC 01276

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 46 of 2009

APPLICATION FOR A NEW AGREEMENT ENTITLED

"THE SISTERS OF THE HOLY FAMILY OF NAZARETH NON-TEACHING STAFF ENTERPRISE BARGAINING AGREEMENT, 2009"

NOTICE is given that an application was made to the Commission, on 5 November 2009, by The Independent Education Union of Western Australia, Union of Employees, under the Industrial Relations Act 1979, for registration of the above named Agreement.

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

5. - SCOPE

(1) This Agreement shall apply to those employees as defined in Clause 6. – Definitions of this Agreement employed in Western Australia by the employer as perscribed in Appendix A who are members of or are eligible to be members of the Unions party to this agreement.

(2) This Agreement provides for all conditions contained within the following Awards;

(a) Independent Schools Administrative and Technical Officers Award 1993;

(b) Independent Schools (Boarding House) Supervisory Staff Award;

(c) Independent Schools Psychologists and Social Workers Award 1996;

(d) Nurses' (Independent Schools) Award 1962.

(3) The number of employees covered by this Agreement is 4.

6. – DEFINITIONS

This Enterprise Bargaining Agreement covers the following classifications:

(1) Administrative and Technical Officers as defined in Part III, Clause 38. – Classifications of this Agreement;

(2) Boarding House Supervisors as defined in Part IV, Clause 43. – Classifications of this Agreement;

(3) Nurses as defined in Part V, Clause 48. – Wages of this Agreement;

(4) Psychologists and Social Workers in Part VI, Clause 53. – Salaries and Classifications of this Agreement.

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

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

27 November 2009

2009 WAIRC 01277

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 49 of 2009

APPLICATION FOR A NEW AGREEMENT ENTITLED

"THE SISTERS OF MERCY PERTH (AMALGAMATED) NON-TEACHING STAFF ENTERPRISE BARGAINING AGREEMENT, 2009"

NOTICE is given that an application was made to the Commission, on 5 November 2009, by The Independent Education Union of Western Australia, Union of Employees, under the Industrial Relations Act 1979, for registration of the above named Agreement.

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

5. - SCOPE

(1) This Agreement shall apply to those employees as defined in Clause 6. – Definitions of this Agreement employed in Western Australia by the employer as perscribed in Appendix A who are members of or are eligible to be members of the Unions party to this agreement.

(2) This Agreement provides for all conditions contained within the following Awards;

(a) Independent Schools Administrative and Technical Officers Award 1993;

(b) Independent Schools (Boarding House) Supervisory Staff Award;

(c) Independent Schools Psychologists and Social Workers Award 1996;

(d) Nurses' (Independent Schools) Award 1962.

(3) The number of employees covered by this Agreement is 46.

6. – DEFINITIONS

This Enterprise Bargaining Agreement covers the following classifications:

(1) Administrative and Technical Officers as defined in Part III, Clause 38. – Classifications of this Agreement;

(2) Boarding House Supervisors as defined in Part IV, Clause 43. – Classifications of this Agreement;

(3) Nurses as defined in Part V, Clause 48. – Wages of this Agreement;

(4) Psychologists and Social Workers in Part VI, Clause 53. – Salaries and Classifications of this Agreement.

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

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

27 November 2009

2009 WAIRC 01278

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 53 of 2009

APPLICATION FOR A NEW AGREEMENT ENTITLED

"THE SISTERS OF MERCY WEST PERTH CONGREGATION NON-TEACHING STAFF ENTERPRISE BARGAINING AGREEMENT, 2009"

NOTICE is given that an application was made to the Commission, on 5 November 2009, by The Independent Education Union of Western Australia, Union of Employees, under the Industrial Relations Act 1979, for registration of the above named Agreement.

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

5. - SCOPE

(1) This Agreement shall apply to those employees as defined in Clause 6. – Definitions of this Agreement employed in Western Australia by the employer as perscribed in Appendix A who are members of or are eligible to be members of the Unions party to this agreement.

(2) This Agreement provides for all conditions contained within the following Awards;

(a) Independent Schools Administrative and Technical Officers Award 1993;

(b) Independent Schools (Boarding House) Supervisory Staff Award;

(c) Independent Schools Psychologists and Social Workers Award 1996;

(d) Nurses' (Independent Schools) Award 1962.

(3) The number of employees covered by this Agreement is 59.

6. – DEFINITIONS

This Enterprise Bargaining Agreement covers the following classifications:

(1) Administrative and Technical Officers as defined in Part III, Clause 38. – Classifications of this Agreement;

(2) Boarding House Supervisors as defined in Part IV, Clause 43. – Classifications of this Agreement;

(3) Nurses as defined in Part V, Clause 48. – Wages of this Agreement;

(4) Psychologists and Social Workers in Part VI, Clause 53. – Salaries and Classifications of this Agreement.

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

(Sgd.) J SPURLING,
Registrar.

[L.S.]

27 November 2009

2009 WAIRC 01279

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 55 of 2009

APPLICATION FOR A NEW AGREEMENT ENTITLED

"THE TRUSTEES OF THE MARIST BROTHERS SOUTHERN PROVINCE NON-TEACHING STAFF ENTERPRISE BARGAINING AGREEMENT, 2009"

NOTICE is given that an application was made to the Commission, on 5 November 2009, by The Independent Education Union of Western Australia, Union of Employees, under the Industrial Relations Act 1979, for registration of the above named Agreement.

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

5. - SCOPE

(1) This Agreement shall apply to those employees as defined in Clause 6. – Definitions of this Agreement employed in Western Australia by the employer as perscribed in Appendix A who are members of or are eligible to be members of the Unions party to this agreement.

(2) This Agreement provides for all conditions contained within the following Awards;

(a) Independent Schools Administrative and Technical Officers Award 1993;

(b) Independent Schools (Boarding House) Supervisory Staff Award;

(c) Independent Schools Psychologists and Social Workers Award 1996;

(d) Nurses' (Independent Schools) Award 1962.

(3) The number of employees covered by this Agreement is 31.

6. – DEFINITIONS

This Enterprise Bargaining Agreement covers the following classifications:

(1) Administrative and Technical Officers as defined in Part III, Clause 38. – Classifications of this Agreement;

(2) Boarding House Supervisors as defined in Part IV, Clause 43. – Classifications of this Agreement;

(3) Nurses as defined in Part V, Clause 48. – Wages of this Agreement;

(4) Psychologists and Social Workers in Part VI, Clause 53. – Salaries and Classifications of this Agreement.

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

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

27 November 2009

INDUSTRIAL MAGISTRATE—Claims before—

2009 WAIRC 01221

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

PARTIES	CHRISTOPHER SHARPE
	CLAIMANT
	-v-
	DAVID A KELLY
	RESPONDENT
CORAM	INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD	THURSDAY, 5 NOVEMBER 2009
DELIVERED	MONDAY, 23 NOVEMBER 2009
FILE NO.	M 48 OF 2009
CITATION NO.	2009 WAIRC 01221

Catchwords:	Respondent's alleged failure, contrary to s 74(2) of the *Industrial Relations Act 1979* (IRA), to act honestly at all times whilst carrying out his duties as Secretary of the State School Teachers' Union of W.A. (Incorporated) (SSTUWA); Respondent's alleged failure, contrary to s 74(3) of the IRA, to exercise a reasonable degree of care and diligence in carrying out his duties; Respondent's alleged use of position to obtain or seek to obtain advantage in contravention of s 74(9) of the IRA; and the Respondent's alleged failure to disclose his personal interest in a matter to the Committee of Management of the SSTUWA contrary to s 74(12) of the IRA.
Legislation:	*Industrial Relations Act 1979; ss74 and 77.*
	Industrial Magistrates (General Jurisdiction) Regulations 2005, regs 5(1), 5(2)(a), 5(2)(b), and 7(1).
Cases cited:	Clay & Ors v Clay & Ors [1999] WASCA 8.
	Naum Nikoloski v Mojak Plastics Pty Ltd [2005] WAIRC 2210.
	Richard John Powers & Ors v Austal Ships Pty Ltd [2003] WAIRC 7726.
Cases referred to in Judgement:	Imobilari Pty Ltd v Opes Prime Stockbroking Ltd (in liquidation) [2008] 252 ALR 41 at 43.
	Temwood Holdings Pty Ltd and Ors v Oscar Neil Blackburne Oliver and Ors Supreme Court of Western Australia Library No.980459 at 27
	Henderson v Templeton and Anor [2004] WASC 192 at paragraph 14
	Oldfield Knott Architects Pty Ltd v Ortiz Investments Pty Ltd [2000] WASC 255
	at paragraph 135
Result:	Claim struck out
Representation:	Mr Christopher Sharpe appeared in person.
	Mr J Fiocco of Fiocco's Lawyers appeared for the Respondent.

REASONS FOR DECISION

Background

1 In his originating claim made pursuant to sections 77 and 83 of the *Industrial Relations Act 1979* (IRA) lodged 1 September 2009 the Claimant alleges that the Respondent has failed to comply with the *SSTUWA Salary Sacrifice Arrangement Participation Agreement* (the Agreement) and further has failed, in carrying out his duties as Secretary of the State School Teachers' Union of W.A. (Incorporated) (SSTUWA), to comply with the requirements of subsections 74(2), 74(3), 74(6), 74(9), 74(11), and 74(12) of the IRA.

2 In short the Claimant alleges that the Respondent, a finance official within the meaning of s 74 of the IRA, has either misused his position or alternatively has acted carelessly and/or without due diligence and/or not in accordance with his duties and has thereby obtained benefits to which he was not entitled. The originating claim does not specifically particularise the allegations but rather contains attachments. The attachments comprise of two letters from the SSTUWA's auditors, copies of correspondence passing between the Claimant and the President of the SSTUWA, and a blank copy of the Agreement to support the claim.

3 On 25 September 2009 the Respondent lodged his particularised response denying each allegation in the claim. On 15 October 2009 the Respondent made an application pursuant to regs 5(2)(a), 5(2)(b) and 7(1)(r) of the *Industrial Magistrates Court (General Jurisdiction) Regulations 2005* (IMC(GJ)R); seeking the following:

> The claim be struck out; or alternatively
>
> The claim be dismissed and judgement entered for the Respondent; and in any event
>
> The Claimant pay the Respondent's costs of the action including today's appearance.

4 The Respondent's application which was listed on 22 October 2009 was adjourned to 5 October 2009 in order to enable the Claimant to lodge an affidavit and written submissions in response. On 3 November 2009 he lodged and served his affidavit and written submissions.

5 When the matter came on for hearing on 5 November 2009 the Claimant announced that he no longer wished to proceed with those parts of his claim relating to the Respondent's alleged failure to comply with the Agreement and alleged failure to comply with subsections 74(6) and 74(11) of the IRA. Those parts of the claim were accordingly struck out. As a result the surviving claim is with respect to the Respondent's alleged non-compliance with subsections 74(2), 74(3), 74(9) and 74(12) of the IRA.

6 The Claimant asserts that between 1 January 1999 and 16 April 2003 the Respondent received payments totalling $85,868.00 from the SSTUWA with respect to his personal motor vehicle and further that an amount of $22,818.00 was paid by the SSTUWA as a penalty to the Australian Taxation Office with respect to the Respondent's salary sacrifice arrangements for the 2000/01, 2001/02, 2002/03 financial years. He contends that such payments were not authorised by the Executive of the SSTUWA and that consequently the Respondent has obtained a financial advantage to which he was not entitled.

Determination

7 The originating claim in this matter is lacking in particulars, a fact recognised by the Claimant in submissions lodged 3 November 2009. Consequently he has sought to augment his allegations made in the originating claim by providing further details in his affidavit sworn and lodged 3 November 2009.

8 The primary issue to be determined in this application is whether as a whole the materials lodged by the Claimant discloses a reasonable cause of action assuming the truth of his allegations and drawing all the inferences in his favour (see *Imobilari Pty Ltd v Opes Prime Stockbroking Ltd* [2008] 252 ALR 41 at 43).

Allegation that the Respondent failed to act honestly

9 The most damming allegation against the Respondent is that which alleges he did not act honestly and thereby contravened subsection 74(2) of the IRA. It is a serious matter to allege dishonesty. His Honour Steytler J observed in *Temwood Holdings Pty Ltd and Ors v Oscar Neil Blackburne Oliver and Ors* Supreme Court of Western Australia Library No.980459 at paragraph 27, that it is well established that pleas of this kind must be distinctly alleged and proved. There needs to be specificity with respect to the act or acts alleged with respect to time, place and circumstances founding the alleged dishonesty. Unless sufficient particularity and evidence exists to support it, the pleadings should not be allowed to stand.

10 There is nothing in the materials lodged by the Claimant which specifically indicates how it is that the Respondent is said to have acted dishonestly. Allegations of dishonesty must be clearly and succinctly particularised (see *Henderson v Templeton and Anor* [2004] WASC 192 at paragraph 14). Justice requires the definition of the accusation brought which is different to setting out the evidence by which it is intended to establish it (see *Oldfield Knott Architects Pty Ltd v Oritz Investments Pty Ltd* [2000] WASC 255 at paragraph 135). There is nothing in the affidavit of the Claimant nor other materials that he has lodged that specifically addresses the particulars required. It is apparent from what the Claimant says in paragraph 85 of his affidavit that to a large extent the allegation relating to dishonesty flows from the Respondent's alleged failure to comply with subsections 74(9) and 74(12) of the IRA. In my view that is incapable of supporting an allegation of dishonesty.

11 The materials before the Court do not sufficiently particularise the allegation of dishonesty and accordingly that allegation should not be allowed to stand.

Alleged use of position to obtain or seek to obtain financial advantage

12 In order to support his contention that the Respondent has contravened subsection 74(9) of the IRA the Claimant is required to demonstrate with particularity when and how in each instance the Respondent has made use of his position in order to obtain advantage.

13 In paragraphs 33 and 34 of his affidavit the Claimant alleges that the Respondent has obtained a pecuniary advantage by writing a letter to the leasing company instructing it to withdraw $15,015.00 from the SSTUWA's bank account in order to pay the residual value of Respondent's leased car and further by having the ownership of that car transferred to him. In paragraph 75 of his affidavit the Claimant alleges that the SSTUWA's payment of the Respondent's personal salary sacrifice penalty for three consecutive years also constitutes the attainment of a pecuniary advantage. To support his contention, the Claimant in paragraph 84 of his affidavit, points out that the minutes of the SSTUWA's Executive Committee do not authorise the payment of the personal salary sacrifice penalty.

14 Subsection 74(9) of the IRA provides:

> "A finance official of an organisation is not to make use of the finance official's position as a finance official to obtain or seek to obtain, directly or indirectly, a pecuniary advantage for the official or for any other person or to cause or seek to cause detriment, loss or damage to the organisation."

15 Subsection 74(9) is concerned with the use of position by a financial official to obtain a pecuniary advantage. In this matter the Claimant is required to particularise how the Respondent has made use of his position in order to gain an advantage. Put another way the Claimant must specify how the Respondent has misused his position to obtain advantage.

16 The term "used" is defined in the Collins' Dictionary of English Language to mean:

> "..to behave towards … in a particular way for one's own ends."

17 It is incumbent for the Claimant to detail how the Respondent has manipulated or misused his position to gain advantage. It is not sufficient to state that money has been paid to the Respondent or that the SSTUWA has made payments to the Respondent or any other body including the Australian Taxation Office. Those matters are not in dispute in any event. What is required is a set of facts or particulars that isolate and demonstrate why it can be said that the Respondent used his position to obtain a financial advantage. That however is not demonstrated by the materials lodged by the Claimant. The mere fact that the SSTUWA has paid out the residual on respondent's vehicle, and has paid FBT liabilities, of themselves do not automatically result in a contravention of subsection 74(9) of the IRA. Similarly the transfer in ownership of the Respondent's vehicle does not of itself amount to a contravention of that subsection.

18 In so far that the Claimant asserts that the minutes of meetings of the Executive Committee of the SSTUWA do not appear to record authorisation of the various payments made to or on behalf of the Respondent, it has not been demonstrated by reference to any rule of the SSTUWA why such is necessary. Again there is a lack of particularity indicating how subsection 74(9) has been contravened in that regard.

Alleged failure to disclose a personal interest

19 Subsection 79(12) provides:

> "A finance official of an organisation who has a material personal interest in a matter involving the organisation is to disclose the nature of the interest to the committee of management of the organisation as soon as is practicable after the relevant facts come to the finance official's knowledge."

20 The Claimant makes reference to subsection 74(12) in paragraphs 81 and 83 of his affidavit, however I cannot discern anything in those paragraphs or indeed in the paragraphs to which they relate which would indicate that the Respondent has specifically failed to disclose a personal interest. There is nothing before me to indicate what that interest might be. If anything the materials before me indicate that the SSTUWA was well aware of the difficulties caused by the novation of the lease with respect to the Respondent's motor vehicle and the penalties incurred in that regard. There is simply nothing else which on its face would tend to identify what interests the Respondent failed to disclose.

21 It is incumbent for the Claimant to indicate how the Respondent has failed to disclose his interests and the particular nature of the interests that he failed to disclose. Clearly that has not been done.

Alleged failure to exercise reasonable degree of care and diligence

22 In paragraph 72 of his affidavit the Claimant alleges that the Respondent has failed to follow up executive initiated instructions concerning the SSTUWA's salary sacrifice policy. However it is not indicated how any such failure contravenes subsections 74(3) and 74(4) of the IRA.

23 Subsections 74(3) and 74(4) of the IRA provide:

> "(3) A finance official is to exercise a reasonable degree of care and diligence at all times in the performance of the functions of the finance official's office or employment.
>
> (4) The degree of care and diligence required by subsection (3) is the degree of care and diligence that a reasonable person in the finance official's position would reasonably be expected to exercise."

24 It is not indicated why the degree of care and diligence allegedly absent was capable of offending the reasonable person test set out in the aforementioned provision.

25 In paragraph 77 of his affidavit the Claimant alleges that the Respondent's failure to have the auditors advice recorded and actioned contravenes subsection 74(3) of the IRA, however it is not indicated why the Respondent was obligated to do that. In that regard there is no reference to the SSTUWA's rules. It is not indicated with the particularity required how the Respondent's actions fall outside what was expected of him. Reference to subsection 74(3) is also made in paragraph 78 of the Claimant's affidavit in which it is alleged that by failing to place the salary sacrifice penalty issue on the SSTUWA Executive

Committee's agenda the Respondent failed to carry out his duties with the care and diligence required thereby contravening subsection 74(3). That allegation is unsupported. No detail has been given as to how that formed part of the Respondent's duties under the SSTUWA rules. There is no specificity as to which SSTUWA rule was not complied with. Indeed the same applies to the allegations made in paragraph 63 of the Claimant's affidavit.

Conclusion

26 It is self evident from the materials lodged by the Claimant that his allegations are broadly based. They lack specificity as to how each of subsections 74(2), 74(3), 74(9) and 74(12) of the IRA have been contravened. It is incumbent upon him to demonstrate precisely which facts support each aspect of his claim. The Respondent is entitled to know the detail of the allegations against him. To require the Respondent to defend a claim expressed in broad generalisations is unfair and should not be permitted.

27 It is obvious that the Claimant has a notion that the Respondent has done wrong, has acted improperly, has been dishonest and thereby obtained a financial advantage. However the difficulty is that he is unable to say with any degree of preciseness how that has occurred.

28 It is quite apparent from the materials before me that the Claimant has initiated this claim without the necessary details required. He hopes that a general inspection of the SSTUWA's records to be accessed through this Court's processes may possibly reveal evidence to support his claim. The Claimant's view as to what the records will reveal is entirely speculative. What he proposes is both improper and impermissible. This Court cannot allow its processes to be used in order to facilitate or assist in a speculative investigation. Such constitutes an abuse of process. If the Claimant wants access to documents as part of an investigative process he should achieve that by other means. This is not the proper forum to achieve that end.

29 This claim against the Respondent is clearly deficient in that it lacks the specificity required to enable the Respondent to know what the case against him is. Regulation 5 of the IMC(GJ)R requires this Court to ensure that cases are dealt with justly, efficiently, economically, expeditiously, that the parties are on an equal footing and that the court's judicial and administrative resources are used as efficiently as possible. To enable this matter to proceed further would not only result in injustice to the Respondent but would also waste time and resources for all concerned.

30 Regulation 7(1)(r) of the IMC(GJ)R enables this Court to strike out a claim which does not disclose a reasonable cause of action. The Claimant has been given the opportunity to indicate with preciseness the particulars which give rise to his allegations but he has failed to do so. Any further opportunity afforded to him so as to enable him to provide the necessary detail is unlikely to resolve his problem. It is apparent that the totality of what is relied upon by him is presently before the Court but that such is insufficient. In those circumstances the matter should not be permitted to proceed further. The claim will be struck out.

31 The Clerk of Court is instructed to re-list the application and notify the parties of the hearing date when formal orders will be made.

G Cicchini
Industrial Magistrate

POLICE ACT 1892—APPEAL—Matters Pertaining To—

2009 WAIRC 01289

APPEAL AGAINST A DECISION OF THE COMMISSIONER OF POLICE TO TAKE REMOVAL ACTION.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER WALL
	APPELLANT
	-v-
	THE COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER S WOOD
DATE	MONDAY, 7 DECEMBER 2009
FILE NO/S	APPL 40 OF 2009
CITATION NO.	2009 WAIRC 01289

Result	Hearing adjourned sine die
Representation	
Appellant	Mr M Judd (by correspondence)
Respondent	Ms D Scaddan, of counsel (by correspondence)

Order

HAVING HEARD Mr M Judd on behalf of the appellant and Ms D Scaddan, of counsel on behalf of the respondent;

WHEREAS this appeal was set down for hearing for the 7th, 8th and 10th days of December, 2009;

AND WHEREAS on 24 November 2009 conciliation between the parties occurred before a Commissioner;

AND WHEREAS on 2 December 2009, the appellant requested that the hearing dates be vacated and the hearing of the appeal be adjourned pending the finalisation of the conciliation process;

AND WHEREAS on 2 December 2009, the respondent verbally advised the WAIRC that it had no objection to the request for adjournment;

NOW THEREFORE, the WAIRC, pursuant to the powers conferred on it under s 33S of the *Police Act 1892*, hereby orders -

1. THAT the hearing dates of 7th, 8th and 10th days of December, 2009 be vacated.
2. THAT the appeal be adjourned sine die.
3. THAT either party may request that the appeal be relisted.

(Sgd.) A R BEECH,
Chief Commissioner,
[L.S.] On Behalf of the Western Australian Industrial Relations Commission.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2004 WAIRC 13422

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JAMIE ALLCOCK
	APPLICANT
	-v-
	CLINTON JOHN MATTHEW HART
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 16 NOVEMBER 2004
FILE NO.	APPL 520 OF 2004
CITATION NO.	2004 WAIRC 13422

Catchwords	Industrial law – Termination of employment – Alleged harsh, oppressive and unfair dismissal and contractual entitlements – Respondent bankrupt – Commission refrains from further hearing the application – Order issued – *Bankruptcy Act 1966* (Cth) s 58, s 58(3), s 58(3)(b)
Result	Order issued
Representation	
Applicant	Mr P King as agent
Respondent	No appearance

Reasons for Decision

(Ex Tempore)

1 As foreshadowed prior to the brief adjournment I have had my Associate undertake some inquiries of the person suggested by the agent for the applicant, Mr King. Accordingly my Associate has made contact with the Insolvency and Trustee Service Australia, Western Australian Branch and she spoke with a person, Miss Jackie Riley, in the state administration. As a consequence of that telephone conversation Miss Riley has confirmed to my Associate that the respondent, Clinton John Mathew Hart, was the subject of a debtor's petition under the *Bankruptcy Act 1966* (Cth) ("the Act") filed on 14 May 2003 and as a consequence is a bankrupt for the purposes of the Act. Additionally Miss Riley has sent on fax to my Associate a copy of the relevant national personal insolvency index extract in respect of the respondent confirming what I have just said and confirming the trustee as being the official trustee in bankruptcy, and accordingly I am satisfied to the extent that I need to be that the respondent is a bankrupt for the purposes of the Act.

2 It is also the case therefore, as I outlined earlier this morning, that the respondent being a bankrupt by reason of s 58 of the Act, all property of a bankrupt vests forthwith in the official trustee and the effect of s 58(3) of the Act is to stay any proceedings that have been, or are to be, commenced against the bankrupt for the obvious reason that the bankrupt's property is brought in to the custody of the official trustee for the benefit of all creditors.

3 I am satisfied that the proceedings before this Commission constitute a legal proceeding in respect of a provable debt for the purposes of s 58(3)(b) of the Act, in particular the applicant's claim for denied contractual benefits in the form of salary and wages and other benefits and additionally there is a claim against the bankrupt for harsh, oppressive and unfair dismissal in relation to which he seeks compensation for loss and injury.

4 Accordingly the Commission has no choice, perhaps regrettably for the applicant, but to stay these proceedings and these proceedings cannot continue any further except with the leave of the court, and that being usually the Federal Court of Australia or the Federal Magistrate's Court on such terms as the court may think fit.

5 So in those circumstances, Mr King, regrettably for your principal, in my view these proceedings will have to be stayed in the interim.

2004 WAIRC 13375

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JAMIE ALLCOCK
	APPLICANT
	-v-
	CLINTON JOHN MATTHEW HART
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 22 NOVEMBER 2004
FILE NO/S	APPL 520 OF 2004
CITATION NO.	2004 WAIRC 13375

Result	Order issued
Representation	
Applicant	Mr P King as agent
Respondent	No appearance

Order

HAVING heard Mr P King as agent on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

THAT until further order the Commission refrains from hearing the herein application.

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

2009 WAIRC 01205

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAUL ERIKU ANDRUGA
	APPLICANT
	-v-
	MR MOSES PUSHPANADEN NATURAL STONE GALLERY
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 17 NOVEMBER 2009
FILE NO/S	B 183 OF 2009
CITATION NO.	2009 WAIRC 01205

Result Discontinued

Order

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

WHEREAS on 19 October 2009 the applicant lodged a Notice of Withdrawal or Discontinuance with respect to the application;

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

THAT this application be, and is hereby discontinued.

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

2009 WAIRC 01206

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES PAUL ERIKU ANDRUGA

APPLICANT

-v-

MR MOSES PUSHPANADEN
NATURAL STONE GALLERY

RESPONDENT

CORAM COMMISSIONER J L HARRISON
DATE TUESDAY, 17 NOVEMBER 2009
FILE NO/S U 183 OF 2009
CITATION NO. 2009 WAIRC 01206

Result Discontinued

Order

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

WHEREAS on 19 October 2009 the applicant lodged a Notice of Withdrawal or Discontinuance with respect to the application;

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

THAT this application be, and is hereby discontinued.

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

2009 WAIRC 01198

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES PHILLIP FRANCES ASTONE

APPLICANT

-v-

CAT WELFARE SOCIETY INC.

RESPONDENT

CORAM ACTING SENIOR COMMISSIONER P E SCOTT
DATE MONDAY, 16 NOVEMBER 2009
FILE NO/S U 100 OF 2009
CITATION NO. 2009 WAIRC 01198

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 22nd day of April 2009 the Commission convened a conference for the purpose of conciliating between the parties, however, agreement was not reached; and

WHEREAS on the 31st day of July 2009 the Commission convened a conference for the purpose of scheduling a hearing; and

WHEREAS the application was set down for hearing and determination on the 16th day of September 2009; and

WHEREAS on the 10th day of September 2009 the applicant's representative advised the Commission that the applicant did not wish to proceed with the matter; and

WHEREAS on the 3rd day of November 2009 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
[L.S.] Acting Senior Commissioner.

2009 WAIRC 01215

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ALAN CHARLES CARSTAIRS

APPLICANT

-v-

CITY OF WANNEROO

RESPONDENT

CORAM COMMISSIONER J L HARRISON
DATE THURSDAY, 19 NOVEMBER 2009
FILE NO/S U 81 OF 2009
CITATION NO. 2009 WAIRC 01215

Result Discontinued
Representation
Applicant Mr K Trainer (as Agent)
Respondent Mr P Brunner (of Counsel)

Order

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

WHEREAS the Commission listed a conference on 11 June 2006 for the purpose of conciliating between the parties, which date was later changed at the request of the applicant to 17 July 2009; and

WHEREAS at the conference on 17 July 2009 no agreement was reached between the parties; and

WHEREAS on 29 July 2009 the Commission wrote to the parties about listing a preliminary issue of jurisdiction raised in the respondent's amended Notice of Answer and Counter-proposal lodged in the Commission on 24 July 2009; and

WHEREAS on 20 August 2009, and prior to the preliminary issue being listed for hearing, the respondent's representative advised the Commission that the respondent was no longer pursuing the issue of jurisdiction; and

WHEREAS on 20 August 2009 the Commission wrote to the parties about listing the substantive matter for hearing; and

WHEREAS on 26 August 2009 the applicant's representative requested that the listing of the matter be delayed to allow time for a further offer of settlement to be put to the respondent for consideration; and

WHEREAS on 31 August 2009 the applicant's representative advised the Commission that the parties were continuing to have discussions with respect to settling the matter; and

WHEREAS on 7 October 2009 the Commission wrote to the applicant requesting advice about the status of the matter; and

WHEREAS on 7 October 2009 the applicant's representative advised the Commission that the matter had been settled; and

WHEREAS on 12 November 2009 the Commission wrote to the applicant requesting advice as to when a Notice of Withdrawal or Discontinuance form was to be lodged in the Commission; and

WHEREAS on 18 November 2009 the applicant filed a Notice of Discontinuance in respect of the application; and

WHEREAS on 19 November 2009 the respondent consented to the matter being discontinued;

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

THAT this application be, and is hereby discontinued.

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

2009 WAIRC 01218

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BERYL CATHERINE CLARK
	APPLICANT
	-v-
	GERALDTON FAMILY ADVOCACY SERVICE
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	MONDAY, 23 NOVEMBER 2009
FILE NO	U 98 OF 2009
CITATION NO.	2009 WAIRC 01218
Result	Application discontinued

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 30 July 2009 at the conclusion of which the matter was adjourned; and

WHEREAS the applicant advised the Commission on 13 November 2009 that she wanted to discontinue the application; and

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

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

THAT the application be and is hereby discontinued

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

2009 WAIRC 01207

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHRISTOPHER COURTMAN
	APPLICANT
	-v-
	HORIZON WEST LANDSCAPE CONSTRUCTIONS
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	TUESDAY, 17 NOVEMBER 2009
FILE NO	U 160 OF 2009
CITATION NO.	2009 WAIRC 01207

Result	Order made to substitute the respondent
Representation	
Applicant	Mr C Courtman
Respondent	Clayton Utz

Order

WHEREAS Counsel for the respondent, by letter dated 6 November 2009, sought to have the respondent identified as Albra Investments Pty Ltd t/a Horizon West Landscape Constructions; and

WHEREAS the applicant by telephone on 17 November 2009, consented to the change of respondent's name;

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

THAT the name of the respondent be deleted and substitute instead the name, Albra Investments Pty Ltd t/a Horizon West Landscape Constructions.

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

2009 WAIRC 01212

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHRISTOPHER COURTMAN
	APPLICANT
	-v-
	ALBRA INVESTMENTS PTY LTD T/A HORIZON WEST LANDSCAPE CONSTRUCTIONS
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	TUESDAY, 17 NOVEMBER 2009
FILE NO	U 160 OF 2009
CITATION NO.	2009 WAIRC 01212

Result	Application discontinued
Representation	
Applicant	Mr C Courtman
Respondent	Clayton Utz

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 19 October 2009 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.

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

2009 WAIRC 01196

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEON DE WAAL
	APPLICANT
	-v-
	MR AND MRS ZENON KURZECKI T/A WEST COAST MARBLE AND GRANITE
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 16 NOVEMBER 2009
FILE NO	U 133 OF 2009
CITATION NO.	2009 WAIRC 01196

Result	Application discontinued
Representation	
Applicant	Mr K Trainer (as agent)
Respondent	Mr Z Kurzecki

Order

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

AND WHEREAS on 15 September 2009 the Commission convened a conference for the purpose of conciliating between the parties;

AND WHEREAS at the conclusion of the conference no agreement was able to be reached between the parties;

AND WHEREAS on 3 November 2009 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

2009 WAIRC 01238

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOANNA DUNSTAN
	APPLICANT
	-v-
	LINDSAY ROBESON - RAY WHITE ROBESON & ASS.
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 27 NOVEMBER 2009
FILE NO/S	B 28 OF 2009
CITATION NO.	2009 WAIRC 01238

Result	Application dismissed

Order

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

WHEREAS on the 17th day of April 2009 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties reached an agreement in principle in respect of the application; and

WHEREAS there were further discussions between the parties as to the details of the agreement; and

WHEREAS the applicant did not return calls made by the Commission to ascertain the status of the application; and

WHEREAS by a letter dated the 9th day of November 2009 the Commission directed the applicant to advise the Commission of her intentions regarding the application no later than 4.00 pm on the 17th day of November 2009 and that if she had not contacted the Commission by that time it would be assumed that she did not wish to proceed with the application and an order of dismissal would issue; and

WHEREAS by 4.00 pm on the 17th day of November 2009 the applicant had not contacted the Commission;

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

THAT this matter be, and is hereby dismissed

(Sgd.) P E SCOTT,
[L.S.] Acting Senior Commissioner.

2009 WAIRC 01203

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SUSAN LINDA ELSON
	APPLICANT
	-v-
	CALTEX CARMART NOMINEES PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 17 NOVEMBER 2009
FILE NO/S	U 152 OF 2009
CITATION NO.	2009 WAIRC 01203

Result	Discontinued
Representation	
Applicant	Ms S Elson on her own behalf
Respondent	Mr W Thorniley

Order

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

WHEREAS on 15 October 2009 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the respondent was given time to consider its position; and

WHEREAS on 21 October 2009 the respondent made an offer to settle the matter; and

WHEREAS on 21 October 2009 the applicant accepted the offer of settlement; and

WHEREAS on 22 October 2009 the Commission wrote to the applicant about lodging a Notice of Withdrawal or Discontinuance form; and

WHEREAS on 30 October 2009 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 1 November 2009 the respondent consented to the matter being discontinued;

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

THAT this application be, and is hereby discontinued.

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

2009 WAIRC 01229

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHANNON JOHN EPIS
	APPLICANT
	-v-
	DENMARK OFFICE TECHNOLOGY
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
HEARD	TUESDAY, 10 NOVEMBER 2009
DELIVERED	WEDNESDAY, 25 NOVEMBER 2009
FILE NO.	U 110 OF 2009
CITATION NO.	2009 WAIRC 01229

Catchwords	Termination of Employment - Claim of harsh, oppressive or unfair dismissal - Principles applied - Application upheld - Reinstatement impracticable - Compensation ordered - Compensation for Injury ordered - *Industrial Relations Act 1979* (WA) s 29(1)(b)(i)
Result	Application Upheld
Representation	
Applicant	Mr S Epis on his own behalf
Respondent	Ms D Carman (as agent)

Reasons for Decision

(Given extemporaneously at the conclusion of the proceedings

as edited by the Commissioner)

1 On 10 June 2009 Shannon John Epis ("the applicant") lodged an application in the Commission pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act") against Denmark Office Technology ("the respondent") claiming that he was unfairly dismissed from his employment on 6 May 2009. The respondent disputes that the applicant was unfairly terminated and maintains that it was appropriate to summarily terminate him.

Applicant's evidence

2 The applicant gave evidence that he was employed by the respondent as a computer technician between 5 March 2007 and 6 May 2009. Initially he was employed by J and M Electronics and his employment was transferred to the respondent on or about 27 October 2008. Whilst employed by the respondent the applicant worked on a full-time basis of 38 hours per week and his duties included building and repairing computers, installing hardware and software and removing viruses. In addition he liaised with customers and assisted with the other activities relevant to the respondent's business which included the sale of art supplies, stationery and general office products.

3 When the applicant was terminated his hourly rate of pay was $17.18 (see Exhibit A3).

4 The applicant gave evidence that the respondent had no issues with his performance and the way in which he undertook his role and he stated that the respondent was pleased with the quality of his work (see Exhibit A2).

5 The applicant gave evidence that towards the end of April 2009 he had a discussion with the respondent's owner Ms Michelle Simcock about a restructure of the respondent's business and during this discussion Ms Simcock told him that she wanted him to work part-time over three days per week working approximately 20 hours per week. The applicant stated that he was happy with this arrangement as it would give him more time to spend with his family.

6 The applicant worked full-time with the respondent until he was terminated on 6 May 2009. The applicant gave evidence that on 6 May 2009 Ms Simcock provided him with his new roster which showed that he would be working approximately 16 hours per week which was less than the part-time hours originally discussed with Ms Simcock. When the applicant expressed dissatisfaction with this roster to Ms Simcock and told her that he should have been given two weeks' notice of the change to his hours so that he could seek out alternative employment she responded by saying that if he did not like working 15 hours per week then he could work 10 hours per week. The applicant gave evidence that Ms Simcock refused to give him notice of the change in hours and told him that if he was unhappy with the proposed arrangement he should leave. The applicant gave evidence that during this discussion Ms Simcock refused to terminate him and he refused to leave given his family commitments and the need for him to have a job. The applicant stated that eventually Ms Simcock told the applicant to leave. The applicant gave evidence that he continued to work at the respondent's premises for the rest of the afternoon and that when he left at around 5.00 pm Ms Simcock told him not to bother coming the next day as his services were no longer required. The applicant then asked Ms Simcock for an employment separation certificate and payment for the previous week however, he only received a copy of the separation certificate after the respondent sent it to Centrelink. The applicant gave

evidence that when he went home on 6 May 2009 he contacted Wageline and then sent an email to Ms Simcock about his entitlements. The applicant stated that in response he received a letter from Ms Simcock in which she alleged he had been terminated due to misconduct, which he disputed (see Exhibit A1).

7 The applicant is seeking the payment of notice given that he disputes that he misconducted himself at the time of his termination and he is also seeking the payment of 15.65 hours in annual leave entitlements owing to him and not paid to him when he was terminated (see Exhibit A3).

8 The applicant maintains that he suffered injury as a result of his termination. The applicant gave evidence that he suffered from depression whilst working with the respondent and the applicant maintains that this illness was exacerbated by the actions of Ms Simcock on 6 May 2009 given the manner of his termination as Ms Simcock treated him in a derogatory manner and told him that he was inefficient. The applicant gave evidence that subsequent to his termination he sought assistance from his local general practitioner as well as his psychiatrist and the applicant tendered a letter in support of his illness due to his treatment by Ms Simcock from Dr Prathalingam dated 20 July 2009 (see Exhibit A4). The applicant maintains that his depression is ongoing and there are days when he cannot work due to illness. The applicant gave evidence his depression was exacerbated after his termination as the respondent did not provide an employment separation certificate in a timely manner and when the respondent did so to Centrelink there was confusion as to the reason for his termination.

9 The applicant gave evidence that as at 15 May 2009 he had obtained casual employment as a bottle shop attendant earning approximately $20 per hour, which is ongoing, and he also undertakes freelance computing duties from home earning on average approximately $300 to $400 per week.

10 The applicant denied that he verbally abused Ms Simcock on the afternoon of 6 May 2009 and even though he conceded that he made statements about the way in which Ms Simcock conducted the respondent's business and made claims about her mismanagement of the shop he maintained that he was not abusive or loud towards her. The applicant could not recall if customers were in the shop at the time of his conversation with Ms Simcock.

11 The applicant denies that Ms Simcock asked him to leave on the afternoon of 6 May 2009 and return to work the following day.

12 The applicant gave evidence that superannuation entitlements owing to him have not been paid into his account since November 2008.

13 Under cross-examination the applicant gave evidence that his depression was caused by work issues and not by any other circumstances such as family pressures or a motorbike accident he had some years previously.

14 The applicant stated that four persons were present in the workshop on the afternoon of 6 May 2009 and after Ms Simcock told him that she did not want the customers in the workshop whilst she was away from the premises he asked them to leave the workshop when she left the shop, which they did, and they went out to the front of the business into the shop area. The applicant maintained that it was necessary for the persons whose computers he was fixing to be present in the workshop so that they could explain to him what was wrong with their computers and it was also necessary for him to clarify faults with customers. The applicant maintained that it was Ms Simcock who intimidated him on the afternoon of 6 May 2009 and not the reverse and the applicant stated that if Ms Simcock was distressed as a result of his discussion with her that afternoon it was not a deliberate act on his part. The applicant conceded that both he and Ms Simcock raised their voices during what he described as an intense discussion, but he claimed he did not shout at Ms Simcock.

Respondent's evidence

15 Ms Simcock stated that as the respondent was experiencing financial difficulties the respondent's accountant conducted a review of the business which was completed in April 2009. This review recommended that the cost of repairing computers be increased and the way in which this service was delivered be changed and as a result Ms Simcock had a discussion with the applicant on 28 April 2009 about reducing his hours to between 15 to 20 hours per week over three days of the week. Ms Simcock stated that on 5 May 2009 she produced a roster to this effect but this roster was not given to the applicant until 6 May 2009 after he returned to work.

16 Ms Simcock stated that on the afternoon of 6 May 2009 she was at the respondent's shop at approximately 4.00 pm in the afternoon and the applicant told her that he was unhappy with his new roster and Ms Simcock told him to go home and calm down and come back the next day. Ms Simcock gave evidence that during her discussions with the applicant that afternoon he requested that she terminate him on at least three occasions and Ms Simcock stated that she felt very uncomfortable at the time as she was being abused by him. Ms Simcock stated that she became distressed as a result of her interactions with the applicant and as she was emotionally fragile due to issues in her personal life at the time she contacted a friend Ms Glenda Marteene to attend the respondent's premises which she did. Ms Simcock gave evidence that the applicant then attended to another customer and left the respondent's premises and Ms Simcock told him not to return.

17 Ms Simcock gave evidence that as a result of financial difficulties that the respondent was experiencing superannuation payments had not been made into the applicant's account since November 2008.

18 Ms Simcock stated that it was unusual for customers whose computers were being fixed to be behind the counter as their presence interfered with her ability to undertake her work.

19 Ms Simcock gave evidence that the applicant took approximately six weeks off work for depression in February and March 2009 when his child was born and she stated that she felt some sympathy for the applicant at the time. Ms Simcock maintained that the applicant's depression was from stressors apart from his job.

20 Under cross-examination Ms Simcock conceded that the respondent's business was in difficulties due to her personal problems and because of financial pressures.

21 Ms Simcock gave evidence that she terminated the applicant in response to the applicant maintaining that he wanted to leave the respondent and Ms Simcock stated that she was a bit surprised by this because she understood that the applicant was happy to work less than full-time hours. Ms Simcock stated that when the applicant asked to be terminated on three occasions she then believed it was appropriate to terminate him. Ms Simcock denied that she summarily terminated the applicant so she would not have to pay his outstanding entitlements. Ms Simcock said that she required an employee to undertake computer repairs and she denied that the applicant would only be rostered on for 15 hours per week under the new roster. Ms Simcock stated that she did not ask customers who were behind the counter to leave on the afternoon of 6 May 2009 because she did not believe that it would be professional to do so.

Submissions

22 The applicant maintains that he did not misconduct himself on the afternoon of 6 May 2009 and he was therefore unfairly terminated. The applicant also concedes that as he obtained alternative employment as at 15 May 2009, apart from one week's pay, he did not suffer any financial detriment as a result of his termination.

23 The respondent maintains that given the applicant's actions on the afternoon of 6 May 2009 it was appropriate to summarily terminate him. The respondent maintains that the applicant should not be compensated for injury because he was already suffering depression at the time he was terminated.

Findings and conclusions

Credibility

24 The central issue with respect to this application relates to what occurred between the applicant and Ms Simcock on the afternoon of 6 May 2009. I listened carefully to the evidence given by both the applicant and Ms Simcock. In my view the applicant gave his evidence honestly and to the best of his recollection and in a forthright manner and I take into account that his evidence was corroborated by documentation tendered during these proceedings. Even though the applicant had just returned from sick leave and he may have been a bit emotional on the day he was terminated, in my view he was not as distressed as Ms Simcock that afternoon. On this basis I accept the evidence given by the applicant.

25 Whilst I accept that Ms Simcock endeavoured to give her evidence to the best of her recollection I find that some of her evidence about her discussions with the applicant on the afternoon of 6 May 2009 was unconvincing. I formed the view that it may well have been the case, particularly given the personal difficulties that Ms Simcock was experiencing at the time of the applicant's termination that her memory may not have been as accurate as possible with respect to the events of the afternoon of 6 May 2009. In making these comments they are not a criticism of Ms Simcock as I appreciate that at the time Ms Simcock was experiencing a range of difficulties which could well have impacted on her recollection about the events surrounding the applicant's termination. In the circumstances I have more confidence in the applicant's recollection as to the specific events of what took place on the afternoon of 6 May 2009 than the recollection of Ms Simcock and where there is any conflict in the evidence I prefer the evidence given by the applicant.

26 This dismissal was summary in nature and the onus is on the applicant to demonstrate the dismissal was unfair on the balance of probabilities. However, there is an evidential onus upon the employer to prove that summary dismissal is justified (see *Undercliffe Nursing Home v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* [1985] 65 WAIG 385 and *Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers* [1988] 68 WAIG 677 at 679).

27 I find that the applicant commenced employment at the respondent's premises as a computer technician on 5 March 2007 with J and M Electronics and I also find that his service and conditions of employment were transferred across to the respondent on or about 1 November 2008 as confirmed by the respondent. It was also not in dispute and I find that the terms and conditions of the applicant's employment were those contained in the *Electronic Industry Award No A22 of 1985* ("the Award"). However, after reviewing the Award it does not appear that the respondent is bound by it.

28 Given my views on witness credit I make the following findings about the events of the afternoon of 6 May 2009. I find that there was an altercation between the applicant and Ms Simcock that afternoon over the hours the applicant was to work with the respondent subsequent to that date. I find that the applicant was content to work reduced hours but not the 15 hours per week as advised to him by Ms Simcock by way of a new roster as he had previously been informed by Ms Simcock that he would be working approximately 20 hours per week. Even though I accept the respondent's evidence that it was necessary to reduce the applicant's hours in order to ensure that the business operated more efficiently I find on the evidence that the 15 hours that Ms Simcock offered to the applicant was less than the hours that he was initially advised in April 2009. I find that when a discussion took place between the applicant and Ms Simcock about the reduced hours the applicant was to work, Ms Simcock was also frustrated and annoyed with the applicant that afternoon as four customers had been with the applicant behind the counter however, I accept the applicant's evidence that when asked to remove these persons from behind the counter the applicant did so. I find that as a result of the tension between the applicant and Ms Simcock during their discussions that afternoon Ms Simcock eventually told the applicant that he was terminated. I find that when Ms Simcock refused to terminate the applicant and the applicant refused to leave, Ms Simcock then decided to terminate the applicant and I find that she did so by telling him not to attend work the next day on the basis that his services were no longer required. Even though Ms Simcock felt intimidated by the applicant and as a result she contacted a friend to come to the respondent's premises, I accept the applicant's evidence that he did not abuse Ms Simcock, nor was he aggressive towards her. I find that a stalemate effectively occurred between the applicant and Ms Simcock and I find on the evidence that Ms Simcock did not ask him to leave that afternoon and return the following day. Given my views on witness credit I find that when the applicant questioned Ms Simcock about the hours he was to work with the respondent he did not behave in such a manner as to warrant summary termination and I find that at the time the applicant did not misconduct himself. In the circumstances I find that the applicant was unfairly terminated by the respondent.

Compensation

29 The applicant is not seeking reinstatement and I am satisfied on the evidence that the working relationship between the applicant and the respondent has broken down such that an order for reinstatement or re-employment would be impracticable particularly given the altercation between the applicant and Ms Simcock on the afternoon of 6 May 2009.

30 I therefore now turn to the question of compensation. I apply the principles set out in *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 78 WAIG 3635 and *Tranchita v Wavemaster International Pty Ltd* (1999) 79 WAIG 1886. On the evidence I am satisfied that the applicant took reasonable steps to mitigate his loss as he obtained employment approximately one week after he ceased employment with the respondent, earning at least what he was earning with the respondent.

31 As I have already found that the relationship between the applicant and the respondent had broken down by the afternoon of 6 May 2009 given the nature of the altercation between the applicant and Ms Simcock I find that in the circumstances the applicant would not have remained working with the respondent any longer than a further week which is the timeframe for terminating the applicant on notice (see Clause 6 of the Award). It is the case that this timeframe is effectively the loss that the applicant suffered as a result of his termination as he obtained alternative employment on 15 May 2009 earning on average the same or if not more wages than he was earning with the respondent. I will therefore order that the amount of one week's pay in lieu of notice be paid to the applicant by the respondent.

32 The respondent concedes that the applicant is owed superannuation entitlements under the *Superannuation Guarantee (Administration) Act 1992* and as this is a compulsory payment to be made to employees by the employer I will therefore order that an amount of $1,175.20 by way of superannuation entitlement be paid to the applicant. I have worked this out on the basis of $58.76 per week by 20 weeks per year based on the 9 per cent levy. I also note that this payment is to be made by the consent of the parties. As I have found that the applicant should not have been summarily terminated I will order that the applicant be paid his annual leave entitlement in the amount of 15.65 hours at $17.18 per hour, which comes to a sum of $268.87.

33 The applicant is claiming compensation for injury. The notion of injury must be treated with some caution (see *AWI Administration Services Pty Ltd v Andrew Birnie* (2001) 81 WAIG 2849). In *AWI Administration Services Pty Ltd v Birnie* (op cit) at 2862 Coleman CC and Smith C (as she was then) observed:

> "It is accepted that there is an element of distress associated with almost all employer initiated terminations of employment. For injury to be recognised by way of compensation and thereby fall outside the limits which can be taken to have normally been associated with a harsh, oppressive or unfair dismissal there needs to be evidence that loss of dignity, anxiety, humiliation, stress or nervous shock has been sustained. Injury embraces the actual harm done to an employee by the unfair dismissal. It comprehends 'all manner of wrongs' including being treated with callousness (*Capewell v Cadbury Schweppes Australia Limited* (1998) 78 WAIG 299)."

34 In order for the applicant to be successful with respect to a payment of this nature he must demonstrate a link between his illness and the actions of the respondent as well as evidence of his illness. I accept the applicant's evidence as confirmed by the letter from Dr Prathalingam that his pre-existing depression was exacerbated by the events surrounding his termination however, I also note that the applicant was well enough to obtain alternative employment as at 15 May 2009. In the circumstances I will order that the applicant be paid $200 for injury.

35 A minute of proposed order will now issue.

2009 WAIRC 01230

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHANNON JOHN EPIS
	APPLICANT
	-v-
	DENMARK OFFICE TECHNOLOGY
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 25 NOVEMBER 2009
FILE NO/S	U 110 OF 2009
CITATION NO.	2009 WAIRC 01230

Result	Application upheld
Representation	
Applicant	Mr S Epis on his own behalf
Respondent	Ms D Carman (as Agent)

Order

HAVING HEARD Mr S Epis on his own behalf and Ms D Carman as agent on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby:

1. DECLARES THAT Shannon John Epis was unfairly terminated by the respondent.
2. ORDERS that the respondent pay the applicant $652.84 gross as one week's pay in lieu of notice.
3. ORDERS that the respondent pay the applicant $268.87 gross in annual leave entitlements owing to the applicant.
4. ORDERS that the respondent pay the applicant $200 as compensation for injury.
5. ORDERS, by consent, that the respondent pay the applicant $1,175.20 in outstanding superannuation entitlements.

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

2009 WAIRC 01204

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHELLE FANALI
	APPLICANT
	-v-
	PGA OF AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 17 NOVEMBER 2009
FILE NO/S	U 141 OF 2009
CITATION NO.	2009 WAIRC 01204
Result	Discontinued

Order

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

WHEREAS the Commission listed a conference on 11 September 2009 for the purpose of dealing with scheduling issues with respect to an issue of jurisdiction raised by the respondent; and

WHEREAS on 10 September 2009 the applicant advised the Commission that she did not wish to proceed with the matter and the conference was vacated; and

WHEREAS on 7 October 2009 the Commission wrote to the applicant about lodging a Notice of Withdrawal or Discontinuance form; and

WHEREAS on 13 November 2009 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 17 November 2009 the respondent consented to the matter being discontinued;

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

THAT this application be, and is hereby discontinued.

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

2009 WAIRC 01200

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN FOSTER
	APPLICANT
	-v-
	SIGNSWEST
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 16 NOVEMBER 2009
FILE NO/S	B 90 OF 2009
CITATION NO.	2009 WAIRC 01200

Result Application dismissed

Order

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

WHEREAS on the 1st day of July 2009 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the applicant sought time to consider his position; and

WHEREAS on the 12th day of August 2009 the applicant advised the Commission that agreement had not been reached; and

WHEREAS on the 4th day of September 2009 the Commission convened a conference for the purpose of scheduling a hearing and at that time the parties reached an agreement in relation to the application; and

WHEREAS on the 7th day of October 2009 the applicant advised the Commission that the matter had settled; and

WHEREAS on the 9th day of November 2009 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
[L.S.] Acting Senior Commissioner.

2009 WAIRC 01199

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN FOSTER
	APPLICANT
	-v-
	SIGNSWEST
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 16 NOVEMBER 2009
FILE NO/S	U 90 OF 2009
CITATION NO.	2009 WAIRC 01199

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 1st day of July 2009 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the applicant sought time to consider his position; and

WHEREAS on the 12th day of August 2009 the applicant advised the Commission that agreement had not been reached; and

WHEREAS on the 4th day of September 2009 the Commission convened a conference for the purpose of scheduling a hearing and at that time the parties reached an agreement in relation to the application; and

WHEREAS on the 7th day of October 2009 the applicant advised the Commission that the matter had settled; and

WHEREAS on the 9th day of November 2009 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
[L.S.] Acting Senior Commissioner.

2009 WAIRC 01211

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RICHARD MACPHERSON
	APPLICANT
	-v-
	BAGIOS HOLDING PTY LTD T/A KARDINYA TAVERN
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 17 NOVEMBER 2009
FILE NO/S	U 164 OF 2009
CITATION NO.	2009 WAIRC 01211
Result	Application dismissed

Order

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

WHEREAS by a Notice of Hearing dated the 30th day of October 2009, the Commission advised the applicant that a hearing would be convened on the 17th day of November 2009 at 9.00 am for the applicant to show cause why the application should not be dismissed; and

WHEREAS at the hearing on the 17th day of November 2009 there was no appearance for or by the applicant;

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

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
[L.S.] Acting Senior Commissioner.

2009 WAIRC 01194

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KAY ELISSA MCINTOSH
	APPLICANT
	-v-
	PRESIDENT CAT WELFARE SOCIETY
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 16 NOVEMBER 2009
FILE NO/S	U 40 OF 2009
CITATION NO.	2009 WAIRC 01194

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 22nd day of April 2009 the Commission convened a conference for the purpose of conciliating between the parties, however, agreement was not reached; and

WHEREAS on the 31st day of July 2009 the Commission convened a conference for the purpose of scheduling a hearing; and

WHEREAS the application was set down for hearing and determination on the 16th day of September 2009; and

WHEREAS on the 10th day of September 2009 the applicant's representative advised the Commission that the applicant did not wish to proceed with the matter; and

WHEREAS on the 3rd day of November 2009 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
[L.S.] Acting Senior Commissioner.

2009 WAIRC 01301

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LYNETTE MCSHERRY

APPLICANT

-v-

LINDSAY ROBESON (T/A RAY WHITE REAL ESTATE ROBESON & ASSOC)

RESPONDENT

CORAM COMMISSIONER S WOOD
DATE TUESDAY, 8 DECEMBER 2009
FILE NO B 22 OF 2009
CITATION NO. 2009 WAIRC 01301

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 matter came on for hearing on 20 October 2009 at which time the parties adjourned to conference and the matter was settled; and

WHEREAS the applicant advised the Commission on 8 December 2009 that she wanted to discontinue the application; and

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

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

THAT the application be and is hereby discontinued

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

2009 WAIRC 01308

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ELGIN NOGALIZA
	APPLICANT
	-v-
	BENALE PTY LTD (ACN 003 630 822) ATF FLETCHER UNIT TRUST T/AS FLETCHER INTERNATIONAL WA
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	FRIDAY, 11 DECEMBER 2009
FILE NO	B 203 OF 2009
CITATION NO.	2009 WAIRC 01308

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 3 December 2009 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

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

2009 WAIRC 01293

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GARRY RAYMOND O'DONNELL
	APPLICANT
	-v-
	BEGA GARNBIRRINGU HEALTH SERVICE ABORIGINAL CORPORATION
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 7 DECEMBER 2009
FILE NO/S	U 94 OF 2009
CITATION NO.	2009 WAIRC 01293

Result	Discontinued
Representation	
Applicant	Mr G O'Donnell on his own behalf
Respondent	Mr S Bibby as agent

Order

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

WHEREAS on 10 June 2009 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties sought time for further discussions; and

WHEREAS on 25 June 2009 the applicant advised the Commission that the parties had reached an agreement; and

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

FURTHER on 9 October 2009 the Commission wrote to the applicant by electronic mail requesting that a Notice of Withdrawal or Discontinuance form be lodged in the Commission by no later than the close of business on 16 October 2009; and

WHEREAS as a Notice of Withdrawal or Discontinuance form was not lodged in the Commission by 16 October 2009 the matter was listed for a show cause hearing on 9 December 2009 and the applicant was advised that non-attendance by the applicant at these proceedings would result in an order being issued dismissing the application for want of prosecution; and

WHEREAS on 26 November 2009 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application and the hearing was vacated; and

WHEREAS on 26 November 2009 the respondent consented to the matter being discontinued;

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

THAT this application be, and is hereby discontinued.

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

2009 WAIRC 01236

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANN MARIE PIPER
	APPLICANT
	-v-
	GH AND NI WESTLEY
	RESPONDENT
CORAM	COMMISSIONER S WOOD
HEARD	THURSDAY, 15 OCTOBER 2009
DELIVERED	THURSDAY, 26 NOVEMBER 2009
FILE NO.	U 150 OF 2009
CITATION NO.	2009 WAIRC 01236

CatchWords	Unfair dismissal – No valid reason for termination – Lack of notice – Fair go all round not afforded - Reinstatement impracticable – No mitigation – Industrial Relations Act 1979 (WA) s.29(1)(b)(i)
Result	Applicant dismissed unfairly; compensation awarded
Representation	
Applicant	Mr J A Piper
Respondent	Mr I S Dhu

Reasons for Decision

1 The applicant, Mrs Ann Piper, alleges that she was dismissed unfairly from her employment as a part-time bus driver. In her application she sought reinstatement and claimed as follows:

> "My husband and I have been school bus drivers since February 2008.
>
> On July 1st this year my husband (who had driven for Mr & Mrs Westley) and I exchanged bus routes with the full agreement of our then employers.
>
> I worked for Mr and Mrs Westley from 1st to 3rd July (which was the end of term.) When I received my pay cheque there was a note attached saying: "Thanks Anne –welcome aboard – catch up with you during the holidays, Nola and Geoff".
>
> During the school holidays my husband became aware that he may have been underpaid by Mr and Mrs Westley during the 17 months he worked for them.
>
> He made enquiries of the Public Transport Authority and they confirmed that indeed he had been underpaid the rate agreed in the contract between the Department and Mr & Mrs Westley.
>
> On Saturday July 18th 2009, Mrs Westley contacted my husband on the telephone accusing him of disloyalty etc. because, unknown to him the P.T.A. had required Mr and Mrs Westley to produce their accounts for audit by the Department. The phone call was terminated with assurance from Mrs Westley that she would contact her union and get back to him.

On Monday the 20th July at 11am Mrs Westley 'phoned me and informed me that my services were no longer required as she would be driving the Yealering school bus.

This dismissal was harsh because:

- I was dismissed, peremptorily over the telephone without any thoughts for my feelings.
- The effect of this dismissal has caused me sleepless nights and affected my wellbeing.
- It has affected not only my financial position but financial independence.
- It is a spiteful act, which appears to have been done to me because of my husband's reasonable enquiries regarding his previous employment with Mr and Mrs Westley.
- Although I was aware of my husband's actions I took no part in them. The only part I took was to get dismissed.

This dismissal was unfair because:

- I have been "punished" because of my husbands actions in seeking clarification of his wages whilst employed by Mr & Mrs Westley.
- Mr and Mrs Westley were happy to employ me as their driver and indeed made me feel welcome at the end of the previous term and looked forward to me driving for them in the future.
- I had an unblemished record as a school bus driver.
- I had never been spoken to regarding my performance**.**
- Mrs Westley is being disingenuous in saying she will drive the bus, as she lives 300 Kms away and in the long term will require a permanent driver.
- I was dismissed without warning.
- I was given no opportunity to make representations to her regarding this matter."

2 Mrs Piper states in her application that she was employed from 1 July to 20 July 2009 and worked 15 hours per week at the rate of $21.17 per hour. Mrs Piper actually worked three days, ie 1 to 3 July 2009, followed by school holidays and then on 20 July 2009 she was dismissed by Mrs Westley over the telephone.

3 The respondent's Notice of Answer and Counterproposal states:

> "Dispute the grounds of unfair dismissal claim on the grounds of lack of jurisdiction. Under the Fair Act Australia 2009, employee had not been employed for greater that 12 months and the business is a small business with less that 15 employees.
>
> Wages – bus drivers employed under Transport Workers (Passenger Vehicles) Award which sets out minimum wages and hours. Clause 8.13 of the contract is between the Minister and the Contractor and operates only between these two parties. The Contract is not a contract with the employee and the employee cannot claim and entitlement to which it is not a party."

4 These issues of jurisdiction were not pursued at hearing. In any event the second issue has no relevance and as to the first issue the respondent business is a partnership, not a trading corporation, and falls within the jurisdiction of this Commission.

5 The uncontested background is that Mr Piper had worked previously for the respondent. Mrs Piper drove school buses for another employer. Mr and Mrs Piper decided to see if they could swap bus rounds and Mr Piper approached both employers to that effect. This arrangement was agreed to take effect from the start of the financial year.

Evidence

6 Mrs Piper was asked whether she had looked for work since her dismissal. She stated, "A little bit but at my age I'm not qualified for an awful lot now, so I felt that I …as I was probably not going to get a job or one I enjoyed as much as bus driving that when a school bus contract came up for sale I went ahead and bought it." This bus contract starts on 26 October 2009. She went on to say that she had looked in the local newspaper but that there was, "very, very little in there", and that there was no one to speak to about a job.

7 Mrs Piper says that she used to work as a hairdresser in the past but that she now has carpal tunnel syndrome and arthritis in her wrists.

8 Mrs Piper says that in May 2009 she asked her husband whether the two of them could swap bus runs, which meant also changing employers. She felt her bus run was too difficult as she encountered too many kangaroos and her bus was big and difficult to clean. She says that the bus her husband drove was newer, airconditioned and the bus route was all on bitumen. Mr Piper approached both employers who were happy to make the swap as of 1 July 2009 to coincide with the taxation year.

9 She says that there was no written contract; they simply swapped, "runs under the same agreements that we'd had with our previous employers". She drove for the respondent for three days and then Mrs Westley included a note with her pay cheque which read, "Thanks Ann. Welcome aboard. Catch up with you during the holidays, Nola and Geoff". She says that at that time she expected to go back to work when school restarted after the holidays.

10 During the school holidays Mr and Mrs Piper spoke with a gentleman from a motor firm who was also a bus contractor. He suggested that Mr Piper had been underpaid whilst employed by Mr and Mrs Westley. Mr Piper sought clarification from the

Public Transit Authority. He was advised to raise the matter with Mrs Westley, which he attempted to do. Mrs Westley telephoned him before he could make contact with her. Mrs Piper says that she overheard loud shouting during that telephone conversation, but that her husband was not shouting.

11 Mrs Piper says that she was sacked by Mrs Westley the day before school started. She was told, "I'm dispensing with your services. I'm driving the school bus myself." (T10). Mrs Piper says that there had been no warnings and that she had done nothing wrong at all. Mrs Piper says, "I was distraught. I was upset. I was emotional, um, I just felt absolutely awful, and I couldn't see why another woman would do ... do that to me out of spite when her dispute should have been with my husband." (T12)

12 Mrs Piper says that when the new school term commenced she went to find out whether Mrs Westley was telling the truth about driving the bus run herself. She says that for the first four days of the first week and five days of the second week Mrs Westley did not drive the bus. She says that Mrs Westley probably only drove the bus about three out of the ten weeks of the school term. Mrs Piper says that Mrs Westley left a cheque for $20 in backpay in her letterbox the Friday after she was dismissed.

13 Under cross-examination Mrs Piper denied that Mrs Westley had asked Mr Piper to tell her that she needed to let Mrs Westley know by the Monday before the new school term whether she wanted to be employed by the respondent. She denied also that she was not confident about driving the bus run, driving on gravel or on a major truck route. She says that she is not questioning her wages at all. Mrs Piper says, "She gave me no reasons at all other than to say she was driving the bus herself which is quite untrue."

14 Mr Dhu for the respondent submitted that Mrs Westley had to put a relief driver on due to her family circumstance and because she had not heard from Mrs Piper. Mrs Piper's evidence is, "it was left with my husband. Nola said she was going to contact her union and get back to him. She did get back, not to him, to me, to sack me". She was asked whether she knew that she had to contact Mrs Westley about her employment and responded, "No. I heard shouting. I heard my husband trying to calm her down but what was actually said, no, I can't absolutely swear to hearing anything of that, and had I have known I would've phoned her up, but if ... if ... why didn't she phone me? I was her bus driver".

15 Mr Jeffery Piper gave evidence on behalf of the applicant. He says that term three was to start on 21 July 2009. Mr Piper says about the conversation he had with Mrs Westley on 18 July:

> "Nola was very angry and upset. Um, she accused me of disloyalty, but I was no longer her employee, but she also accused me of accusing her of being a rip-off merchant, that I was ... that she was unlawfully withholding wages from me. She was upset and she was angry and I tried to explain that all I had done was make what I thought was reasonable inquiries of my employment package with her and what had come out of that was ... you know, was not what I was actually anticipating at all. I was anticipating to get a reply. I could've been completely wrong and to actually ... and if I was told I was right to come and discuss the matter with her, and that's really what I wanted to do but she put the telephone down and her remarks were, "I will speak to my union on Monday." Er, there was never any assertion or request by her in relation to her taking over the bus or Ann doing anything. It was never mentioned. Ann was never mentioned at all. It was a conversation between me and her over my letter to the PTA and presumably what had come out of that." (T22)

16 Mr Piper says that for the first two weeks of term he was still driving a bus and could see who was driving Mrs Westley's bus. He says that Mrs Bell drove the bus for the first week, Mrs Westley for weeks 2 and 3, and for weeks 4 to 10 there were three other drivers. He says that most days his wife and he went out to check who had driven the bus and that Mrs Westley would have driven the bus 15 days in 10 weeks. Under cross-examination Mr Piper says that, when he telephoned her to ask to swap the bus routes, Mrs Westley replied straight away that she had no objections.

17 Mrs Nola Westley gave evidence for the respondent. She says that she has made a decision to sell the buses. She says of her conversation with Mr Piper on 18 July 2009 that:

> "I was a little bit upset that Jeff couldn't come and speak to me, um, about it. He had to go to the department and get information on my personal and private contract between me and the minister, um, so I was a little bit upset about that. Um, he did go on about the hours I paid him and said I had to pay him four hours which I do not. Then the conversation went ... and I said, "Well, Ann ... if Ann wants to drive for me three hours ... I need to know whether she wants to continue to be a driver for me or not. " Could she let me know. Um, the conversation ended, "I will contact my union and speak to my union," as I wasn't quite paying the right hourly rate which I told him." (T28)

18 She says further,

> "when I hadn't had a phone call back by the Monday from Ann stating whether she was going to driver for me or not I didn't quite know what I was going to do as ... because of unforeseen circumstances I ... later that day I could not get back to drive for the first week, um, so I then rang a relief driver to see if I could get her to drive my bus as I cannot just get anybody off the streets to drive my school bus, um, which is what happens." (T28)

19 Mrs Westley says that Mrs Bell did drive for her the first week of term and she drove the bus herself the second week. Then due to an unforseen family situation she could not drive the bus regularly.

> "I didn't ring Ann because from my professional ... from my professional feelings of being a school bus driver I do not ... I do not feel confident with her behind the steering wheel of my school bus and I just can't put her behind the steering wheel. The bus route is a very dangerous bus route. There are lots of hills. It's very narrow roads. You have to go off. It is the main drive to the cattle ... to the sheep sale yards. I, in myself, have to feel confident with my driver to protect the children on the bus. I don't believe I have time to give warnings because it could be too late. After doing this I spoke to my driver who has been driving with me for four years and told him what I had done and he even expressed his feelings of concern ... as Ann as a school bus driver." (T29)

20 Mrs Westley says that she checked the bus on the Monday and it was not cleaned. She says Mrs Piper was paid for those services and she should have completed them on Friday, 3 July. She says she made the decision for the following reasons:

> "I made the decision to keep my children on the school bus safe and from my professional point of view. My safety to my children is my number one concern. I have had dealings with Ann in the last 13 weeks, with her temper. Her display of temper at the roadhouse, um, has made me realise ... plus another incident at the school with her pulling the bus in, into a ... she was in the bus. She stopped at the intersection because a young child ceased to step out in front of the bus." (T30)

21 Under cross-examination Mrs Westley says that she felt pressured to make the swap of bus drivers as Mr Piper had a confrontation with a student and she thought she would lose his services. She says that Mrs Piper was not her choice of driver. Mrs Westley says that she was concerned about Mrs Piper's driving as she had spoken to her previous employer who mentioned that Mrs Piper had burnt out a clutch and had driven a bus with an oil light on. Mrs Westley, in relation to the light coming on, admitted that there had been a problem with the timing belt, and Mrs Piper had been assured it would be fixed and it was not. Mrs Westley says that she did not feel confident with Mrs Piper behind the wheel of her bus. She did send a note to Mrs Piper after the first three days of driving and in that note said, "Many thanks". She says that she always said this to her drivers when she paid them.

22 Mrs Westley says of the conversation with Mrs Piper on 20 July 2009 that she did raise her intention to sell her buses. She says:

> "You never expressed that view?---I, I did when I rang Ann up and spoke to Ann. When I make the phone call to Ann to tell her that I was going back to Corrigin to drive my own bus, um, I thanked her very much for her time. Ann went very quiet. She did not say anything. I wasn't sure what else I was supposed to say. I did thank her for her services. So with that I just thanked her and put the phone down." (T33)

23 Of her discussion with Mr Piper on 18 July 2009 Mrs Westley says:

> "I told you to ask ... I told you that I was paying the three hours and if Ann wanted to still be employed with me and drive my bus that she would need to give me a ring and let me know ... have a think about it and let me know whether she still did want to continue to drive for me." (T33)

24 Mrs Westley was later asked by the Commission the following:

> "In that conversation you say you told Mr Piper that if his wife wanted to work for three hours then she was to call you?---Yes.
>
> That's what you say?---Yes.
>
> Correct?---Correct, yes.
>
> All right. So the follow-up question to that is an obvious one and that is: given that you expected her to call you to tell you if she wanted to work, were you expecting her to work the next term?---Um, no, because I was going back to drive the school bus myself.
>
> So why would you ask Mr Piper to put that question to his wife if you had already decided you're going back to drive the bus yourself? It's inconsistent, is it not?---It is inconsistent. I'm sorry. Um, sorry. I, um, um ... I can't answer, sorry. Do I have to answer? I just - - -" (T34)

25 Mrs Westley was then asked why, if she had concerns about Mrs Piper's competence as a driver, was she expecting as of 18 July 2009 Mrs Piper to telephone her to advise her if she wanted to work for her. Mrs Westley replied:

> "Yes. She ... I would've, oh, I would say, yes, but it was after that phone call when the school bus ... I had checked the school bus and the duties had not been fulfilled, um, and then, um, the driving ... just my feeling on her driving was ... yes, I, after that, made the decision that I wanted to go back to drive my own school buses, um, to find ... to make that decision to put them on the market, um, yes. So that would have been after that phone call on the 18th, I think." (T35)

26 She later had the following exchange with Mr Piper:

> "I go to the question of fill-in drivers. Why didn't you actually decide to keep Ann on as a fill-in driver? You're suddenly desperate for a driver because you couldn't get down from Mandurah. Why not keep her on?---Because I was not confident in Ann as driving ... her driving abilities and her abilities to do the duties that needed to be done, cleaning buses, checking oil ... um, after the bus I had got checked ... after the 18th they weren't done. I was not confident and - - - " (T35)

27 Mrs Westley says that she drove the bus for 5 or 6 weeks of the school term. There were a number of relief drivers also during the term.

28 Mr Dhu in closing for the respondent stated that Mrs Westley had to make the decision to dismiss Mrs Piper in the interests of the safety of the children and because she had decided to sell the buses.

29 Mr Piper in closing stated that a number of accusations put in the hearing that were adverse to his wife were put for the first time, and had never been raised previously.

Considerations

30 I have laid out a fair amount of the evidence verbatim so that it is clear for the parties what was the actual, relevant evidence given at hearing. However, this matter in my mind is a very simple one. It is the case that Mrs Piper drove the bus route for the respondent for three days, ie 1 to 3 July 2009. She expected to resume work on 21 July 2009 and there is no evidence to the contrary. She could have expected to work to the end of the school term which would have been (according to my diary)

25 September 2009. A period of nine weeks and four days. The fourth term was due to commence on 12 October 2009 in this State and the day of hearing was 15 October 2009. Hence as at the day of hearing there was also four days of potential loss of work during the fourth term. I will deal later with the issue of mitigation and actual loss.

31 Mrs Piper's expectation of ongoing employment is somewhat reinforced by the evidence of Mrs Westley that she expected Mrs Piper to telephone her, after Mrs Westley had spoken to Mr Piper on 18 July 2009, to let her know if she (Mrs Piper) wanted to continue in the job. This suggests a willingness on the part of Mrs Westley, as of 18 July 2009, to continue to employ Mrs Piper. Even if this was the message given to Mr Piper, and I do not consider that to be the case, it was for Mrs Westley as the employer to contact Mrs Piper and speak with her about the matter. Mrs Piper, an employee of the respondent, had given no indication that she intended to leave, so if some new condition was then to be placed on the contract, Mrs Westley needed to deal with Mrs Piper about that.

32 Mrs Westley gave inconsistent and unconvincing evidence that her mind changed between 18 and 20 July 2009 about a range of things that then led her to dismiss Mrs Piper. Mrs Westley would have the Commission believe that in that period she alternatively decided that Mrs Piper was not a competent driver (albeit she seeks to rely also on matters she says that she has discovered since the dismissal), that Mrs Westley decided to sell her buses, and that Mrs Westley decided that she was going to drive her own bus. I note that as at the time of hearing, the buses had not been sold. The only real evidence that points to a possible change of mind at that time about Mrs Piper's abilities was the failure of Mrs Piper to have cleaned her bus on 3 July 2009, rather than at the start of term. Mrs Westley says that she discovered this on 20 July 2009. As of 3 July 2009, Mrs Westley seemed happy about Mrs Piper's performance when she sent her a note of thanks.

33 It should be noted that the respondent's real complaint about Mrs Piper's driving, which was a point reinforced by Mr Dhu in submission on behalf of the respondent, and in the evidence of Mrs Westley, was a concern for the safety of the children. Yet Mrs Piper drove for Mrs Westley for three days, was thanked for her work and then she did no other driving for her prior to her dismissal on 20 July 2009. The suggestion then that the issue of child safety arose at that time can be given little weight.

34 It is relevant also that Mrs Westley chose to engage another driver in the first week of term, rather than employ Mrs Piper. If the decision to sell her bus or to drive the route herself had been a prime reason for the dismissal, then there was no reason why Mrs Piper could not have filled in at that time. This is except for any concerns as to child safety which I have just addressed and which I dismiss as not a plausible reason.

35 In my mind, what is perfectly clear is that Mr Piper's challenge to Mrs Westley about whether he had been paid the correct rate of pay whilst employed by the respondent upset her tremendously. Two days later Mrs Westley telephoned Mrs Piper and dismissed her as a consequence. I consider that to be the most probable explanation of events. It is the case that Mrs Piper had no warning or notice of her dismissal. She was not paid any notice in lieu at the time of termination. It is common ground that the position was one of a part-time driver and not a casual driver. The period of notice, given her age and length of service, should have been one week. That is a loss Mrs Piper has suffered as a consequence of the dismissal.

36 In the matter of *Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385 at 386 Brinsden J states:

> "The jurisdiction has been variously stated: in re Loty and Holloway v. Australian Workers' Union (1971) A.R. 95 at 99 Sheldon J. said that even though in the dismissal be it summary or on notice, the employer has not exceeded his common law and/or award rights, the Court was entitled to enquire as to whether the employee had received "less than a fair deal". He also approved what had been said in an earlier case whether there had been "a fair go all round".
>
> ……
>
> As His Honour points out the question to be investigated is not a question as to the respective legal rights of the employer and the employee but a question whether the legal right of the employer has been exercised so harshly or oppressively against the employee as to amount to an abuse of that right."

37 My finding is that Mrs Westley dismissed Mrs Piper as Mr Piper had queried the rate of pay paid to him by Mrs Westley when he was employed by her. Mr Piper was entitled to query his rate of pay and his query had nothing to do with his wife's employment. In these circumstances clearly Mrs Piper's dismissal was unfair, and made more so by the absence of any payment of notice. I reject the other explanations given by Mrs Westley for the dismissal for the reasons given above.

38 The relationship between Mrs Piper and Mrs Westley has very clearly broken down and can not be re-established. Therefore reinstatement is not practicable. The questions then to be addressed are whether Mrs Piper has sought to mitigate her loss, her actual loss and hence whether any compensation is payable to her.

39 As stated, her loss includes the loss of the payment of notice. That is one week of pay at the rate of $21.17 per hour for 15 hours per week (as per her application the accuracy of which she attested to). This totals $317.55 for one week of pay. Her maximum loss could have amounted to 10 weeks and 3 working days to the date of hearing. However, this must be assessed against whether Mrs Piper can be said to have sought to mitigate her loss. I find that Mrs Piper failed to mitigate her loss as at the time of hearing for the following reasons.

40 It is the case that she has purchased a bus route which is due to start on 26 October 2009. This is an act of mitigation, but does not explain what Mrs Piper was doing during the period up to the date of hearing. Both parties were unrepresented at hearing and unfamiliar with the procedures of the Commission. After much instruction to both parties it still proved difficult for the parties to adhere to proper procedure rather than simply debate matters in Court. As the Commission required certain details to be able to decide the application, the Commission questioned Mrs Piper as to the steps she took in mitigation. Her immediate response was:

"Have I looked? A little bit but at my age I'm not qualified for an awful lot now, so I felt that I ... as I was probably not going to get a job or one I enjoyed as much as bus driving that when a school bus contract came up for sale I went ahead and bought it. I do do a little bit of voluntary work." (T6)

41 Mrs Piper later went on the say that she had simply looked at the local newspaper. Additionally, Mrs Piper was on her own evidence affected badly by her dismissal. She was so caught up with her dismissal that on the evidence of both Mr and Mrs Piper they kept regular checks on the bus route which Mrs Piper had driven. Mrs Piper's evidence is also that she used to be a hairdresser but now suffers carpal tunnel syndrome and cannot hence seek employment as a hairdresser, and that her age and the country location limit her employment prospects.

42 I am confident that Mrs Piper's first and spontaneous answer represents the true position. She decided that she was probably not going to get a job she enjoyed as much as driving the bus and hence made very little effort to find another job. I so find.

43 Her previous employment I assume did not require a qualification except for the appropriate driving license and perhaps a certification for working with children. A range of unskilled work could then potentially be said to be reasonable alternate employment. Mrs Piper by her own evidence did not look for work except to have a look in the local newspaper. She made no application or approach to prospective employers. I discount the fact that she says she was hindered by her age as she says she wanted to work and had previously been working. In my view I am not entitled to presume some age discrimination may have operated at large; if this is in fact what Mrs Piper is suggesting. What is clear to me is that what she wanted was to continue to drive the bus. As stated, in the circumstances I find that Mrs Piper has failed to seek to mitigate the loss suffered by her dismissal. Of course any loss must be causally linked to the dismissal if compensation is to be awarded.

44 The issues of mitigation, loss and as a consequence compensation were dealt with at length by the Full Bench in two decisions in the matter of *Merredin Customer Service Pty Ltd as Trustee for Hatch Family Trust t/a Donovan Ford/Merredin Nissan and Donovan Tyres v Roslyn Green* 87 WAIG 2771 and at 2789. The Hon A/President stated:

"41. With respect I also think the Commissioner erred in stating in paragraph [49] that reasonableness in this context is not objective or "*an assessment from the view point of a reasonable and prudent person*". In my opinion there is an objective element within the concept of reasonableness in the present context. This opinion is supported by *Leigh v Quito Pty Ltd t/as Benara Nurseries* [2000] WADC 38 at [61] and [62], *Karabotsos v Plastex Industries Pty Ltd* [1981] VR 675, *Cubillo v Commonwealth (No 2)* (2000) 103 FCR 1 at [1522] and *Sherson and Associates Pty Ltd v Bailey* (2000) NSWCA 275 per Heydon JA at [77], quoted with approval by Mason P (Beazley JA agreeing) in *Castle Constructions Pty Ltd v Fekala Pty Ltd* (2006) 65 NSWLR 648 at [57]. *In Karabotsos* Kaye J (with whom McGarvie J agreed) at pages 680 and 683 accepted the correctness of the observation of Gobbo J in *Glavonjic v Foster* [1979] VR 536 at 540 that the appropriate test was whether a reasonable man in the circumstances as they existed for the claimant, would have taken the same course. This was in the context of a personal injury claim. Heydon JA in *Sherson* referred to the taking of such steps "*as a reasonably prudent man in his [the claimant's] position would have taken to avoid further loss to himself*". There is an objective component in both of these formulations, which in my opinion expresses the correct position for the purposes of assessing mitigation under *the Act*."

45 Mrs Piper took little or no reasonable steps to avoid further loss. She wanted to resume driving the bus and was caught up in her dismissal. She kept a close and daily eye on who drove the bus. The dismissal was clearly difficult for her to come to terms with, however, this difficulty does not mean that some claim for compensation for injury can be sustained given that dismissals are often by their nature difficult for individuals (see the Full Bench decision in *Nicholas Richard Lynam –v- Lataga Pty Ltd* 81 WAIG 986).

46 The Hon. A/President outlined at paragraph 48 of the initial *Green* decision the following points in summary about compensation and mitigation:

"48. The reasons of the majority in *Curtis*, which have not been questioned in any subsequent Full Bench or Industrial Appeal Court decisions, brought together some of the strands of reasoning in the earlier decisions. The points made by the majority may be summarised as follows:-

(a) Section 23A(6) of *the Act* provides for the payment of an amount of compensation for loss and injury caused by the dismissal.

(b) In the context of an unfair dismissal application mitigation means the taking of reasonable steps to minimise the financial impact upon an employee of their unfair dismissal.

(c) Mitigation was considered relevant to the assessment of compensation by the Commission before the introduction of s23A of *the Act*, and has continued relevance both because of the need to assess loss and its specific mention in s23A(7).

(d) As there is a connection between the concepts of causation of loss and mitigation, s23A(7) insofar as it refers to the employee, may have been legislatively unnecessary. This connection was recognised and developed in *Sealanes* at [101]-[105].

(e) The reasons in *Sealanes* were quoted with approval by the majority in *Curtis*. (In those reasons there were quotations from a number of cases of high authority. Some of them will be referred to below).

(f) If it can be established that there has been a failure by an applicant to reasonably mitigate loss, the total amount of income they have not received from the lack of continued employment with their former employer may not be the total of the loss "*caused by*" the unfair dismissal for the purposes of s23A(6) of *the Act*.

(g) It is for an employer respondent to establish on balance a failure to take reasonable steps to mitigate.

(h) Whether reasonable steps to mitigate have been taken is a question of fact, dependent upon an evaluation of the facts and circumstances of the case."

47 He then went on to deal with the issue which had been raised in that matter as to onus and nominal compensation. He later stated with the full support of the other member of the Full Bench that:

"80 There is a difficulty in determining the orders which should be made in this appeal. This is because apart from the reference to nominal compensation the appellant did not make any submission to the Full Bench about the extent to which the respondent's reasonable failure to mitigate had exacerbated her loss. Accordingly in my view the Full Bench is not yet in a position to assess the extent which the loss of the respondent could have been lessened if she had made reasonable attempts to mitigate. The Commissioner found that but for the unfair dismissal the employment of the respondent with the appellant would have lasted at least a further six months. This finding of fact is not challenged on appeal and must in my opinion be taken into account in assessing compensation. In my opinion however it cannot be said that the loss of wages by the respondent over the whole of that period was caused by the unfair dismissal. At least some of it was caused by her failure to mitigate. The difficulty is in deciding that amount.

81 In deciding compensation the Commission is also required by s23A(7)(a) of the Act to take into account the efforts of the former employer to mitigate loss. Here the appellant paid the respondent two week's wages instead of providing notice. This amount must be taken into account in assessing loss. (See Dellys v Elderslie Finance Corporation Ltd (2002) 82 WAIG 1193).

82 Additionally it is my preliminary view that in assessing the respondent's compensation the Full Bench may take into account the unskilled nature of her employment with the appellant, the level of wages she earned and hours worked in that employment, the buoyancy of the Western Australian economy and statistics about the rate of unemployment. Using this evidence and information the Full Bench could make a reasoned determination, on balance, of the extent of the loss caused by the dismissal."

48 It is the case, given my finding as to mitigation, I find that the total potential loss of 10 weeks and 3 days was not 'caused by' the dismissal. Therefore an assessment needs to be made of the factors endorsed by the Full Bench in the *Green* decision at paragraph 82 of that decision.

49 The nature of Mrs Piper's work was not strictly unskilled, but was not a skilled or qualified occupation. She worked for $21.17 per hour and for 15 hours a week. Hence the difficulty of finding a job to replace the rate of pay and the number of hours can be said to be less than say a qualified, full-time job. As for the buoyancy of the Western Australia economy this was addressed by the Commission at the last State Wage Case. The State Wage bench stated:

"41. The evidence and the supporting material before the Commission, particularly from the Department of Treasury and Finance, but not solely from that source, shows a vastly different economic environment on this occasion from the economic environment on the last three occasions. This is shown too by the supporting material from the CCIWA and from the submissions of the ARA and the AHA. Some indicators show the State to be in a healthy position. WA's Real Gross State Product increased by 5.2% which is higher than the national growth of 3.7%. Real Gross State Income growth over 2007-08 was the fastest of the States at 12%. Perth's CPI for the year to the March quarter was 2.2%. Inflation peaked in September 2008 and is expected to decline markedly over 2009. The WPI for Perth in the year to December 2008 at 5.7% was the fastest growth of the States although the WPI in the retail trade grew by less than the long-run average growth rate.

42. However, labour market conditions have started to deteriorate from late 2008. Weakening domestic demand is likely to result in slower wages growth in the next two years. Demand for labour has softened and this is expected to continue in the medium term. Some businesses have implemented hiring freezes and redundancies. The number of short term unemployed has risen sharply. The State's unemployment rate reached 4.9% in March 2009 which is its highest rate since September 2004. Although falls in global commodity prices have been partly offset by the decrease in the Australian dollar since mid-2008, now the dollar has started to pick up while commodity prices continue to decline.

43 The level of business investment is likely to remain high for the rest of 2008-09 providing a short-term buffer to the weakening in other sectors, however investment is likely to fall once current projects are completed. The State's labour participation rate is expected to drop from its record high as the labour market deteriorates. The annual average growth rate of the CPI for Perth is expected to soften to 3.5% for the 2008-09 financial year."

50 Clearly the Western Australian economy has deteriorated since the time of the *Green* decision. I note that the *Green* decision also involved employment in a country location; namely Merredin. The Full Bench in *Green* went on to discuss the issue of a 'period of adjustment' post termination. The A/Hon President stated:

"21. The issue of when it is reasonable for a person to commence looking for work after their employment has ended is a question of fact, dependent on the circumstances. As discussed in my primary reasons it is a question of what a reasonable person would have done in the circumstances of the wronged employee. On the particular facts of this case I think that allowance should be made for a period of adjustment for the respondent in coming to terms with a dismissal which was found to be unfair, making an assessment of her position and then trying to obtain alternative employment. This is because of the following:-

(a) In giving her evidence it is clear, from the transcript, that the respondent had been upset by what had happened.

(b) The experience that she described in the workplace involving unfair treatment by another employee.

(c) The way she found out about the real reason for her dismissal. The respondent was initially told by Mr Hatch that he could not afford to keep her on. In her evidence the respondent said that she was "*really upset though I could understand his position…*". (T8).

(d) The respondent took a sensible first step towards getting another job by asking for a reference. She did this by sending an email to the appellant.

(e) A couple of days after her dismissal the respondent was told by someone she knew that worked near the appellant's workplace that it looked like there was another car cleaner being employed there.

(f) Shortly afterwards the respondent went to the appellant's workplace to find out about the reference and collect her pay. She spoke to Mr Hatch and was told they had a new car cleaner and that the reason she had been dismissed was that she "*didn't do a good job"*. In response the respondent said that she was "*really really hurt"* and "*shocked"* and walked out. (T11).

22. In my opinion on the facts of this case a period of two weeks should be allowed for the adjustment referred to. I emphasize however that this does not mean that this is an appropriate allowance to be made in every case. Also it is not a back door way of obtaining compensation for injury for what might be described as the ordinary disappointments of losing a job. It is simply recognition that the allowance may be justified on the facts where the circumstances are such that a reasonable person in the position of the wronged employee would take a period to adjust to their position before seeking other work."

51 In Mrs Piper's case I would similarly allow a period of adjustment of four weeks and add this to the period of notice of one week that should have been paid and was not. Therefore I would award a total loss of 5 weeks; being a total of $1,587.75 less any taxation payable to the Commissioner of Taxation. This amount to be paid to the applicant within 7 days of the date of the order.

52 I have decided on a period of adjustment of four weeks for the following reasons. The situation of Mrs Piper has some parallel to that of Mrs Green in relation to the unskilled nature of the job, hours and a low rate of pay. Mrs Green did seek some work albeit work she was not qualified for, and the Full Bench made allowance for this. Both women were in country locations in the Wheatbelt. Principally, however the economy has worsened and it can be assumed that jobs relatively might have been more difficult to find in Mrs Piper's case, if she had really looked for one. I make some allowance also for the fact that the dismissal was sudden, was the day before she was to resume work and that she took the dismissal badly.

53 As I am required to under s.35 of the Act, I will issue the order expressing my decision in Minute form.

2009 WAIRC 01287

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANN MARIE PIPER
	APPLICANT
	-v-
	GH AND NI WESTLEY
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	FRIDAY, 4 DECEMBER 2009
FILE NO	U 150 OF 2009
CITATION NO.	2009 WAIRC 01287

Result	Applicant dismissed unfairly; compensation awarded
Representation	
Applicant	Mr J A Piper
Respondent	Mr I S Dhu

Order

HAVING heard Mr J A Piper on behalf of the applicant and Mr I S Dhu on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby:

DECLARES that the applicant, Ann Marie Piper, was dismissed unfairly by the respondent on the 20th day of July 2009;

DECLARES that reinstatement is impracticable;

ORDERS that the said respondent do hereby pay to Ann Marie Piper, as and by way of compensation, the amount of $1,587.75 gross less any taxation that may be payable to the Commissioner of Taxation, within 7 days of the date of this order.

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

2009 WAIRC 01190

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEVEN JAMES RANN
	APPLICANT
	-v-
	MCMASTER TRANSPORT PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	THURSDAY, 12 NOVEMBER 2009
FILE NO	B 105 OF 2009
CITATION NO.	2009 WAIRC 01190

Result	Application dismissed for want of jurisdiction
Representation	
Applicant	Mr S Rann
Respondent	Mr A McMaster and Mrs T McMaster

Order

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

WHEREAS the Commission listed the matter for hearing on 13 October 2009; and

WHEREAS the respondent provided a certificate of Registration certifying that the Mc Master Transport Pty Ltd is a registered company under the Corporations Act 2001; and

WHEREAS the respondent is engaged primarily in the transport and delivery of goods; and

WHEREAS there was no evidence or submission on behalf of the applicant; and

WHEREAS the Commission finds that the respondent is a trading corporation;

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 WOOD,
[L.S.] Commissioner.

2009 WAIRC 01191

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEVEN JAMES RANN
	APPLICANT
	-v-
	MCMASTER TRANSPORT PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	THURSDAY, 12 NOVEMBER 2009
FILE NO	U 105 OF 2009
CITATION NO.	2009 WAIRC 01191

Result	Application dismissed for want of jurisdiction
Representation	
Applicant	Mr S Rann
Respondent	Mr A McMaster and Mrs T McMaster

Order

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

WHEREAS the Commission listed the matter for hearing on 13 October 2009; and

WHEREAS the respondent provided a certificate of Registration certifying that the Mc Master Transport Pty Ltd is a registered company under the Corporations Act 2001; and

WHEREAS the respondent is engaged primarily in the transport and delivery of goods; and

WHEREAS there was no evidence or submission on behalf of the applicant; and

WHEREAS the Commission finds that the respondent is a trading corporation;

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 WOOD,
[L.S.] Commissioner.

2009 WAIRC 01300

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NICHOLAS READ
	APPLICANT
	-v-
	ROBERT BRODIE-HALL; LEATHER-LIFE
	RESPONDENT
CORAM	COMMISSIONER S WOOD
HEARD	MONDAY, 23 NOVEMBER 2009, TUESDAY, 24 NOVEMBER 2009
DELIVERED	TUESDAY, 8 DECEMBER 2009
FILE NO.	U 161 OF 2009, B 161 OF 2009
CITATION NO.	2009 WAIRC 01300

CatchWords	Unfair Dismissal - Denied Contractual Benefit - Reference - Use of language and inappropriate behaviour in workplace - Industrial Relations Act 1979, s29(1)(b)(i) and (ii)
Result	Applications dismissed
Representation	
Applicant	Mr N Read
Respondent	Mr D Jones and with him Mr M Haylett

Reasons for Decision

1 The applicant Mr Nicholas Read, was employed by the respondent for the period from July 2008 to 20 August 2009. The respondent manufactures Ugg boots and Mr Read worked in their factory in Cannington helping to produce these boots. Mr Read alleges that he was dismissed unfairly on 20 August 2009 after Paula Brodie-Hall, the daughter of the proprietors and the Assistant Manager, assaulted him. He claims also a denied contractual benefit being:

> "That employer refer me to other employers, as per our agreement (contract law) see tape, specifically the Corruption and Crime Commission of WA and other employers who I make application to. See Attachment B and Attachment G."

2 In response, the respondent's complaints about the applicant are contained largely in a letter of warning of 17 July 2009 [Exhibit A1] and a letter of dismissal of 19 August 2009 [Exhibit A2]. These letters read as follows:

"WRITTEN WARNING OF INAPPROPRIATE BEHAVIOUR [Exhibit A1]

"I am aware that on Wednesday, July 15 during lunch break, you initiated a verbal confrontation with 2 employees which, at best, was inappropriate and at worst, was aggressive and abusive by language, tone and gesture.

Even though I was not present to witness the incident, I have no reason to doubt that the incident as reported, did occur and posed a real threat to the personal safely of those concerned and represented a serious breach of the "duty of care" I owe to all employees, which I will not condone. You need to think very carefully before you react spontaneously to any inferences you may draw from otherwise normal conversation.

If you have issues with other employees, especially the women, or for that matter with the way I conduct this business, you should reconsider your suitability to continue working in this environment. I will not tolerate situations which intimidate or threaten the personal safely or well being of myself, Paula or any other member of my staff.

I will give you some directives to consider which may influence your decision to continue in this employment.

1. You should not engage in conversation that by language, tone or gesture, deteriorates into confrontation or argument, (no swearing, no shouting, no offensive gestures). Just walk away.
2. Do not engage in conversation or correspondence of a suggestive or sexual nature. There are enforceable penalties for sexual harassment in the work place for which I am responsible.
3. Any issues you have with the way I run my business should be addressed to me. I will decide whether or not to deal with them.
4. Do not concern yourself with anyone else's time card. They are none of you business.
5. Do not make notes on your time card or in any way suggest what you should be paid.

You should consider these points over the weekend before deciding how to respond. I regard this incident as a serious disruption to the operation of the business and this letter will be retained as a reference should another or similar incident occur in the future."

"NOTICE OF TERMINATION OF EMPLOYMENT [Exhibit A2]

I am taking this action because your recent attitude towards me and others, particularly as displayed this morning has become intolerable and in my view constitutes a threat to the duty of care I owe all employees which I will not ignore.

Your termination is effective from 10.00am on Wednesday, August 19th 2009. You will be payed up to the close of business the same day.

Furthermore, you will be payed:

a) 2 weeks wages in lieu of notice

b) Any accumulated sick leave entitlements

c) Accumulated annual leave

These amounts will be credited to your bank account at the end of the current pay period.

A statement of settlement will be sent to your postal address.

A separation certificate is included with this notice.

You should advise the Superannuation fund of any change of address."

3 The background is that there were incidents in April, July and August 2009 about which the respondent complains primarily. The respondent did not undertake any counselling or disciplinary action against Mr Read over the incident in April. In relation to this incident, the facts about the events leading to Mr Read challenging police officers at the Cannington Police station to a sprint race are in dispute. However, it is common ground that after the police officers did not take up the challenge, Mr Read wrote a letter to Police Woman Joe, Cannington Police Station [Exhibit R1] and handed a copy of that letter to Paula Brodie-Hall at work. The letter stated in part:

"I take my prize. This is what I want, one young curvy, beautiful, redhead – female (no children). She may be a member of the public or a prostitute. If she is contemplating being a prostitute I could take her now (before). If she is a prostitute I would only be interested in her if she has been in the industry for a short period of time."

4 The letter of warning then concerns an incident at the workplace on 15 July 2009 which involved the applicant, Mrs Katie Howley (a machinist) and Ms Bianca Andrews (the Quality Controller). Mr Read maintains that this incident was not during work, did not involve inappropriate behaviour on his part and that he merely acted in his defence. Mrs Howley and Ms Andrews maintain that Mr Read acted towards them in an aggressive, threatening and abusive manner. The employer adopted the view put forward by both women and disciplined Mr Read. Mr Read says that the owner, Mr Robert Brodie-Hall did not give him a chance to explain the situation and that this exchange is captured on a tape recording of their conversation.

5 The tape recording of the conversation is important also for the contractual benefit claim. Mr Read says that during that conversation Mr Brodie-Hall promised that he would write to the Corruption and Crime Commission and recommend Mr Read for employment by that Commission. Mr Read maintains that this promise then became a condition of his employment contract. Mr Brodie-Hall says that he agreed to give a reference for Mr Read to any prospective employer who may contact him, and the CCC was mentioned in that context. He says that he has never been contacted by any prospective employer about Mr Read and in any event the respondent submits that the promise did not amount to a legally enforceable term of Mr Read's contract of employment.

Denied Contractual Benefit

6 I will deal firstly with the contractual benefit claim. The tape recording is in part difficult to follow, not because of audibility but because the tape has been recorded at too fast a speed. Additionally, the conversation does ramble through many issues. Nevertheless, the conversation relevant to the denied contractual benefit claim is as follows:

"Mr Read –	To wrap up the whole thing Robert um I will do like the company and I will conform to what you are saying you know whatever you're saying …..or to be someone else which I'm not trained to be and I will do this exactly what you're saying now but and I will be happy in doing it and I will get an income to do it but in the same token will you recommend me to Corruption and Crime Commission for a job there or for another employer for a higher income cause that's what I want.
Mr Brodie-Hall -	Yes, but look I am probably on speaking terms with you know of regular social speaking terms with may be three other employers.
Mr Read -	Right ok.
Mr Brodie-Hall -	two of them are in the same industry
Mr Read -	Yep
Mr Brodie-Hall -	so I know they are not looking for people
Mr Read -	ok but my strategy is to get a higher income. A much higher income than $17.00 an hour.
Mr Brodie-Hall -	so what do you want me to do ring up the government and say I've got a bloke working for me who wants more money have you got a job for him.
Mr Read -	yes the Corruption and Crime Commission cause I have already put the application in.
Mr Brodie-Hall -	Now righto well when the application gets to the person who reads them and says oh and they read the application this Nic Read sounds like a interesting fellow. He is currently working at Leather-Life and his employer will act as a referee I'll give the bloke a ring and he rings me up and then he says what do you know about Nic and I say he has worked here for about 12 months he is a reliable fella if you want someone who you know has a good work ethic and he's punctual and reliable efficient and listens to instructions and carries out the duties he's your man.
Mr Read -	Yep
Mr Brodie-Hall -	But you know it a bit like the Jehovah's knocking on the door if I just pick up the phone and ring the Corruption and Crime Commission and say I got recommendation from or I want to make a recommendation for someone who has applied for a job. You know I mean I can do that but I can also tell you fairly confidently that it won't go anywhere.
Mr Read -	well its up to you Robert.
Mr Brodie-Hall -	I can do it
Mr Read -	see the Corruption and Crime Commission might know what sort of a man I am you see.
Mr Brodie-Hall -	well they could if they read your ……
Mr Read -	well that's right they know me, and their staff know me and you could recommend me to them and that's all I ask you to do
Mr Brodie-Hall -	but see you know this is
Mr Read -	or other employers, other employers seeking higher income
Mr Brodie-Hall -	I mean if another employer came to me and said I'm looking to I'm looking to pinch some of your staff have you got anyone there that you think would be good for me um yeah I'd say yeah I'd say yeah I got a bloke down the back whose been working for me for 12 months and look like another opportunity I'd do that without any trouble at all. I'm not gonna get on the phone or get the yellow pages out and start ringing up every person
Mr Read -	yeah alright no worries, rightyo
Mr Brodie-Hall -	and you know offer them your services
Mr Read -	Good deal
Mr Brodie-Hall -	I mean I said that before
Mr Read -	yep ok
Mr Brodie-Hall	and I will do that
Mr Read -	all right"

7 In my view, this exchange cannot be construed as varying the contract of employment or adding a legally enforceable condition to the terms and conditions of the employment. Mr Brodie-Hall was responding to the applicant's desire to get a higher paid job and so offered to provide a reference, which specified certain attributes of Mr Read as a worker, if he was contacted by that prospective employer. The prospective employer that was mentioned specifically was the Crime and

Corruption Commission ("the CCC"). There is no evidence that the CCC ever contacted Mr Brodie-Hall about Mr Read. The conversation had nothing to do with Mr Read's employment at Leather-Life. It concerned only Mr Brodie-Hall agreeing to assist Mr Read obtain a higher paid job elsewhere.

8 In the Full Bench decision of *Hotcopper Australia Ltd v David Saab* 81 WAIG 2704 @ 2707, the Hon President stated:

> "33. I observe that a claim made under s.29(1)(b)(ii) of the Act is not a claim for breach of contract of employment, in the common law sense, because the ability to make the claim, the nature of the claim and the remedies available are limited by and also stem from the wording of the sub-section. S.29(1)(b)(ii) prescribes and defines a particular statutory breach of contract within those limitations.
>
> 34. The limitations (and/or conditions precedent to the exercise of jurisdiction and/or power) include the following—
>
> (a) The claim must relate to an "industrial matter", as defined in s.7 of the Act.
>
> (b) The claim must be made by an "employee", as defined in s.7 of the Act.
>
> (c) The benefit claimed must be a contractual benefit, i.e. the claimant must be entitled to the claim under his/her contract of service.
>
> (d) The subject contract must be a contract of service.
>
> (e) The benefit must not arise under an award or order of the Commission.
>
> (f) The benefit must have been denied by the employer.
>
> (See also the discussion of the nature of s.29(1)(b)(ii) claims in *Ahern v AFTPI* 79 WAIG 1867 (FB)."

9 Clearly I find that Mr Read's claim fails in terms of criterion (c) above, but in any event I do not consider that criterion (f) has been met either in that no employer has contacted Mr Brodie-Hall on Mr Read's behalf. Mr Brodie-Hall did consider writing to the CCC but decided against it as he checked and there were no positions advertised. I would therefore dismiss Mr Read's claim for denied contractual benefit.

Unfair Dismissal - Evidence

10 It is not greatly in dispute what actually happened in April and August 2009, except that Mr Read says that he was assaulted during the August 2009 incident. As for the events of 15 July 2009, the evidence of Mr Read is that, prior to that date, Mrs Howley came up to him and harassed him by stating that her husband did Police clearances. The evidence of Mrs Howley and Ms Andrews is that Mrs Howley mentioned to a group of employees that her husband, as a building supervisor, had to obtain a Police clearance to do a job on a particular Government site. His fellow employees similarly had to obtain Police clearances. Mr Read seems to connect this discussion to the earlier discussion with Mrs Howley about his black eye and an incident out of work where he was challenged to a sprint race which he won, was then told he could have sex with a sixteen year old girl as his prize and then received a black eye. Mr Read says that after Mrs Howley's comment as to Police clearances she taunted him by asking about his black eye. He says that he told her to go away and put his finger up in defence.

11 Mr Read says:

> "Kate asked me the previous day how I got my black eye and she asked me if it hurt. I gave her the answer in that lunch break, which was a couple of days after. She asked me if it hurt. I said, a couple of days later, "My eye does not hurt."" (T30)

He goes on to say:

> "I told her, "No, my eye does not hurt." And then the tea break finished, and then I went back to work. I did not follow her or did not pursue her or anything. We started the shift working again." (T30)

12 Mr Read later says that, on 15 July 2009, he did not tell Mrs Howley to tell her husband to stay away from him. He said this on a different day. On that day Mrs Howley did go outside for a smoke and he, "did go outside there as well". He says that she did not tell him to leave her alone. He says Ms Andrews "was in the vicinity". He says that he did not yell at Mrs Howley and that the incident happened in a break and not during working hours. He denies that Ms Andrews ever told him to leave Mrs Howley alone. He says that Ms Andrews butted in three times and he said to her something like, "you fucking fat ugly bitch, mind your own fucking business".

13 Mr Read says that he did not pursue Mrs Howley; instead he walked away and if Mrs Howley had told him that she did not want to talk to him he would have left her alone as he does what he is told at work. He accuses Mrs Howley of threatening him about her husband and Police clearances. Mr Read says that he does not know what his employer is talking about when, in the letter of warning, he was instructed not to engage in "conversation or correspondence of a suggestive or sexual nature". He says that he has not sexually harassed anyone, that he is allowed to use reasonable force and to act in self defence. He says that he has done nothing of detriment to other employees in the past. He says that his behaviour has not been inappropriate.

14 As for the issue of time cards, Mr Read says that he was late one day and did note the reason on his time card. He says that was a mistake and he apologised for that. As for his interest in the time cards of other employees, he says that he was allowed to ask the question as he worked and was paid for 38 hours a week, but others did less than this and were paid for 38 hours a week.

15 Mr Read says that Ms Brodie-Hall assaulted him on 19 August 2009. He says:

> "She hit me on the right forearm." "With force to bruise my right forearm."
>
> "Enough force to bruise my right forearm and force enough to displace my forearm in a space from one position to another position.

> And you deny that she told you four or five times before to put the phone down and stop speaking the way you were?---Yes." (T37, 38)

16 Mr Read summonsed Mr Brodie-Hall as a witness. They had the following exchange at hearing:

> "do you remember an incidence where Chris told me to ... came up to me and told me to fuck off. Do you remember that incidence?---No, I don't.
>
> ….
>
> "I do remember you raising something with me that resulted from some interaction between you and Chris around your workstation, and I went to Chris and I said to him, "Just make sure that you don't stir Nick up." Right, so I don't recall the actual language that was used or the context in which it was used." (T46)

17 Mr Read asked Mr Brodie-Hall a number of questions that went to his treatment compared to others in the workplace concerning pay, working time, safety boots, superannuation, time taken at morning tea breaks, loans of money. In essence, Mr Brodie-Hall perceives that Mr Read is a different individual to others in the workplace but was not treated differently in relation to his terms and conditions of employment.

18 Of the incident on 15 July 2009, Mr Brodie-Hall's evidence is:

> "Right. I came back from Canning Vale, from a visit ... the Canning Vale factory at after 1 o'clock on the afternoon of 15 July and was told that an incident had taken place while I was away and that I should go and talk to Kate. I went and had a talk to Kate. She related an incident to me that started in the lunchroom, ended outside the bike shop where you were berating her about her husband's role in making police checks. There was references made to the incident with the black eye. You pursued and abused her and make threatening gestures to her. It involved ... along the way it involved Bianca. And that was what Kate had ... Kate said to me, "Robert," she said, "If I have to" ... She said, "I can't continue to work here if I have to work with Nick. I will resign rather than stay on." And I said to Kate, "I'll talk to Nick and sort it out. So that was where we got to on the afternoon of the 17th when I asked you to stay behind and talk about the issue, and that was when, you know, we talked about the issue. By then I had already written a letter of warning because the reported incident was totally inappropriate, even with explanation, and explanation didn't improve anything." (T52)

19 Mr Brodie-Hall says that when Mrs Howley and Ms Andrews reported to him the incident of 15 July 2009, they had regained their composure but they said they were both in tears after the incident. Mrs Howley, who was a very long term employee, said that she would resign rather than work under those conditions. She indicated that she was frightened by Mr Read.

20 Mr Brodie-Hall says that on 19 August 2009 he had intended to write a letter concerning Mr Read to the CCC. He went to the CCC website and found that there were no positions advertised so he reconsidered as to why he would write to the CCC if there were no positions available. He says that when he had earlier spoken to Mr Read about the CCC it had been on the basis that if someone contacted him from the CCC he would recommend Mr Read for employment. On that morning he heard Mr Read say the word, "slut", he then saw his daughter come into the office. She was crying and she said that she had just hit Mr Read. Mr Brodie-Hall went to see Mr Read but he had left the premises. Mr Brodie-Hall says he expected that Mr Read would not come back to work. He wrote the letter of dismissal and posted it.

21 On 20 August 2009 Mr Read came to work through the front door which was unusual. He proceeded to clock on but Mr Brodie-Hall followed him and told him not to bother clocking on as his employment had been terminated. Mr Read said that he could not do that and that he had to be given two weeks' written notice. Mr Read refused to leave the factory, sat in the middle of the factory and refused to take the letter of termination. So Mr Brodie-Hall called the Police. The Police arrived and asked Mr Read to leave and he did so.

22 Ms Paula Brodie-Hall's evidence is that she was pretty disturbed about the letter which Mr Read handed her in April 2009 [Exhibit R1]. She says that Mrs Howley and Ms Andrews came to see her on 15 July 2009 and were visibly upset. They reported that they had had a conversation with Mr Read which had turned into harassment, with shouting and explicit language. Mrs Howley reported that she had asked Mr Read to stop but he kept going and followed her out of the office and into the car park.

23 On 19 August 2009, early in the morning, Mr Read confronted her about his rate of pay and asked who got paid more than him. She says that he was yelling at the time. Ms Brodie-Hall sent him back to his workstation. He came back later and said that it did not matter as Marcus got the same pay as him. He then asked about superannuation and she explained this to him. He later made a telephone call when he asked four or five time for a pizza without the slut on the side. The telephone was in the factory. At that time Ms Brodie-Hall says that Mrs Howley was in the factory and Ms Andrews was in the office (she was not with Ms Brodie-Hall). Ms Brodie-Hall says that she was two or three metres away from Mr Read and he was calm but progressively his conversation got louder. She says that she felt terribly uncomfortable and yelled at him three or four times to put the telephone down and not use that language. She attempted to take the telephone off him and she says she probably touched him. She says that it was definitely not harder than a touch. She touched him on his right arm and the telephone was in his right hand and remained so after she had touched him. Mr Read said to the person on the other end of the telephone that he had been assaulted and must leave. Ms Brodie-Hall says that she was left shaken and crying. Through redial she spoke to the manager of the café which Mr Read had telephoned. She apologised for Mr Read's call and discovered that the employee who had taken Mr Read's call was left crying and upset. Ms Brodie-Hall spoke to her father and they decided to dismiss Mr Read. They paid two weeks' notice in lieu and Mr Read's accrued annual leave into his bank account.

24 Mrs Howley gave evidence that she asked Mr Read how he had got a black eye and he said that he would tell her later. Then at morning tea she asked again and he told her that he was challenged to a foot race by a girl, he won, and then she hit him followed by a man who hit him also. He did not know why she had hit him. Then on 15 July 2009 she asked him how his eye was and he replied, "It's fine now". Later at lunch break Mr Read unsolicited and in a raised voice said, "Yeah, Kate, my eye's fine". Mrs Howley says that they then had the following exchange:

"And I just said to him ... everyone just stopped and I said, "Well, what do you mean," and he just said, "Well, you know how you asked me how my eye was and it's fine, especially since I found out you can have sex with a 16-year-old and not get into trouble," and I just assumed he was talking about the girl in the foot race and I just said, "Was she only 16?" And he'd sort of got really ... you know, shouted at me, "Did I say she was 16?" And I just immediately ... I said, "Nick, end of conversation. I don't want to speak to you," and I walked back into the factory and commenced working and Bianca followed me in and sat with me that day and she just ... I was shaking a little bit and Bianca just said, "Now, calm down. This is what Nick is like all the time," and probably a minute or so later he came into the factory and he called my name. He said, "Kate," and I said, "Nick, I don't want to talk to you. Please leave," and he says, "No; no, no. I want to speak to you," and Bianca said to him, "Nicholas, she doesn't want to talk to you. Please leave," and he says, "No, I just want to ask her a question." And we both just ignored him and he kept talking.

What did he ask you?---And he said, "Do you know when you were saying the other week that your husband does police checks," and I was sort of ... I've never said that, you know, I was ... and then he said, "Yeah; yeah, yeah, at morning tea you said your husband does police checks." I said, "No, Nicholas. I said my husband had to have a police clearance because he's on a government site and they've requested for all the workers to get a police clearance and he also had ... because he's the supervisor, he had to ensure that all his men, all the staff, had police clearances," and I explained that to Nicholas. I said, "That's what my husband's doing, not ... I said he's got no authority to do police clearances on anybody and Nick said, "No, no, you said that." I said, "Nicholas, I didn't say that. I said my husband has to have a police clearance himself," and he just turned at me, pointed his finger at me - - -

What was his state at that time?---He just ... and he just was ... kept going on and on about ... and I tried to reassure him my husband doesn't to police checks, he had to have a police clearance and I said, "No, Nicholas, you've got it wrong." I said it two or three times, "He had to have a police clearance. He does not do police checks. He hasn't got the authority to do that," and I suppose - - -

What did Nick do?---Well, he just turned around, pointed his finger at me and said, "You tell your fucking husband to stay away from me," and I just ... and walked out." (T92,93)

25 Mrs Howley says she was shaking and she went outside for a cigarette. Ms Andrews followed her and Mr Read came after them two or three minutes later and stood over Ms Andrews, pointed his finger and said, "You shut your fucking fat ugly mouth, you bitch". She later said he used the word "slut". Mrs Howley asked Mr Read to go away but instead he followed her to the motorbike store next door. She says that Ms Andrews and her burst into tears after Mr Read returned to the showroom. They told Ms Brodie-Hall and later Mr Brodie-Hall what had happened. Mrs Howley says that she told Mr Brodie-Hall that if Mr Read continued to work there, she could not, as she was getting too scared of him.

26 On 19 August 2009 Mrs Howley heard Ms Brodie-Hall tell Mr Read four or five times to put down the telephone. She says that Ms Brodie-Hall, "grabbed him on the ….touched him on the arm". She later says that Ms Brodie-Hall, "put a bit of pressure on it and pushed it away", meaning Mr Read's arm. Ms Brodie-Hall burst into tears.

27 Ms Andrews gave evidence and says of the incident on 15 July 2009 as follows:

"Me and Kate were in the lunch room, and Robert and Paula weren't there obviously, and I was looking after the shop so I was just in and out, and Nick come up to Kate and said, "My eyes are fine," and Kate kind of just went, "What do you mean by that?" and he said, "You know how you asked me if my eyes are okay?" He goes, "It's okay now that I've found out if I can sex with a 16-year-old girl," and Kate went, "Is she 16?" and he went, "No, I didn't say that." Like really aggressively and Kate said, "Well, you're being too aggressive, Nick. I'm not talking to you any more." So he walked out of the lunch room and Kate doesn't have a lunch break, so I just sat down with her while she was working and - - -

And what happened?---Nick came in not long after that and sat down. It was strange. He was talking about Kate's husband, Trevor, getting police … like a police check on him and Kate didn't really know what he was talking about at first, and then he said, "You know how your husband had to do police checks," and it was … sorry.

Had you ever been present in the company of your fellow work colleagues where Kate had discussed her husband doing police clearance checks?---Yeah. She said one day when we were at morning tea that her husband had to get … all his workers had to get a police clearance for working on the site that he was working on.

…

What was his demeanour when he was talking to - - -?---He was getting really aggressive so we … and then he ended up getting up and walking away.

…

Did he go away?---At first, yes, and then me and Kate ended up walking out where our showroom is, and Kate went outside for a cigarette and I just stayed in … where the door is and we were just chatting about it.

What state was Kate in when she went out for a cigarette?---She was frightened, shaking, really … she was a bit upset about the way he was talking to her, involving her husband.

…

What happened after a short while whilst you were standing there talking with Kate?---Nick came back in and he started going on about Kate's husband doing police checks on him again and Kate was saying, "Nick, go away," and he wouldn't go away, and I said, "Nick, go back to work," and he just wouldn't and he stood about two centimetres away from my face and called me a fat, ugly bitch and told me to shut my mouth.

> And what did he do after he had told you that?---He started following Kate outside and kept going on about the police checks and Kate's telling him to go away, and he followed her to our next-door business which is a motorbike shop.
>
> …
>
> He said, "Tell your husband to fuck off and stay away from me."" (T106-108)

28 Of the incident on 19 August 2009, Ms Andrews' evidence is that she was about two metres away from Mr Read and Mrs Howley and Ms Brodie-Hall were also in the immediate vicinity. She says:

> "Paula told him to stop using that language and to get off the phone. Can you recall approximately how many times Paula told him to stop using that language and get off the phone?---Probably about five, maybe more." (T109)

29 The evidence of Mrs Caroline Brodie-Hall is not relevant to my determination of these applications.

30 For completeness, I will include the relevant parts of the taped conversation as it related to the events of 15 July 2009. Mr Brodie-Hall's taped conversation with Mr Read about those events commenced as follows:

"Mr Brodie-Hall -	Now I just wanted you to understand that the sort of confrontation that occurred on Wednesday is under any circumstances not acceptable. It's inappropriate to talk to women like that and it's inappropriate to pursue someone after they have clearly stated that they don't want to carry on the conversation. In lots of examples when someone says Nick I don't want to talk about that, that means drop it. Don't go on with it. Now I don't know what the circumstances were.
Mr Read -	I see Robert you don't know what the circumstances were.
Mr Brodie-Hall -	I don't need to know.
Mr Read -	Oh you don't need to know.
Mr Brodie-Hall -	I don't need to know. Whatever, whatever happens your response was inappropriate.
Mr Read -	My response was inappropriate and you don't know what happened.
Mr Brodie-Hall -	Don't yell.
Mr Read -	Ok Robert.
Mr Brodie-Hall -	Don't yell at me, right. This is this is important for your future employment here.
Mr Read -	Robert I'm not yelling at you, I'm just talking at the same volume you're talking to me.
Mr Brodie-Hall -	No, so.
Mr Read -	Yes."

31 Later, in respect of 15 July 2009, the conversation went on as follows:

"Mr Brodie-Hall -	But no the problem the problem's not with the problems not with you and me the problem is the way you react with other people now what give me the justification for the way you reacted to Kate.
Mr Read -	Well you're talking about going back to the beginning of the tape you're talking about the example of what happened on Wednesday, you can't even tell me specifically what actually happened on Wednesday, dates, times, events…
Mr Brodie-Hall -	I don't need to.
Mr Read -	You don't need to? So you're addressing me and you don't know what actually happened.
Mr Brodie-Hall -	I know what happened.
Mr Read -	What happened then you tell me what happened.
Mr Brodie-Hall -	During the lunch break you initiated a conversation with Kate that turned into a verbal abuse.
Mr Read -	Now Robert my question is, what happened prior to that conversation, do you know, yes or no?
Mr Brodie-Hall -	I don't know. I don't need to know.
Mr Read -	You don't know…..you hadn't even listened to what I was going to say, have you?
Mr Brodie-Hall -	Go on then tell me what you were going to say, don't go, don't worry about going back to the beginning of the tape tell me what ….. tell me what happened on Wednesday.
Mr Read -	Well it was outside.
Mr Brodie-Hall -	I'm not interested in that.
Mr Read -	It was outside of working hours……all respect it's got nothing to do with you anyway but I will tell you anyway because you're my employer.
	(TALKING OVER EACH OTHER – THE CONVERSATION CANNOT BE DECIPHERED READILY)

Mr Brodie-Hall -	Immediately you have got me off side.
Mr Read -	You asked me to speak, I'm explaining.
Mr Brodie-Hall -	No you're not, you're bullshitting.
Mr Read -	I'm not bullshitting.
Mr Brodie-Hall -	You are bullshitting, all this business about what I was going to say was during my lunch break which is my time, when you're here in my premises you obey my rules
Mr Read -	I understand that and I conform and I give you one hundred per cent during working hours.
Mr Brodie-Hall -	Right, so go on tell me - we are getting - we are fast approaching the place - the stage where you are taking my options away from me, right but go on tell me what tell me what you say. I think you are being unreasonable and unrealistic and one of the things with unreasonable people is you can not reason with an unreasonable person, so go on you tell me what the story was with Kate.
Mr Read -	Ok we will start again and this is my turn to tell you what was saying and I'll for respect may I not be interrupted. What actually happened and previous to this was I had a black eye and you yourself asked me why I had a black eye and I gave you the reason for it not the full reason but roughly the reasons the reasons I gave you not the full story but the reason was I was challenged for the race and I won the race in Perth from William Street to McDonalds. I won the race and this girl who challenged me with the race told me I had the right to have sex with a sixteen year old girl. She didn't like this and she hit me a number of times, I did not hit her at all and this other man came in and just started hitting me as well then I threw one punch at him then both left and that was the reasoning because you asked me what happened and I told you what had happened, during working hours you asked me about my black eye and I told you this. Further more on lunch time outside of working hours Kate asked me the same question. I told her the full story I told her the full story and ah about the sixteen year old girl. About the fact that this woman told me I had the right to have sex with a sixteen year old girl. Kate did not like this either and she thought to herself that, that I was not allowed to do this. She thought that I did not have the right to do this. And then furthermore another time I asked, no it's my turn to speak, I came here in this lunch room and I told Kate that it did not hurt, of course it did not hurt my black eye did not hurt because this woman told me that I had the right to have sex with a sixteen year old girl of course that did not hurt when she hit me if I have the right if someone tells me I have the right to do that its not gonna hurt is it. So then furthermore came up to Kate and I said to her about cause Kate did not like what I what my right was she was offended by this I asked her about cause I knew knowledge of what Kate told me before about her husband going to Police and asking for ah you know peoples what peoples supposed to have done and didn't do so I told Kate I did not want her husband to come round near me. Meanwhile while I was speaking to Kate about this, Bianca and this was in morning tea outside of working hours
Mr Brodie-Hall -	Morning tea, morning tea is not outside of working hours.
Mr Read -	Bianca, Bianca, morning tea is my break.
Mr Brodie-Hall -	You get paid for your breaks so that's…….
Mr Read -	I can do what I want right, Bianca continually butted in three times, I had to tell her three times to butt in right this was outside of working hours in morning tea. I don't care what she does during working hours she can do whatever she wants to ……..you can do what ever you want during working hours I don't particularly care right. Bianca continually butted in three times I told her three times to butt out cause I was having a conversation with Kate right, about this about her husband about Kate's husband. Now ah I then told Bianca during, during ah morning tea which is outside working hours to shut her mouth and to keep out of my business and to stop interrupting all the time right, and to be polite right, and she just walked off and I told Kate for her husband to keep out of my business and that's the end of the story and that is what actually happened Robert."

32 Shortly, after this exchange Mr Brodie-Hall said that he was handing Mr Read an official warning for unacceptable, inappropriate behaviour. He told Mr Read, "In there are several points that I want you to - I want you to read over the weekend. I want you to consider them - I want you to come - I want you to decide for yourself whether you want to come back here and work under those conditions." Mr Read responded, "Yes I have already said Robert I will come to work and I will work under these conditions."

Conclusions

33 The quality of Mr Read's work is not in contention. He was said to be a diligent worker. It is his conversation and behaviour that his employer questions and specifically the three incidents in April, July and August of this year.

34 As stated, the tape has been recorded at a faster than normal speed hence both speakers are a little difficult to understand. Their words, in the main, can be made out as is apparent from the transcript which I have just quoted. What is more difficult to decipher is the tone of the voices. Nevertheless it is apparent that there is considerable argument during the conversation and that Mr Brodie-Hall expressed considerable frustration with the way Mr Read raised, in Mr Brodie-Hall's view, irrelevant, sexual and inappropriate matters in conversations at work, and the way Mr Read treated breaks as being completely separate from work in which he could do as he liked.

35 It is not in contention that Mr Read gave Ms Brodie-Hall the letter of 14 April 2009. What is not clear is why he chose to give her a copy of that letter. It had no connection to his work other than the whole event started with some exchanges at work. I do not propose to deal in depth with the conflicting evidence as to what transpired earlier that day. Mr Read says it arose from him asking questions as to whether police officers are the better people. The respondent says that it arose because Mr Read appeared concerned about his pay and had discovered that police officers appeared to be getting a pay rise. It is not relevant which version is correct. The uncontested fact is that Mr Read left his workplace without notice and attended at the Police station. His employer did not complain about this conduct at the time and does not emphasise it now. Their objection is that his letter was inappropriate and offensive and the sexual content of the correspondence upset Ms Brodie-Hall. They complain also that it forms a pattern of unpredictable or irrational behaviour on the part of Mr Read. Mr Read can see nothing wrong with what he had written. I agree with the respondent's submission and will say more later, however, it is important to deal firstly with the evidence as to the incidents on 15 July and 19 August 2009.

36 Mr Read complains that Mr Brodie-Hall did not have the correct impression of what had actually occurred on 15 July 2009. He complains that Mr Brodie-Hall simply believed what Mrs Howley and Ms Andrews had said and did not give him a chance to present his case during their taped conversation. Whilst it is true that Mr Brodie-Hall did believe Mrs Howley and Ms Andrews, and the conversation started on this basis as a warning to or counselling of Mr Read, not an investigation, Mr Read was given the opportunity to present his case. Additionally, if one listens to the conversation as a whole Mr Brodie-Hall had other complaints about the way Mr Read conducted himself and the conversations he (Mr Read) had in the workplace. Mr Brodie-Hall tried hard to get Mr Read to understand his concerns.

37 More relevantly though, having heard the evidence of all concerned, I am sure that, in fact, Mr Brodie-Hall should have believed Mrs Howley and Ms Andrews over Mr Read. I unreservedly accept the evidence of Mrs Howley and Ms Andrews over that of Mr Read. However, on Mr Read's evidence alone he abused Ms Andrews in a very demeaning way. He simply says that he was acting in defence because she tried three times to butt into his conversation with Mrs Howley. This is no excuse for calling a fellow employee, "you fucking, fat, ugly Bitch". Mr Read at hearing could see no problem with the term he used and sought to justify it by attempting to cross exam Ms Andrews as to whether she in fact fitted this description. This questioning did Mr Read no credit and was stopped by the Commission. It also visibly upset Ms Andrews. Given the abuse of two employees by a fellow employee, Mr Brodie-Hall had a duty to act and the warning he gave to Mr Read was fairly measured in its content. I find that, on 15 July 2009, Mr Read acted towards Mrs Howley and Ms Andrews in an abusive and threatening manner which left them shaken and in tears. In my view, Mr Read put his employment in jeopardy by his actions on 15 July 2009.

38 There are minor inconsistencies in the evidence for the respondent, such as whether Ms Andrews was in the vicinity to hear Mr Read's telephone call on 19 August 2009 and what contact Ms Brodie-Hall made with Mr Read's forearm. However, these are not material to whether Mr Read should have been dismissed as Mr Read's own evidence substantiates that he acted inappropriately in April and August. As for the events of 15 July 2009, the evidence of Mrs Howley and Ms Andrews is consistent and plausible. One has to question why Ms Andrews thought it necessary to intervene on Mrs Howley's behalf three times if Mr Read had not been unwelcomely pursuing Mrs Howley.

39 I do not put great weight on the events in April 2009 when Mr Read handed Ms Brodie-Hall a letter. The employer took no corrective action or counselling. Mr Read was then not to know how the letter affected Ms Brodie-Hall. I say this with one obvious reservation. The letter does form a pattern of behaviour which is both random and inappropriate in the workplace. Mr Read decided to challenge police officers to a sprint race seemingly because someone had said, in answer to a question from Mr Read, that she thought police officers were better than him. It is unusual to adopt such a response. It is also not appropriate to suddenly depart your workplace to do so. It is not clear then why Mr Read gave the letter to Ms Brodie-Hall, but I can understand why she was offended and unsettled by its content. To claim some sort of sexual encounter as a prize for an illusory sprint race is, to say the least, inappropriate behaviour. To then introduce this into the workplace was both wrong and understandably disturbing. The problem is that Mr Read simply does not comprehend this on two fronts.

40 Mr Read maintained, at his workplace and again at hearing, that anything he did during his breaks was his own business and not work related. Yet it was he who introduced these elements to his workplace and so made them part of the work environment and exchanges at work with his work colleagues. He brought the letter in April 2009 to Ms Brodie-Hall. He responded to questions from his colleagues about his black eye with a story of how a girl had said he could have sex with a sixteen year old girl as a prize for winning a sprint race. He spoke loudly over the telephone at work and close to fellow employees about the price of a pizza without the slut. Secondly, and most importantly, each of these acts is not disputed by Mr Read. He can see nothing wrong with them, and clearly cannot understand how they could offend his fellow employees. Yet understandably they did. At hearing, there was no sense on Mr Read's part that his behaviour was inappropriate and that discussions of such a sexual nature in the workplace might not be welcome. These were not portrayed as some misguided workplace humour. In fact, Mr Read in the taped conversation with Mr Brodie-Hall, when he was challenged about the April letter and use of such language, responded abruptly and said, "are you saying I can't take my prize?" Mr Read defends his individuality at hearing, but he simply does not comprehend that his actions and words, in relation to the matters I have just addressed, are not appropriate and were unsettling in the workplace. Furthermore, if Mr Read had truly listened to Mr Brodie-Hall in the taped conversation he should have been fully aware that Mr Brodie-Hall found his actions and conversation about sexual matters to be completely inappropriate.

41 As for the events of 19 August 2009 it would be wrong to see the telephone conversation in isolation from earlier events and hence diminish its relevance. Mr Read had been put on notice about one month earlier not to use such language in the workplace. He knew his employment was at stake. He does not seem to comprehend the effect such conversation has on fellow employees but that is not the point. He was told clearly by Mr Brodie-Hall that he should not engage in such behaviour in the workplace. Yet Mr Read randomly chose to make the telephone call and act completely inappropriately in front of two or three of his work colleagues. He continued to do so even after he was told to stop. Mr Read does not accept this last point but I accept the evidence of Ms Brodie-Hall over that of Mr Read.

42 As for the alleged assault by Ms Brodie-Hall, this does not change my view as to whether Mr Read's dismissal was justified. It is clear that Ms Brodie-Hall tried to get the telephone from Mr Read's grasp. In doing so, she made contact with his arm but not with such force as to dislodge the telephone from his hand. Mr Brodie-Hall says that his daughter reported that she had hit Mr Read. Ms Brodie-Hall and Mrs Howley say the contact was less severe. Mr Read tendered a medical certificate which stated, "Nicholas Read presented to the Emergency Department at Royal Perth Hospital on the 19 Aug 2009 at 18:16. The presenting problem was pain in his right forearm post blunt trauma this AM. No features suggestive of fracture. Elbow and wrist joint NAD. Neurovascular status of RUL normal. The diagnosis was – Injury – Bruise/contusion – upper limb – forearm. Diagnosis – bruising of Right Forearm." This supports a view that contact of some force was made to Mr Read's forearm. Ms Brodie-Hall should not have touched Mr Read, even though he refused to obey a lawful direction. However, having weighed all the evidence, I do not consider it a reasonable description to say that Ms Brodie-Hall assaulted Mr Read. The Concise Oxford Dictionary, the New Edition, defines "assault" as, "a violent physical or verbal attack".

43 In the matter of *Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385 at 386 Brinsden J states:

> "The jurisdiction has been variously stated: in re Loty and Holloway v. Australian Workers' Union (1971) A.R. 95 at 99 Sheldon J. said that even though in the dismissal be it summary or on notice, the employer has not exceeded his common law and/or award rights, the Court was entitled to enquire as to whether the employee had received "less than a fair deal". He also approved what had been said in an earlier case whether there had been "a fair go all round".
>
> ……
>
> As His Honour points out the question to be investigated is not a question as to the respective legal rights of the employer and the employee but a question whether the legal right of the employer has been exercised so harshly or oppressively against the employee as to amount to an abuse of that right."

44 In the circumstances where Mr Read was warned, and correctly so about his behaviour, and where he again displayed inappropriate behaviour about one month later in disregard of his warning, I find Mr Read has received a fair go. He breached the trust his employer held in him.

45 Mr Brodie-Hall chose on 19 August 2009 to send a letter of termination to Mr Read, rather than dismiss him in person. Mr Brodie-Hall's evidence is that he did not think Mr Read intended returning to the workplace after he had departed without explanation on the morning of 19 August 2009. He thought Mr Read had come to realise that he had gone too far in his behaviour. Even if this were so, a telephone call to Mr Read would have been preferable, if the termination could not have been done in person. Nevertheless, it did not matter in the end as Mr Read did not receive the letter before he turned up for work the next day. At that time Mr Brodie-Hall spoke with him directly and informed him that he had been dismissed. Mr Read then acted poorly by refusing to leave the workplace until such time as the Police were called, and then responded to their request.

46 I find the dismissal of Mr Read to be wholly justifiable. For the reasons given, I would therefore issue orders dismissing both of the applications.

2009 WAIRC 01298

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NICHOLAS READ
	APPLICANT
	-v-
	ROBERT BRODIE-HALL; LEATHER-LIFE
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	TUESDAY, 8 DECEMBER 2009
FILE NO	U 161 OF 2009
CITATION NO.	2009 WAIRC 01298

Result	Application dismissed
Representation	
Applicant	Mr N Read
Respondent	Mr D Jones and with him Mr M Haylett

Order

HAVING heard Mr N Read on his own behalf and Mr D Jones and with him Mr M Haylett on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the application be and is hereby dismissed.

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

2009 WAIRC 01299

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NICHOLAS READ
	APPLICANT
	-v-
	ROBERT BRODIE-HALL; LEATHER-LIFE
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	TUESDAY, 8 DECEMBER 2009
FILE NO	B 161 OF 2009
CITATION NO.	2009 WAIRC 01299

Result	Application dismissed
Representation	
Applicant	Mr N Read
Respondent	Mr D Jones and with him Mr M Haylett

Order

HAVING heard Mr N Read on his own behalf and Mr D Jones and with him Mr M Haylett on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the application be and is hereby dismissed.

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

2009 WAIRC 01214

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EVITA ROSS
	APPLICANT
	-v-
	AUSTRALIAN ISLAMIC COLLEGE (KEWDALE CAMPUS)
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 17 NOVEMBER 2009
FILE NO/S	U 156 OF 2009
CITATION NO.	2009 WAIRC 01214

Result	Discontinued
Representation	
Applicant	Mrs E Ross on her own behalf
Respondent	Mr M Jensen (of Counsel)

Order

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

WHEREAS the Commission set down a conference on 6 October 2009 for the purpose of conciliating between the parties, which date was later changed to 16 October 2009; and

WHEREAS at the conclusion of the conference held on 16 October 2009 the parties reached an agreement in principle in respect of the application; and

WHEREAS on 9 November 2009 the applicant advised the Commission that the settlement of the matter had been finalised; and

WHEREAS on 9 November 2009 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 17 November 2009 the respondent consented to the matter being discontinued;

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

THAT this application be, and is hereby discontinued.

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

2009 WAIRC 01304

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SUSANNE MAUD RYAN
	APPLICANT
	-v-
	BRIGHTWATER CARE GROUP (INC)
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	WEDNESDAY, 9 DECEMBER 2009
FILE NO	U 69 OF 2009
CITATION NO.	2009 WAIRC 01304
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 2 November 2009 that she wanted to discontinue the application; and

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

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

THAT the application be and is hereby discontinued.

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

2009 WAIRC 01281

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIAM NATHANIEL SAVAGE
	APPLICANT
	-v-
	GRAEME WHEILDON AND SALLY WHEILDON T/AS RUMPS GOURMET BUTCHERS AND OTHER FINE FOODS
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 2 DECEMBER 2009
FILE NO/S	U 130 OF 2009
CITATION NO.	2009 WAIRC 01281

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 1st day of September 2009 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties sought time to consider their respective positions; and

WHEREAS on the 1st day of December 2009 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS subsequent to the conference held on the 1st day of December 2009 the parties reached an agreement in principle in respect of the application; and

WHEREAS the parties agree that an order should issue to reflect that agreement;

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

1. The respondent shall pay to the applicant an amount of $3,000 gross, less $600 tax leaving a net amount of $2,400 to be paid;
2. Such payment is to be made at 4.00 pm on Tuesday the 1st day of December 2009;
3. The payment referred to in Order 1 above is in full and final settlement of all matters relating to the employment.
4. This application be, and is otherwise dismissed.

(Sgd.) P E SCOTT,
[L.S.] Acting Senior Commissioner.

2009 WAIRC 01213

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	VICTOR ADRIAN SERAFINI
	APPLICANT
	-v-
	SARINA SIRNA MANAGING DIRECTOR FOR AND ON BEHALF OF THE EMPLOYER ITALO-AUSTRALIAN WELFARE & CULTURAL CENTRE INC.
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 17 NOVEMBER 2009
FILE NO/S	U 114 OF 2009
CITATION NO.	2009 WAIRC 01213

Result	Discontinued
Representation	
Applicant	Mr V Serafini on his own behalf
Respondent	Mr S Bowler (of Counsel)

Order

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

WHEREAS on 15 July 2009 the Commission convened a conference for the purpose of dealing with scheduling issues with respect to the application being lodged out of time; and

WHEREAS on 15 July 2009, and with the consent of the parties, the Commission conducted conciliation proceedings between the parties; and

WHEREAS at the conclusion of that conference the respondent's representative was given time to get further instructions about an offer made by the applicant to settle the matter; and

WHEREAS on 18 August 2009 the Commission convened a further conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties reached an agreement in principle in respect of the application; and

WHEREAS on 25 August 2009 the applicant contacted the Commission about the contents of a Deed of Settlement with respect to the settlement of the matter, provided by the respondent; and

WHEREAS on 10 September 2009 the Commission convened a further conference and at this conference the terms of settlement of the matter were finalised; and

WHEREAS the Commission contacted the parties on a number of occasions about the status of the settlement; and

WHEREAS on 2 November 2009 the applicant advised the Commission that the settlement of the matter had been finalised; and

WHEREAS on 2 November 2009 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 9 November 2009 the respondent consented to the matter being discontinued;

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

THAT this application be, and is hereby discontinued.

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

2009 WAIRC 01195

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CATHERINE ALEXANDRA SKINNER
	APPLICANT
	-v-
	PRESIDENT CAT WELFARE SOCIETY
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 16 NOVEMBER 2009
FILE NO/S	U 41 OF 2009
CITATION NO.	2009 WAIRC 01195

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 22nd day of April 2009 the Commission convened a conference for the purpose of conciliating between the parties, however, agreement was not reached; and

WHEREAS on the 31st day of July 2009 the Commission convened a conference for the purpose of scheduling a hearing; and

WHEREAS the application was set down for hearing and determination on the 16th day of September 2009; and

WHEREAS on the 10th day of September 2009 the applicant's representative advised the Commission that the applicant did not wish to proceed with the matter; and

WHEREAS on the 3rd day of November 2009 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
[L.S.] Acting Senior Commissioner.

2009 WAIRC 01184

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANTHONY THORNTON
	APPLICANT
	-v-
	KEYZONE
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 12 NOVEMBER 2009
FILE NO/S	U 138 OF 2009
CITATION NO.	2009 WAIRC 01184

Result	Application dismissed

Order

WHEREAS at the hearing on 11 November 2009 there was no appearance for or by the applicant and the Commission proceeded in the absence of the applicant;

NOW THEREFORE, I the undersigned, having given reasons for decision extemporaneously and pursuant to the powers conferred on me under section 27(1)(a) of the *Industrial Relations Act 1979*, hereby order -

THAT this application be, and is hereby dismissed for want of prosecution.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

2009 WAIRC 01193

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SABINE VANDEWINKEL
	APPLICANT
	-v-
	DIRK & KATJA BOLSENBROEK
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 16 NOVEMBER 2009
FILE NO	U 111 OF 2009
CITATION NO.	2009 WAIRC 01193

Result	Application discontinued
Representation	
Applicant	Ms S Vandewinkel
Respondent	Mrs K Bolsenbroek

Order

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

AND WHEREAS on 3 July 2009 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 30 October 2009 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

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

CONFERENCES—Matters arising out of—

2009 WAIRC 01232

DISPUTE RE INDUSTRIAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	APPLICANT
	-v-
	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 25 NOVEMBER 2009
FILE NO/S	C 35 OF 2009
CITATION NO.	2009 WAIRC 01232

Result	Order issued
Representation	
Applicant	Mr R L Bathurst (of Counsel)
Respondent	Mr N Whitehead (of Counsel)

Order

WHEREAS this application was lodged pursuant to s 44 of the *Industrial Relations Act 1979* ("the Act") on 5 November 2009 whereby the applicant sought a conference requesting that the Commission issue orders with respect to education assistants employed by the respondent ceasing all industrial action taking place in relation to negotiations for a new industrial agreement to replace the *Education Assistants' (Government) General Agreement 2007* ("the Agreement"); and

WHEREAS on 6 November 2009 the Commission convened a conference with respect to this application; and

WHEREAS at this conference the applicant advised the Commission that the respondent had directed education assistants to commence industrial action from 26 October 2009 onwards; and

FURTHER that some, but not all, education assistants have engaged in industrial action consisting of bans on administrative duties, bans on supervision of students including but not limited to during recess and lunch, bans on bus duties and bans on school excursions; and

WHEREAS the applicant informed the Commission that employees who had implemented bans would have their pay withdrawn for the duration of the bans being in place; and

WHEREAS the applicant was seeking the following orders:

(a) the Union, its officers, employees, agents and members employed as Education Assistants by the respondent are to cease all industrial action including, without limitation, bans on administrative duties; bans on supervision of students; bans on bus duties; and bans on school excursions by no later than 5pm on 6 November 2009;

(b) the Union is to notify all its members employed in the Department of Education by 4pm on 6 November 2009 that they are to cease all industrial action relating to negotiations for a new industrial agreement to replace the Education Assistants' (Government) General Agreement 2007;

(c) the Union, its officers, employees and agents are not to direct or encourage, in any way, employees working in the Department of Education to engage in any further industrial action relating to negotiations for a new industrial agreement to replace the Education Assistants' (Government) General Agreement 2007;

(d) there be liberty to apply; and

WHEREAS the applicant informed the Commission that on 22 October 2009 it responded to the respondent's log of claims with respect to a new industrial agreement for education assistants and this response was in accord with the Western Australian Public Sector Wages Policy 2009 with which the applicant is required to comply; and

WHEREAS on 23 October 2009 the applicant notified the respondent pursuant to s 42 of the Act that it wished to bargain in good faith for a new industrial agreement; and

WHEREAS the respondent advised the applicant on 9 November 2009 that it agreed to bargain in good faith pursuant to s 42 of the Act; and

WHEREAS the applicant put arguments in support of the issuance of orders being sought and the respondent opposed the issuance of these orders; and

WHEREAS the respondent confirmed that there was no intention to escalate the bans in place at this point in time; and

WHEREAS the Commission set down a further conference to be held on 9 November 2009 to hear further from the parties with respect to the impact of the bans at workplaces; and

WHEREAS prior to the conference commencing on 9 November 2009 the respondent advised the Commission that the bans which had been in place since 26 October 2009 had been lifted and there was therefore no need for the Commission to issue the orders being sought by the applicant; and

WHEREAS on the basis of this information the applicant did not pursue the issuance of the orders being sought; and

WHEREAS on 10 November 2009 the applicant sought an urgent conference on the basis that it had been notified that cleaners, gardeners and education assistants who are members of the respondent would be attending stop work meetings on 11 November 2009 commencing at 10.30 am; and

WHEREAS a conference was convened in the Commission late on 10 November 2009 and the respondent confirmed that the stop work meetings would be taking place throughout Western Australia between 10.30 am and 12.00 noon on 11 November 2009; and

WHEREAS at this conference the parties agreed to meet in the Commission the following day in an endeavour to reach agreement on a process for moving forward with respect to negotiations for a replacement industrial agreement for education assistants; and

WHEREAS at both a meeting and a conference held in the Commission on 11 November 2009 no understanding was reached between the parties with respect to an agreed process for holding further negotiations however, the respondent undertook to cease all industrial action for 14 days commencing on 12 November 2009 so that bargaining could take place with respect to a new industrial agreement for education assistants; and

WHEREAS the undertaking given by the respondent was as follows:

> That the respondent by its officers, agents and employees and the respondent's members employed by the applicant as cleaners, gardeners, education assistants and home economic assistants undertake to the Commission, the applicant and the Minister for Commerce not to take any industrial action in any form between 12 November 2009 and 25 November 2009 inclusive ("the Undertaking"); and

WHEREAS the applicant argued that the Commission should issue an order with respect to the Undertaking that the respondent's members not undertake any industrial action in the next 14 days given that extensive industrial action taken to-date by the respondent's members was having a detrimental impact on the running of Western Australian schools; and

WHEREAS the applicant also sought an order that the respondent give the applicant two days' notice of any industrial action to be undertaken subsequent to 25 November 2009; and

WHEREAS the applicant undertook to engage in good faith bargaining with the respondent in the period 12 to 25 November 2009 and the applicant stated that it was open to reviewing its decision to withhold pay to the respondent's members who had engaged in industrial action up to and including 10 November 2009 as part of these negotiations; and

WHEREAS the respondent committed to bargaining in good faith during the 14 days that the Undertaking was in place with a view to reaching an agreement with the applicant for a replacement industrial agreement; and

WHEREAS the Commission accepted the respondent's commitment that the respondent and its members would abide by the Undertaking and that the respondent and its members would take the Undertaking seriously; and

WHEREAS the Commission expected the respondent and its members to abide by the Undertaking and the respondent was to take reasonable steps to immediately inform its members about the terms of the Undertaking; and

WHEREAS the Commission advised the parties that it expected the parties to meet regularly in the period 12 to 25 November 2009 to bargain in good faith with a view to reaching agreement on a replacement industrial agreement; and

WHEREAS the parties were advised that the Commission would hear from the parties as to the progress of the negotiations between the parties and any other issues either party wished to raise on 18 November 2009 and 25 November 2009; and

WHEREAS the application was adjourned until 18 and 25 November 2009 respectively, and the parties were advised that either party could request that a conference be convened at short notice prior to these dates; and

WHEREAS report back conferences were held in the Commission on 18 and 25 November 2009 respectively; and

WHEREAS at the conference held on 25 November 2009 the applicant requested that the Commission issue the following orders on the basis that the respondent's members were to attend a half day stoppage the following day and return to their workplaces around 12.00 noon:

(a) the Union is to notify all its member employed in the Department of Education as education assistants by 5pm on 25 November 2009 that they are not to engage in any further industrial action of any sort whether relating to negotiations for a new industrial agreement to replace the *Education Assistants' (Government) General Agreement 2007* or otherwise;

(b) the Union, whether by its officers, employees, agents or otherwise, is not to direct or encourage, in any way, education assistants working in the Department of Education to engage in any further industrial action relating to negotiations for a new industrial agreement to replace the *Education Assistants' (Government) General Agreement 2007*;

(c) there be liberty to apply; and

WHEREAS the applicant put the following arguments in support of the issuance of the orders being sought:

1. the previous stop work meeting undertaken by education assistants on 11 November 2009 was attended by approximately 10 per cent of education assistants employed by the respondent (630 employees) and over half of these education assistants could well have been working with special needs students, some with profound disabilities;

2. the applicant argues that this stoppage:

   - was particularly targeted at the most vulnerable students, that is students with special needs;
   - seriously compromised the ability of the respondent to fulfil its duty of care to students;
   - seriously compromised the ability of the respondent to deliver educational programs to students;

3. the applicant maintains that bans previously in place by education assistants, including bans on photocopying, excursions, outside duty and bus duty have had a negative impact on disabled students:

   - due to their disabilities, many students with special needs cannot be taught orally and must be taught with visual aids;
   - schools such as Sir David Brand and Creaney Education Support Centre are unable to run if the photocopying of visual aides does not occur;
   - when education assistants do not perform outside supervision a student's education program in a social setting is compromised;
   - for their own safety many students with special needs require close supervision whilst outside;
   - using relief staff to supervise students with special needs is likely to lead to serious behavioural problems, such as violent behaviour;
   - having education assistants supervise students getting on and off buses is important for the safety of students with special needs;
   - a change in the people who supervise students with special needs at the buses can lead to violent behaviour from the students;
   - excursions are not a break for students with special needs, they allow the students to learn to use the skills they are taught at school out in the community;

4. the applicant argues that the stop work attended by education assistants on 11 November 2009 seriously affected the applicant's schools and its students in that:

   - the applicant maintains that approximately 10 per cent or at least 630 of 7,800 education assistants attended the stop work meeting which was a significant number;
   - in at least one education support centre, no education assistants attended the school out of the 32 rostered to attend that day and 15 out of 17 education assistants did not attend the Sir David Brand Centre which has 40 students and the care offered to students at these schools was seriously compromised as a result;
   - even though schools managed to offer a teaching program and care for students during this stoppage this may not be the case if further stoppages are held particularly at the applicant's 72 schools where students have disabilities;

5. the applicant maintains that tomorrow's proposed strike action will have the following impact:

   - students with severe disabilities require particularly close supervision and assistance by education assistants who know them and education assistants not being present can place a student's health at serious risk;
   - a change in routine such as that caused by a strike will cause many students with special needs, particularly students with autism, to behave violently to other students and staff;

- the violent behaviour caused by strike action puts other students and staff at risk of injury;
- not having education assistants at school due to strike action means that some students with disabilities are unable to eat;
- for some deaf and visually impaired students who rely on education assistants, not having an education assistant at school due to strike action means they cannot participate at all in classes;
- for some students with disabilities, not having education assistants at school due to strike action means they cannot go to the toilet and have to sit in their own faeces and urine, which is both humiliating and a serious health risk;
- at special education schools and centres, strike action causes the education program for students with special needs to stop;
- strike action can force schools to close, assuming parents are available to pick students up at all, the students may behave violently towards their parents;
- when education assistants working in mainstream schools do not attend for duty the duty of care towards students and their teaching programme is compromised;

6. the applicant argues that in exercising its jurisdiction the Commission shall have regard for the interest of the persons immediately concerned whether directly affected or not and, where appropriate, for the interest of the community as a whole and the applicant maintains that it is not in the public interest for the most vulnerable of students to be put at risk by further industrial action; and

WHEREAS the respondent made the following submissions in support of the orders being sought not issuing:

1. even though education assistants had bans in place up to 11 November 2009, excluding a ban on undertaking recess duty, these bans have had little or no impact on the teaching programmes offered to students and excursions and in any event the duty of care provided to students is the responsibility of teachers;
2. during the stoppages held on 6 August 2009 and 11 November 2009 the duty of care afforded to students was not compromised and the respondent's members would not act to compromise their responsibilities towards students;
3. during the above stoppages schools successfully re-organised their programmes and operations to cater for students including students with disabilities and no school was closed during these stoppages to the best of the respondent's knowledge including Malibu Education Support School;
4. the applicant is exaggerating the impact of the non-attendance of education assistants at schools where students have disabilities as these schools have and will be able to make sufficient arrangements to ensure that students are adequately fed and toileted notwithstanding the stoppage. Furthermore, schools will still run their normal education programmes but maybe not the full programme;
5. the respondent argues that as its members would not put students at risk and as there will be minimal disruption to schools and their students if tomorrow's stoppage goes ahead it is not in the public interest to issue the orders being sought; and

WHEREAS the Commission is of the view that the matters before it are industrial matters as they relate to issues pertaining to the employment relationship between the applicant and the respondent's members and the rights of an organisation; and

WHEREAS the Commission is of the view that it has jurisdiction to issue the orders sought pursuant to s 44 of the Act which enables the Commission to issue orders with respect to an industrial matter; and

WHEREAS having heard from the applicant and the respondent and after considering the submissions made by both parties and when taking into account equity and fairness and the substantial merits of this case and relevant objects of the Act the Commission has formed the view that orders with respect to this application should issue; and

WHEREAS the Commission is of the view that some of the bans previously put in place by the respondent's members have had a detrimental impact on the health and safety of some students especially profoundly disabled students and the teaching programmes run by some schools; and

WHEREAS the Commission is of the view that the proposed industrial action in the form of tomorrow's stoppage particularly when taking into account the lack of notice given by the respondent and its members to the applicant and parents of students who will be affected by the stoppage will create difficulties for the respondent in ensuring that its responsibilities towards students, in particular students with profound disabilities, will not be compromised; and

WHEREAS in reaching the conclusion that orders should issue with respect to further industrial action taking place the Commission has also taken into account that the interests of those persons directly involved in this dispute, particularly profoundly disabled students, will be compromised if education assistants recommence industrial action; and

WHEREAS on 25 November 2009 the Commission issued Reasons for Decision by way of recital and a Minute of Proposed Order in this matter; and

WHEREAS on 25 November 2009 the Commission conducted a Speaking to the Minutes of Proposed Order; and

WHEREAS at this Speaking to the Minutes the respondent argued that the proposed order be limited to a ban on the stop work meeting being held on 26 November 2009 given the poor conduct of the applicant during the negotiations to date; and

WHEREAS the applicant opposed limiting the application of order 1; and

WHEREAS after hearing from the parties the Commission is of the view that the issuance of order 1 as proposed is appropriate in all of the circumstances;

NOW THEREFORE having heard Mr R L Bathurst of Counsel on behalf of the applicant and Mr N Whitehead of Counsel on behalf of the respondent, the Commission having regard for the interests of the parties directly involved, the public interest and to prevent the further deterioration of industrial relations, and pursuant to the powers vested in it by the Act, and in particular s44(6)(ba)(ii) and s44(6)(bb)(i), hereby orders:

1. THAT the respondent by its officers, agents and employees and the respondent's members are not to undertake any further industrial action in any form in relation to negotiations for a new industrial agreement to replace the *Education Assistants' (Government) General Agreement 2007* including stop work meetings and bans and limitations on the normal duties undertaken by education assistants under their contracts of employment with the applicant.
2. THAT the respondent, by its officers, agents and employees are to take reasonable steps to immediately inform its members about the terms of this order and direct its members to comply with this order.
3. THAT this order is to remain in force until revoked or varied by the Commission.
4. THAT both parties have liberty to apply to vary this order.

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

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Australian Medical Association (WA) Incorporated	The Registry Officer, Department of Health	Wood C	PSAC 14/2009	15/06/2009 13/08/2009	Dispute re external review process	Discontinued
Health Services Union of Western Australia (Union of Workers)	The Director of General of Health as the delegate of the Minister for Health in his incorporated capacity as under section 7 of the Hospitals and Health Services 1972 for the hospitals formerly compri	Wood C	PSAC 18/2009	17/07/2009	Dispute re personal leave calculation of Union Member	Discontinued
Health Services Union of Western Australia (Union of Workers)	The Director General of Health in Right of the Minister for Health as Royal Perth Hospital, Wellington Street Campus	Wood C	PSAC 8/2008	7/05/2008 18/09/2008	Dispute re reclassification of a union member.	Discontinued
Health Services Union of Western Australia (Union of Workers)	The Director General of Health in Right of the Minister for Health as the Metropolitan Health Services Board (Pathwest Laboratory Medicine WA)	Wood C	PSAC 13/2009	10/06/2009 29/06/2009 30/06/2009	Dispute re alleged misconduct of union member	Discontinued
Health Services Union of Western Australia (Union of Workers)	The Director General of Health in Right of the Minister for Health as the Metropolitan Health Services Board	Wood C	PSAC 19/2009	17/08/2009	Dispute re proposed termination of employment of union members	Concluded
The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch	Public Transport Authority	Wood C	C 30/2009	18/09/2009	Dispute in relation to fine imposed on union member	Concluded

Parties		Commissioner	Conference Number	Dates	Matter	Result
The Health Services Union of Western Australia (Union of Workers)	Director General of Health as the delegate of the Minister of Health in his incorporated capacity under section 7 of the Hospitals and Health Services Act 1972 for the hospitals formerly comprising th	Wood C	PSAC 27/2008	23/10/2008 27/11/2008 11/06/2009	Dispute re Health Professionals Review	Discontinued

CORRECTIONS—

2009 WAIRC 01291

RESCIND GENERAL ORDER NO. 9/08 & ISSUE NEW GENERAL ORDER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES (COMMISSION'S OWN MOTION)

APPLICANT

-v-

(NOT APPLICABLE)

RESPONDENT

CORAM COMMISSION IN COURT SESSION
ACTING SENIOR COMMISSIONER P E SCOTT
COMMISSIONER S WOOD
COMMISSIONER S M MAYMAN

DATE MONDAY, 7 DECEMBER 2009

FILE NO. APPL 24 OF 2009

CITATION NO. 2009 WAIRC 01291

Result Correction Order Issued

Correction Order

WHEREAS on the 29th day of June 2009, an Order was deposited in the office of the Registrar to rescind General Order No. 9/08 and issue a new General Order for the 2009 Location Allowances pursuant to Section 50 of the *Industrial Relations Act 1979;* and

WHEREAS on the 5th day of November 2009 the Department of Commerce informed the Commission that there was an error in the General Order and sought that it be corrected; and

WHEREAS on the 4th day of December 2009, the Chamber of Commerce and Industry of Western Australia (Inc) and the Trades and Labor Council of Western Australia advised that they did not object to such an order issuing; and

WHEREAS the Commission in Court Session is of the opinion that the Order ought to be corrected;

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

THAT the General Order issued on the 29th day of June 2009 be corrected in Schedule B subclause (7)(a)(i) and (ii) by substituting:

(i) a spouse or defacto spouse; or

(ii) a child where there is no spouse or defacto spouse;

with

(i) a spouse or defacto partner; or

(ii) a child where there is no spouse or defacto partner.

(Sgd.) P.E. SCOTT,
Acting Senior Commissioner,
[L.S.] For and On behalf of the Commission In Court Session.

PROCEDURAL DIRECTIONS AND ORDERS—

2005 WAIRC 02375

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GLENN BURTON
	APPLICANT
	-v-
	INGOT METAL PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 17 AUGUST 2005
FILE NO/S	APPL 348 OF 2004
CITATION NO.	2005 WAIRC 02375

Result	Order issued
Representation	
Applicant	In person
Respondent	Mr D Charlesworth

Order

HAVING heard Mr G Burton on his own behalf and Mr D Charlesworth on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT until further order the herein application be and is hereby stayed.

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

2005 WAIRC 01550

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RAYMOND JOHN CONRAD
	APPLICANT
	-v-
	PRI REALTY PTY LTD T/A CLARENDON REALTY
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 13 MAY 2005
FILE NO/S	APPL 1001 OF 2004
CITATION NO.	2005 WAIRC 01550

Result	Order issued
Representation	
Applicant	In person
Respondent	Mr A Houghton of counsel

Order

HAVING heard Mr R Conrad on his own behalf and Mr A Houghton of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT until further order the herein application be and is hereby stayed.

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

2005 WAIRC 01825

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TROY GRZELKA
	APPLICANT
	-v-
	SYNERGY CONTACT CENTRE SERVICE, A DIVSION OF SYNERGY REGIONAL PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 16 JUNE 2005
FILE NO/S	APPL 1143 OF 2004
CITATION NO.	2005 WAIRC 01825

Result	Order issued
Representation	
Applicant	In person
Respondent	No appearance

Order

HAVING heard Mr T Grzelka on his own behalf and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT until further order the herein application be and is hereby stayed.

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

2005 WAIRC 03307

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ADAM JAMES FAHEY
	APPLICANT
	-v-
	BLUEJACS MANDURAH OF ROSEMOUNT HOLDINGS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 13 DECEMBER 2005
FILE NO/S	APPL 101 OF 2005
CITATION NO.	2005 WAIRC 03307

Result	Order issued
Representation	
Applicant	In person
Respondent	No appearance

Order

HAVING heard Mr A Fahey on his own behalf and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT until further order the herein application be and is hereby stayed.

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

2005 WAIRC 02589

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES JOHN VAN DER ENDE

APPLICANT

-v-

SYNERGY REGIONAL PTY LTD

RESPONDENT

CORAM COMMISSIONER S J KENNER

DATE THURSDAY, 8 SEPTEMBER 2005

FILE NO/S APPL 234 OF 2005

CITATION NO. 2005 WAIRC 02589

Result Order issued

Representation

Applicant Mr B Jackson of counsel

Respondent Mr K Dundo of counsel

Order

HAVING heard Mr B Jackson of counsel on behalf of the applicant and Mr K Dundo of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT until further order the herein application be and is hereby stayed.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Unions WA Enterprise Agreement 2009 AG 71/2009	(Not applicable)	Australian Municipal, Administrative, Clerical and Services Union of Employees, W.A. Clerical and Administrative Branch	Trades and Labor Council of Western Australia	Commissioner S M Mayman	Agreement registered
Dental Technicians Industrial Agreement 2009 PSAAG 11/2009	12/11/2009	The Civil Service Association of Western Australia Incorporated	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 Peel	Commissioner S M Mayman	Agreement registered
LHMU - Disability Services Commission - Disability Support Workers Industrial Agreement 2008 AG 42/2009	(Not applicable)	Disability Services Commission	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Commissioner S M Mayman	Agreement registered

PUBLIC SERVICE APPEAL BOARD—

2009 WAIRC 01185

APPEAL AGAINST THE DECISION MADE ON 24 NOVEMBER 2008 RELATING TO TERMINATION OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANNE CATHERINE DUDDY
	APPELLANT
	-v-
	WESTERN AUSTRALIA POLICE SERVICE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S WOOD - CHAIRMAN
	MS M BUTLER - BOARD MEMBER
	MR B DODDS - BOARD MEMBER
HEARD	WEDNESDAY, 16 SEPTEMBER 2009
DELIVERED	THURSDAY, 12 NOVEMBER 2009
FILE NO.	PSAB 4 OF 2009
CITATION NO.	2009 WAIRC 01185

CatchWords	Unfair dismissal - Constructive dismissal - Sub-standard performance - Out-of-time application - Industrial Relations Act, 1979, s 80I(e)
Result	Appeal dismissed
Representation	
Applicant	Mr K Trainer as agent
Respondent	Mr M Wheeler and with him Ms D Glynn

Reasons for Decision

1 Ms Anne Duddy was employed by the Western Australian Police Service as a Customer Service Officer, Level 2, from early 2006 to 24 November 2008 when she retired from the Service. She appealed to the Public Service Appeal Board pursuant to s.80I(e) of the Industrial Relations Act 1979 on 19 March 2009 alleging that she was constructively dismissed on 24 November 2008. Such an appeal has to be made within 21 day of dismissal in accordance with Regulation 107. Ms Duddy's application is therefore some 13 weeks and 3 days out of time and the Board must first exercise its discretion as to whether it would be unfair not to accept the application out of time (see *Thomas Brocklehurst v Director General Department of Health* (2008) 88 WAIG 1890).

2 Ms Duddy gives her grounds for the application as follows:

> "I retired from WA Police employment on 24th November 2008. I had worked for 3 years as a Customer Service Office at Mundijong Police Station. I was given the choice of be sacked or resign. A letter of Suspected Substandard Performance was delivered to me on Thursday 28th February 2008. Following this letter I was sent to Cockburn Police Station for training for 3 month after which I received no written or verbal assessment of my performance. I then went to Risk Assessment Unit for another three months due to the fact that circumstances arose which would have made going back to Mundijong to work impossible. I was not given an assessment written or verbal all the time I worked in Risk Assessment Unit and my employment was terminated at the end of three months. I was in shock virtually and could not focus on what I should do. I had been on sick leave prior to my termination. Christmas came and went, and then after New Year I contacted Ilberrys Lawyers who were recommended by CPSU. They took sometime to peruse my circumstances but due to my financial circumstances I could not afford to engage them further. I then contacted WAIRC."

The Evidence

3 Ms Duddy's evidence is that she is currently unemployed. She first joined the Police Service in a part-time position at the Mundijong station. She worked five days per week for three and three quarter hours per day. She says that she had no prior knowledge of Police procedures or running a Police Station and she found it difficult to complete the volume of work in the time available. She discussed this problem with the officer in charge of the Police station and suggested that she work one full day a week and three half days. This was agreed, however, originally the telephone was to be diverted and the office door closed to allow her to concentrate on her work, especially the records management. District Office complained and these measures were stopped and the work accumulated again. Ms Duddy found the situation very stressful.

4 In February 2008 she received a letter concerning suspected sub-standard performance and she was shocked. She raised her concerns with the officer-in-charge. She told him that she did not think it was necessary and that she thought from their earlier discussions she was going to get someone to help mentor her. He advised that he had told her this would happen; meaning she would be issued with notice of sub-standard performance. She wrote a reply to the letter of sub-standard performance and contacted the union, but she says they were not of much help.

5 A new officer-in-charge started at Mundijong station and he was quite concerned about her. Ms Duddy was to go on leave in March 2008. She says that she had given up by then, was really upset and not capable of working to full capacity. She received another letter which advised her that she would be moved to the Cockburn station for three months to undergo some training. She started there on 14 April 2008. She was to receive a regular performance assessment by the Sergeant in charge of that station. She was supposed to have a weekly meeting with the Sergeant. After the initial meeting she had only one other meeting where he indicated that she could only do one thing at a time.

6 Around July 2008 Ms Duddy received a telephone call from the officer-in-charge of the Mundijong station who asked when she was to return and sent her an email specifying all the jobs Ms Duddy would be expected to do. He asked her if she would cope with the duties and she replied that she would give it her best shot. Ms Duddy says that the officer-in-charge then replied, "Well, you'll have to do better than that and if you don't cope with it, you'll get the sack". She then contacted the Human Resource department to see whether they could find her an alternative position. She was given a job doing integrity checks for people who wanted to work for the Police or in other secure places. She says that she did not receive any feedback on her performance in that position.

7 Around October 2008 Ms Duddy emailed Mr John O'Brien in the Human Resources department as her placement was coming to an end. She then had a meeting with the Sergeant in charge of the risk assessment unit who advised her that there was no job for her in that unit; that she was not suitable. She then met Mr O'Brien on 10 October 2008 who told her, "leave or we'll terminate your employment". She was to be allowed to work until 31 October 2008. In that time she was to decide whether to resign or have her employment terminated. Ms Duddy says, 'Unexpectedly, there was someone else present at this interview and I wasn't aware who he was until I asked. He was a union person, apparently, been requested by Mr O'Brien to be present and that was Gavin Richards". The meeting lasted five minutes. Ms Duddy says that she had been on medication since February 2008 when the issue of sub-standard performance arose.

8 Ms Duddy went on sick leave. Her medication was doubled and she consulted the union. She was certified for sick leave from 10 October to 24 November 2008 [Exhibit A4]. Ms Duddy sought advice from the union, prior to the termination of her employment, about an unfair dismissal (Transcript p12). The union advised her the "date" before she was to be dismissed that it would be better for her financially to retire, than be sacked or resigned. She elected by letter dated 12 November 2008 to retire [Exhibit A5]. This retirement was accepted by the Police Service on 13 November 2008 [Exhibit A6]. On 26 November 2008 Ms Duddy wrote to her union representative [Exhibit A7] and said, "I am feeling most dissatisfied with the outcome of my dismissal, and that's what it really is, and I'm not getting much in the way of closure because of it". She says that she did not receive a response to that letter. Ms Duddy says that she could not have afforded to retire. At no time was she advised that she could appeal to the Public Service Appeal Board.

9 Ms Duddy noted in her diary on 19 January 2009 that she had seen an advertisement for two part-time CSO's at the Mundijong Police station. She was really angry about the advertisement as she felt that she had been gotten rid of to make way for someone else. She sent this advertisement to her union representative to spark a reaction and in the hope that they might do something about it. She received no response. Ms Duddy then followed up the matter with her Member of Parliament and the Workplace Ombudsman without success. She spoke also with Mr Richards and asked if he would be a witness for her if she made a complaint about her employment. Ms Duddy enrolled also in a 12 week self-development course which started on 3 February 2009. She got the name of a lawyer from her union and she contacted Ilbery's solicitors on 17 February 2009. She sent her lawyers all her documentation and telephoned several times. She also sent an email to the Sergeant at Cockburn Police station who confirmed that no assessment report had been completed on her. Then on 3 March 2009 Ms Duddy again contacted Ilbery's and spoke that day with someone from the Commission about lodging a late application.

10 Ms Duddy was asked:

> "And in terms of the way in which your employment came to an end, what is for you the issue that has caused you to bring this to the Board?---The issue is, basically, just unbelievable … the issue is I didn't get any help hardly to overcome the obstacles I faced when I first started in the Mundijong office until two-and-a-half years later. I really … courses that I took while I was in Mundijong weren't really … they were helpful, but they were not really what I was looking for. I was looking for the systems in the police to get some training on … proper training. I did a course on one particular system which was basically geared for people who had already been doing it and it was a refresher course and he wasn't particularly interested in slowing down and giving me information because I hadn't even seen it before. And that was a … kind of disappointed me in … in that I thought there surely is some sort of proper training, because I thought it'd be … the … the initial … the initial being … oh, sorry, I've got that mixed up. Sorry. The initial induction I thought would be induction and then training and … you know, training because it was the whole of WA had been recruited, basically, in that time and I thought there was a course probably arrange for everybody, however, that wasn't to be. That wasn't happening. Anyway, I was really disappointed in the whole thing.
>
> Right?---And I thought I was being treated really badly." (T27)

11 Mr Gavin Richards gave evidence that Ms Duddy asked him to attend a meeting in October 2008 with Mr O'Brien because she was feeling very stressed. He attended as a support person for her. He says that she was told, "Well, you can take whatever leave is owing to you and after that you can leave the agency or you can keep working up to a point in time and then you have to leave". He says that he was startled. He did not make a comment as he was not in a position to do so. There was no

discussion about alternative positions or investigation of Ms Duddy's performance. Ms Duddy was given until 31 October 2008 as the date to which she could work. Ms Duddy was given the option to leave straightaway and be paid out, or use her leave entitlements and then leave, or work until 31 October 2008. At the end of the meeting Mr Richards advised Ms Duddy that it appeared she had been constructively dismissed and that she should get advice from her union.

Submissions

12 Mr Trainer for Ms Duddy submitted that the matter had to be decided on the evidence before the Board. The respondent had chosen not to lead any evidence. The applicant's evidence was not contradicted in any substantive way. The Board should not take into account any suggestion that Ms Duddy suffered a negative assessment report. The evidence of Mr Richards was clear and untested and was that Ms Duddy was told that her employment was to finish on 31 October 2008. She had no option and hence Mr O'Brien's actions amounted to a dismissal.

13 It is not for the Board to decide the ultimate merit of the matter at this time. The merit is to be determined at present in a rough and ready way. The issue at present is whether there is an arguable case. There is no evidence that the employer followed correct procedure in dismissing Ms Duddy or in her performance assessments. There is no indication that Ms Duddy knew what was to happen to her. These are fundamental procedural flaws.

14 The mere absence of prejudice to the respondent does not mean that appellant must succeed. However, there is no evidence of prejudice to the respondent at all. This point was uncontested. Very soon after her supposed retirement the applicant expressed her dissatisfaction in an email of 26 November 2008 to her union representative. On 18 January 2009 it is unsurprising that the appellant felt aggrieved when she discovered two part-time positions were advertised when previously she had complained about the workload imposed upon her. She responded by writing to Sergeant Johnson. It is not until March 2009 after consultation with Ilbery's solicitors that she discovered that she had a case to put. The appellant had not been in good health for all of the period leading to and post termination. The Board should not draw any inference as to whether or when Ms Duddy may have been told about any time limit for her appeal. The Board should take account of the fact that there was a representative error in the pursuit of Ms Duddy's complaint.

15 Mr Wheeler for the respondent submitted that Ms Duddy chose to be represented by the union and at the time of her retirement there was no indication that further matters would be raised. The employer proceeded on the basis that Ms Duddy chose to retire. The delay is extraordinarily long.

Considerations

16 The considerations to be weighed in considering whether to accept Ms Duddy's appeal out of time were expressed by the Industrial Appeal Court in *Prem Singh Malik v Paul Albert, Director General, Department of Education of Western Australia* (2004) 84 WAIG 683. The IAC endorsed the principles enunciated by Marshall J in *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298 as follows:

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

17 There is some conflict between the evidence of Ms Duddy and Mr Richards as to whether she knew he would be at the meeting with Mr O'Brien on 10 October 2008. In that regard the evidence of Mr Richards is to be preferred. He says that he was asked to attend by Ms Duddy as a support person. Mr Richards was called to give evidence for Ms Duddy. His recall of events appeared very clear and direct. Whilst one can infer from his evidence that Ms Duddy expected that the meeting was to be about something difficult for her, in that she required a support person, and whilst this might lessen her evidence as to the surprise she suffered, the crucial point is still that at that meeting she was given an end point of 31 October 2008 for her employment. This is the clear evidence of Mr Richards and supports the evidence of Ms Duddy. We do not need to deal in any detail with the issue of a constructive dismissal as this evidence unchallenged leads the Board to the inevitable conclusion that the dismissal was at the hands of the employer. She was told her employment would end on 31 October 2008. It is of no importance that in fact her employment ended shortly after that date. Clearly Ms Duddy responded to the options put to her and secured the best financial result for herself, given the position she was placed in by her employer.

18 We do not need to deal either with the options as to how she could spend her time prior to termination which were, on the evidence of Mr Richards and Ms Duddy, presented to her. She was suffering ill health at the time, was on sick leave, and then put in a letter of resignation followed by a letter of retirement to improve her financial position. There is no criticism of that course of action. There is no evidence that Ms Duddy otherwise intended to retire. In fact she says unchallenged that she needed to work.

19 The question then is whether there is an arguable case that the dismissal was in fact unfair. The appellant's evidence is that she was shocked to receive a letter regarding sub-standard performance. She was overworked and needed measures to alleviate these pressures and be trained better in the systems which she was required to operate. She did receive some positive training

initially and some other training later, but did not consider that to be adequate. Ms Duddy was then moved to another position on a trial basis and was supposed to get regular feedback and assessments which she did not receive. Clearly on the appellant's own evidence she was then required to return to her original position, did not want to, and was after her request placed in the risk assessment area until she was advised that there was no longer a position for her and then that her employment was to finish. These are all the facts based on the evidence of the appellant alone. No evidence was led by the respondent and the Board restricted any attempt to lead such evidence from the bar table. The respondent was asked whether they wanted an opportunity to lead evidence and decided not to do so.

20 The test to be applied is that enunciated by Brinsden J in *Miles and Crown Hiring Service t/a The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385 at 386 and is as follows:

> "the question then arises to what principles it should apply and having regard to the circumstances in which the termination took place. The jurisdiction has been variously stated: in *re* Loty v Holloway v Australian Workers' Union (1971) A.R. 95 at 99 Sheldon J. said that even though in the dismissal be it summary or on notice, the employer has not exceeded his common law and/or rights, the Court was entitled to enquire as to whether the employee had received "less than a fair deal". He also approved what had been said in an earlier case whether there had been "a fair go all round". In a later case Metropolitan Meat Industry Board v Australian Meet Industry Employees' Union (New South Wales Branch) (1973) A.R. 231 at 233 Watson J. thought that even if there are grounds for terminating the contract of employment it was still open to the tribunal to examine the severity or otherwise of the step of dismissal. In the majority judgment in Western Suburbs District Ambulance Committee v Tipp at 277 their Honours stated the question as being "whether the employer's action was harsh or unjust or that the employer had abused his right to dismiss his employee". In that case they considered the union had made out its case in connection with an employee whose services had been terminated pursuant to the award without any reason being given, the employee having been of impeccable conduct and service over a long period of years. Finally in North West Council v Dunn 129 CLR 247 at 263 Walsh J specifically approved a test stated by McKeon J in the case immediately last cited as being the question to ask:
>
> > Has there been or has there not been oppression, injustice, or unfair dealing on the part of the employer towards the employee?
>
> As His Honour points out the question to be investigated is not a question as to the respective legal rights of the employer and the employee but a question whether the legal right of the employer has been exercised so harshly or oppressively against the employee as to amount to an abuse of that right."

21 In short, what can be inferred from that evidence is that Ms Duddy was under trial for sub-standard performance in the eyes of the respondent. That she did not receive proper assessments and that the decision to terminate her employment most probably came as a surprise and shock to her. There was no warning that her employment was in jeopardy and the handling of her termination on 15 October 2008 was not adequate. On those findings it is the case that Ms Duddy has an arguable case that there was not a fair go all round. This is not to say that she can sustain such a case as there is limited evidence before the Board, and at present the substantive issue is not being determined finally. However, the merit of her case is at least arguable.

22 The *Malik* decision makes it plain that merit is but one of the factors to be weighed into the equation as to whether to accept an application out of time. As the appellant's agent has submitted the Board must be persuaded that it should accept the application. It is the case that the time limit should be applied unless there is good reason for the Board not to do so. Inherent in this notion is that it is not adequate to simply operate on the basis that the appellant was ignorant of her potential remedy or the time limits. Mere ignorance of the requirements cannot sustain the appellant's application to accept her claim out of time.

23 Mr Richard says that he told Ms Duddy on 10 October 2008 that she should consult her union about being constructively dismissed. Ms Duddy says that she did raise with her union the question of unfair dismissal prior to her letter of retirement on 12 November 2008. Then shortly after her "retirement" she sent an email to her union representative in the following terms:

> "I am feeling most dissatisfied with the outcome of my dismissal.(that's what it is really) and I'm not getting much in the way of closure because of it. I guess what I am looking for is some support from someone who may be able to tell me what it is all about. I can't rationalise it at all.
>
> Are you aware of other things which may be involved. After three years of turning myself inside out I think I at least deserve some sort of explanation from somebody. If you can't help me I'll have to ask around at least to satisfy myself that I have done everything I can.
>
> I do need to work and I do need closure in order to move on and turn myself inside out for another employer, so to speak.
>
> Sorry to be the bad penny turning up again like this but I need to start somewhere."

24 Mr Trainer for the appellant submitted that the Board should take account of representative error. Ms Duddy says that she was not made aware of any timeframes or that she had an arguable case until she received advice from Ilbery's. Whilst that evidence was not challenged and may be accepted on its face, it is the case that Ms Duddy put to her union in her letter of 26 November 2008 that she had been dismissed. In her letter she says she needed closure and she stated, "If you can't help me I'll have to ask around at least to satisfy myself that I have done everything I can". Ms Duddy wrote on this correspondence that she had been ignored by the union. There is no evidence then that she did anything about it even though she clearly thought she had been treated badly and that she had been dismissed. It should be noted also that whilst Ms Duddy knew from 10 October 2008 that there may be an issue of constructive dismissal, she on her evidence did not make her employer aware of this and instead advised her employer of an intention to retire.

25 It is the case that Ms Duddy was not sparked into concerted action until she saw that the Police service had advertised for two part-time Customer Service Officers at the Mundijong Police Station. She emailed this advertisement to the union on 19 January 2009. Then on 29 January 2009 she emailed the Cockburn Police Station regarding a referee for a job. In early February 2009 she approached her local Member of Parliament, the Workplace Ombudsman and Mr Richards for assistance. She also started to compile a complaint file as to her treatment. On 23 February 2009 she contacted her union again for advice on a solicitor and then telephoned Ilbery's. Then after some correspondence and telephone conversations the appeal was lodged in the Commission on 19 March 2009. This is not simply about 4 months after she was dismissed but it is also nearly 4 months after she queried her dismissal with the union and said that she would take further steps if they could not help her. Ms Duddy did nothing substantive to pursue the matter until she saw the job advertisement. It is clear from her evidence that this is what fired her into action, yet it took another two months to lodge an application. It cannot be said then that Ms Duddy pursued her grievance with any urgency or vigour. At no time during those four months did she alert the employer to her claim that she had been dismissed, let alone her contention that she was dismissed unfairly. The delay is a significant period of time, and in the view of the Board there is no valid reason given as to why she did not pursue her claim more expeditiously.

26 The question of prejudice to the respondent is neutral as the respondent presented nothing by way of evidence or submission on this point. Although the respondent would have to unravel the retirement benefit the applicant received from the retirement should the applicant be successful at a hearing of the substantive matter. The evidence is clearly that the respondent did not know that the appellant challenged her termination until the appeal was lodged. At no time did the applicant seek to alert her employer to her concerns either during the period 10 October 2008 to the date of dismissal, or since her dismissal up until the appeal was lodged. The length of delay is considerable.

27 On balance, clearly Ms Duddy's performance was under review and had been for sometime. She had received other positions and not been seen to be suitable (Transcript p10), on her own evidence, in her last position in the risk assessment area. She has an arguable case that her dismissal was unfair. However, weighing against that is the fact that she did not contest her dismissal with her employer between 10 October 2008 and her departure. There is then excessive delay in bringing an appeal, and no good reason given as to why this was so, except a suggestion by way of submission that Ms Duddy suffered representative error. Ms Duddy by her own word, was to seek other counsel if her union did not act. She did not do so. She only became active on the issue after seeing the job advertisement and then there was a further 2 months delay before an appeal was lodged. In all of these circumstances, the Board is not persuaded to accept the application to extend time. Ms Duddy's application will therefore be dismissed.

2009 WAIRC 01186

APPEAL AGAINST THE DECISION MADE ON 24 NOVEMBER 2008 RELATING TO TERMINATION OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANNE CATHERINE DUDDY
	APPELLANT
	-v-
	WESTERN AUSTRALIA POLICE SERVICE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S WOOD - CHAIRMAN
	MS M BUTLER - BOARD MEMBER
	MR B DODDS - BOARD MEMBER
DATE	THURSDAY, 12 NOVEMBER 2009
FILE NO	PSAB 4 OF 2009
CITATION NO.	2009 WAIRC 01186

Result	Appeal dismissed
Representation	
Applicant	Mr K Trainer as agent
Respondent	Mr M Wheeler and with him Ms D Glynn

Order

HAVING heard Mr K Trainer on behalf of the applicant and Mr M Wheeler and with him Ms D Glynn on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the appeal be and is hereby dismissed.

(Sgd.) S WOOD,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2009 WAIRC 01256

APPEAL AGAINST THE DECISION MADE ON 26 AUGUST 2009 RELATING ALLEGATIONS OF MISCONDUCT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DARREN-BRADLEY STEVENS
	APPELLANT
	-v-
	MRS I. RANDALL KUNUNOPPIN HOSPITAL
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
	MS B CONWAY - BOARD MEMBER
	MR J FRAME - BOARD MEMBER
DATE	MONDAY, 30 NOVEMBER 2009
FILE NO	PSAB 11 OF 2009
CITATION NO.	2009 WAIRC 01256

Result Appeal dismissed

Order

WHEREAS this is an appeal to the Public Service Appeal Board pursuant to s 80I of the *Industrial Relations Act 1979*; and

WHEREAS the appeal was listed for hearing on the 12th day of November 2009 for the purpose of scheduling; and

WHEREAS at the hearing the Board directed the appellant to advise the Board by 4.00 pm on Thursday the 26th day of November 2009 of his response to the issue of whether or not he may bring an appeal to the Public Service Appeal Board on account of the provisions of s 80J of the *Industrial Relations Act 1979*, otherwise the appeal would be dismissed; and

WHEREAS the Board's direction was confirmed to Mr Stevens in a letter dated 12 November 2009; and

WHEREAS by 4.00 pm on the 26th day of November 2009 the appellant had not contacted the Board;

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

THAT this appeal be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2009 WAIRC 01255

APPEAL AGAINST THE DECISION MADE ON 30 JUNE 2009 RELATING TO TERMINATION OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SAMANTHA WILLIAMS
	APPELLANT
	-v-
	DEPARTMENT OF INDIGENOUS AFFAIRS
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S WOOD - CHAIRMAN
	MS J GARDNER - BOARD MEMBER
	MR G RICHARDS - BOARD MEMBER
DATE	FRIDAY, 27 NOVEMBER 2009
FILE NO	PSAB 8 OF 2009
CITATION NO.	2009 WAIRC 01255

Result	Appeal dismissed for want of prosecution
Representation	
Appellant	No appearance
Respondent	Ms P Lewis

Order

WHEREAS this is an appeal to the Public Service Appeal Board filed pursuant to section 80I of the Industrial Relations Act 1979; and

WHEREAS the matter was listed for a show cause hearing on 27 November 2009 and the appellant was advised that failure to attend would lead to the appeal being dismissed; and

WHEREAS the appellant did not attend the hearing;

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

THAT the appeal be and is hereby dismissed for want of prosecution.

(Sgd.) S WOOD,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2009 WAIRC 01228

APPEAL AGAINST THE DECISION MADE ON 20 MARCH 2009 RELATING TO TERMINATION OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DION WYNYARD
	APPELLANT
	-v-
	WA POLICE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
	MR C FLOATE - BOARD MEMBER
	MS R LAVELL - BOARD MEMBER
HEARD	TUESDAY, 2 JUNE 2009, MONDAY, 27 JULY 2009, FRIDAY, 18 SEPTEMBER 2009, FRIDAY, 25 SEPTEMBER 2009
DELIVERED	WEDNESDAY, 25 NOVEMBER 2009
FILE NO.	PSAB 5 OF 2009
CITATION NO.	2009 WAIRC 01228

CatchWords	Industrial Law (WA) – Public Service Appeal Board – Appeal against decision to dismiss – Applicant's case given from bar table – Whether training period can be considered probationary – Whether employee should be given the opportunity to complete training – Procedural fairness – Differences between language used when allowing applicant to respond to allegations and when informing him of the respondent's decision to terminate his employment – Relevance of conduct in previous employment – Appeal dismissed
Result	Appeal dismissed
Representation	
Applicant	The Applicant
Respondent	Ms T Kerr

Reasons for Decision

1 These are the unanimous reasons of the Public Service Appeal Board (the Board):

2 The appellant, Dion Francis Wynyard, has appealed against the respondent's decision to dismiss him from the position of Senior Custody Officer.

Conduct of appellant's case

3 Mr Wynyard represented himself during the hearing. At the commencement of his case, the Chairman of the Board explained to him that he could present his case by giving sworn evidence and being subject to cross-examination or by making a statement from the bar table, and that the former would have greater weight than the latter. Mr Wynyard chose to make a statement from the bar table. This means that where Mr Wynyard's assertions conflict with the otherwise credible sworn evidence of the respondent's witnesses, the sworn evidence will prevail over Mr Wynyard's assertions.

Background

4 Mr Wynyard applied for a newly created position of Senior Custody Officer with the respondent. The respondent engaged a number of people for the purpose of them undertaking work at the East Perth Watchhouse as Custody Officers or Senior Custody Officers. They were to undertake a newly developed training program prior to commencing work at the Watchhouse.

5 Mr Wynyard was appointed to the position of Senior Custody Officer. To be eligible for permanent appointment, he needed to successfully complete the training course. He was then to commence a probationary period of 6 months (Exhibit A3).

6 Mr Wynyard's employment with the respondent commenced on 5 January 2009 when he commenced the training course.

7 The Custody Officer training program consisted for a number of modules including:

1. Operational Safety and Tactics Training Unit (OSTTU) which involved:
   (a) Aerosol Subject Restraint;
   (b) Confined Space Extraction;
   (c) Extendable Baton;
   (d) Rigid Handcuff and Search; and
   (e) Taser (Exhibit A15).
2. Empty Hands Tactics which includes various pin positions, holds and take-down methods (Exhibit R 14).
3. Tactical Communications Skills to "de-escalate volatile situations and diffusing hostility" (Exhibit R16 – Statement of Stephen John Hackwell, para 13).

8 Evidence was given on a range of issues and incidents involving Mr Wynyard. These issues and incidents are most conveniently and succinctly set out in the Trainee Running Sheet for Mr Wynyard (Exhibit R4). The Trainee Running Sheet was used for members of staff to record "relevant information concerning the progress of individual trainees". Mr Wynyard's Running Sheet consists of the following record:

TRAINEE RUNNING SHEET

DATE	COMMENTS	NAME/REG NO
12/01/2009	Spoken to about the use of personal computer during lessons	Salleo 83449
15/01/2009	Spoke with Dion re travelling home on 14.01.09 whilst wearing uniform after instructions not to. He stated that he was not aware of the instruction. I reinforced with him that if he does travel in uniform it must be covered. Also spoke with him re conduct in classroom. Whilst not wishing to dampen his natural enthusiasm I pointed out to him that he may wish to be less vocal and use better judgement when making comments. He seemed to accept this in the spirit in which it was conveyed.	Mawson 5214
27/01/2009	Concern from Custody Officer Barbara Wylie Spoke to Colin Salleo during meal break on evening of 27 Jan 09. Wylie stated that injury aggravated during handcuffing exercise with Wynyard. Wynyard quite aggressive and Handcuffs applied roughly. Wynyard could not release handcuffs and instructor had to intervene. Discussed with Sgt Horsfield and Wynyard to be carefully monitored during OSTTU training and any incidents/concerns to be monitored	Salleo 83449
27/01/2009	Message relayed to Wynyard from Insp Alan Adams regarding fulfilling requirements for Secondary employment Application. Told him that he required worker's compensation insurance ASAP. Indicated to C.Salleo that he would follow in due course and advise Insp Adams.	Salleo 83449

TRAINEE RUNNING SHEET

DATE	COMMENTS	NAME/REG NO
03/02/09	WYNYARD deemed NYC (not yet competent) on his baton written assessment.	Robinson 11992
4/2/09	WYNYARD has requested Friday 6th February off due to his secondary employment as a DJ. This request will be addressed by Sgt HORSFIELD and denied.	S/C 13179 HOLMES
05/02/09	WYNYARD re sat baton written assessment and deemed competent.	Robinson 11992
05/02/2009	Wynyard again reminded regarding obtaining Secondary Employment - worker's compensation insurance. Stated that he was making enquires with brokers but had mentioned that he worked for WA Police and because of this was having difficulty obtaining required cover.	Salleo 83449
05/02/2009	Spoke Wynyard regarding his hair style requested him to comply with WAPOL standards as wearing the Custody Officer uniform reflected on his professionalism and the WA Police.- Recommended he get a hair cut. Complied with request	Salleo 83449
06/02/09	Prior to this incident it had been noted by staff that at times WYNYARD appeared to lack control while participating in physical activities. While conducting a level 1 CSX he was too aggressive putting a wrist lock onto CLOVERDALE. This caused strain to CLOVERDALE's wrist which required ice to reduce swelling. WYNYARD was spoken to in relation to this by Sgt Horsfield and advised to display more self control in his actions. WYNYARD was reluctant to take ownership of his actions and stated that he believed he had done nothing wrong. Sgt HORSFIELD then pointed out that no-one else in the group has suffered similar injuries and that this was due to the care they had taken in performing the task. WYNYARD remained reluctant to believe he was at fault but informed Sgt HORSFIELD that he would take more care in the future.	GOUGH 9960
06/02/09	I spoke to WYNYARD about his 2nd baton assessment particularly a question about strike areas when NOT in fear of death or GBH - his answer was to the head. I questioned him about it and he gave a correct answer. He admitted that he rushed through the exam. I reminded him he had to take his time to read through questions properly (one question was missed entirely) and to ensure he did this next time especially given he may be writing reports and memos.	Robinson 11992
09/02/2009	Contacted by Steve Coverdale by telephone requesting an appointment to discuss concerns regarding aggressive treatment by Wynyard during handcuffing exercise on Friday evening 6 Feb 09. Wynyard rough application of handcuffs caused soft tissue injury to Coverdale's wrist required Ultra Sound treatment over weekend to assist recovery. Custody Officer Coverdale also commented that many of the group were concerned about training with Wynyard and had concerns regarding their safety as he tended to be rough and over zealous in his application of force. Met with Sgt Any (sic) Gough discussed concerns and comments made by Custody officer Cloverdale.	Salleo 83449
10/02/09	During practice of option 3 CSX in full kit, I was overseeing WYNYARD applying handcuffs to LEADER and noticed LEADER breathing hard. Twice I asked him if he was alright and he replied "yes". LEADER approached me afterwards and informed me WYNYARD had knelt on his neck causing pain. Ice and pain killers were declined but he approached me after crib and stated he had a headache. Injury book filled in.	Robinson 11992

TRAINEE RUNNING SHEET

DATE	COMMENTS	NAME/REG NO
12/02/2009	While receiving training in conducting strip searches. WYNYARD was required to give Sgt HORSFIELD a strip search. He approached Sgt HORSFIELD stating that "we can either do this the easy way or the hard way" WYNYARD failed to utilise any form of tactical communication. This approach continued until Sgt HORSFIELD suspended the scenario to de-brief WYNYARD on his lack of tactical communications. During this de-brief, Sgt HORSFIELD asked WYNYARD what he would have done in a real situation if he had continued with his approach. He responded by saying he would have resorted to the use of TASER to complete the strip search.	GOUGH 9960
12/02/09	At the end of shift WYNYARD had a heated argument with HANNAH over the allocation of rank. In there (sic) previous employment HANNAH of a higher level than WYNYARD. Now this has reversed in there role as Custody Officers. WYNYARD is now of a higher level than HANNAH. As you can imagine this has caused friction between the two. After the argument WYNYARD got onto his motor bike and rode home without removing his accoutrement's. This included a training Taser and handcuffs. When asked by Sgt HORSFIELD he stated that he had forgotten to take it off.	GOUGH 9960
13/02/2009	While WYNYARD was involved in training where he was to utilise tactical communication techniques during a prisoner cell transfer scenario. WYNYARD went straight to a hard line approach. Raising his voice to the prisoner shouting that he is moving cells and that he is doing it now. He appears that he has real problems communicating with people appropriately and could result in situations becoming violent with out a need. WYNYARD requested that he complete the scenario again, he was afforded this opportunity, and though better, he had to be coached by his partner during the scenario to successfully complete it:	GOUGH 9960
16/02/2009	WYNYARD presented to Inspector BRADLEY, by Sgt HORSFIELD, to discuss his actions during the Custody training program. This included his secondary employment, the wearing of police issue accoutrements home on a motorbike, the wearing of his Custody officer uniform home in a vehicle, his lack of self control with the physical aspects of OSTTU Custody training which resulted in injuries to others, and his lack of ability to utilise any form of acceptable Tactical Communications. WYNYARD responded by stating he blamed much of his behaviour on his background, including being a New Zealander, a former rugby player and a former Security Officer. He also stated he had had numerous verbal altercations with other Custody officer students during his training. These altercations revolved around his status of being a level 3, when other believed that he should only be a level 2. WYNYARD also was spoken to by other students about him taking photos of the group without their permission. WYNYARD believes that these altercations could also be the basis of some of his aggression and why he has acted the way he has during training. Inspector BRADLEY advised WYNYARD that the work environment he was going to be working in could be volatile at times and that he would have to display a high level of restraint and self control to ensure no harm came to himself or others. WYNYARD acknowledged this and reassured the Inspector that he would make every effort to amend his behaviour.	
19/0209	Wynyard asked about the progress of complying with Insp Adams request regarding Secondary employment - stated that it was in progress and meeting a Insurance Broker on the weekend.	Salleo 83449

The Respondent's Evidence

9 The respondent called evidence from:

1. Colin Salleo, the Acting Training Co-ordinator of the Custody Officer Program at the WA Police Academy;
2. David Neil McDonald, Acting Sergeant assisting with the Custody Officer Training Program;
3. Robert George Stuart, Police Constable attached to the OSTTU at the Joondalup Police Academy and a trainer in the area of Operational Safety and Tactical Training;
4. Barbara Lynn Wylie, Ross Edward Banyard Leader and Steven James Coverdale, Custody Officers undertaking training with Mr Wynyard;
5. Andrew Gough, a Police Sergeant attached to the OSTTU assisting Sergeant Horsfield with the supervision of the first Custody Officer course;
6. Cecelia Mary Robinson, a Police Constable attached to OSTTU at the Joondalup Police Academy, assisting with the training of Custody Officers;
7. Steven Bradley Horsfield, a Sergeant attached to OSTTU at the Police Academy Joondalup, who formulated and managed the training of officers for the newly formed Custody Officer Training Program in OSTTU skills;
8. Adrian Dawson Frankling, Senior Constable attached to the OSTTU involved in the first Custody Officer course and tactical communications and other skills;
9. Steven James Bradley, Police Inspector, Head of Operational Skills Faculty, WA Police Academy Joondalup, who had overall responsibility for the training activities undertaken by OSTTU. It is his responsibility to interview and communicate with recruits and officers in training should any significant issues arise surrounding their behaviour and performance during OSTTU training.
10. Michelle Pude, a Physical Training Instructor with the WA Police attached to the Police Academy at Joondalup who conducted empty hand tactics training sessions for the Custody Officer Training;
11. Allan Robert Adams, Police Inspector with WA Police, responsible as Assistant Divisional Officer for the Perth Watchhouse;
12. Stephen John Hackwell, a Senior Sergeant who gave evidence of the requirements for Custody Officers at the Perth Watchhouse;
13. Tammie Kerr, Acting Principal Employee Relations Officer who undertook an investigation of issues raised by various personnel regarding Mr Wynyard's performance and the incidents which involved him.

10 The evidence of the trainers, other staff and trainees elaborated on the issues set out in the Trainee Running Sheet and other matters involving Mr Wynyard. There was a considerable amount of evidence and it is not our intention to recite all of it. Examples include efforts made by Steven Bradley Horsfield on 6 February 2009 to set out the requirements and techniques used in tactical communications skills, and of Mr Wynyard's failure to apply the skills or the principles involved either at all or with any success in the Confined Space Extraction. He terminated the exercise and explained the difficulties and consequences of Mr Wynyard's approach. He asked Mr Wynyard how he would have gained the compliance of the person he was attempting to move from the cell if he had refused to move and Mr Wynyard responded that he would have used a Taser (Exhibit R10, Statement of Steven Bradley Horsfield, para 18). Mr Horsfield then reinforced the circumstances when a Taser can be used and gave Mr Wynyard an opportunity to attempt the extraction exercise again. However, Mr Wynyard's tactical communication, although improved, could have provoked the subject. Mr Horsfield described Mr Wynyard's body language as "continually hostile and leaking pre-attack indicators" (para 20).

11 Mr Horsfield's evidence also covered an incident on 14 February 2009 where Mr Wynyard was again required to exercise tactical communication skills. He was not successful, and after being de-briefed, he attempted the exercise again, but relied on a fellow trainee's prompting to complete the exercise (paras 27 – 28).

12 A number of officers and trainees have given evidence of injuries suffered by three trainees engaged in exercises with Mr Wynyard – Ms Wylie on 27 January 2009; Mr Coverdale on 6 February 2009 and Mr Leader on 10 February 2009.

13 There was also evidence regarding Mr Wynyard being in conflict with other trainees, and that on 12 February 2009 he left the premises angry and still having his accoutrement's belt on, including his Taser and handcuffs.

14 The training records include comments about Mr Wynyard being aggressive, of not thinking before he acted, and of his responses to situations not being measured, controlled, appropriate and proportionate to the situation (Exhibit A15 - OSTTU – Custody Officer Assessment Booklet for Dion Wynyard, p 7).

15 There is evidence that towards the end of the OSTTU training Mr Wynyard said to his fellow trainees that he had been so angry at a number of things that if he had had a Taser available, he would have shot someone. (Exhibit R6, Statement of Ross Edward Banyard Leader, para 90 and Exhibit R8, Statement of Steven James Coverdale, paras 75 – 79).

16 In the Extendable Baton – Written Assessment on 5 February 2009, Mr Wynyard gave the answer to question 5 that the head is an appropriate target for the extendable baton where there is no threat of death or grievance bodily harm (Exhibit A14), and Mr Wynyard stated that he would have resorted to the use of Taser in the rigid handcuff and search training and to seek compliance in the strip search situation.

17 Ms Pude's evidence included that she was of the view that Mr Wynyard lacked the "cognitive processing that is critical for competent outcomes" (Exhibit R13, Statement of Michelle Pude, para 7) and has a "tendency to act/not act prior to him making an educated judgment when faced with a stressful situation" (Exhibit R13, para 8).

18 Sergeant Gough's observations of Mr Wynyard led him to conclude that instead of gradually implementing force, Mr Wynyard's pattern was "going straight to a hard line aggressive approach when met with resistance. When dealing with members of the public, this often results in situations escalating, where physical force will be used, which should not have been required" (Exhibit R7, Statement of Andrew Hedley Gough, para 24).

19 Senior Constable Frankling described Mr Wynyard as having a "confrontational mindset" and "lack(ing) the capacity to gradually escalate his level of force", and tending not to escalate the level of communications and reasoning (Exhibit R11, Statement of Adrian Dawson Frankling, para 22).

20 Allan Robert Adams, a Police Inspector responsible for the Watchhouse, gave evidence that in February 2009 he noted the negative references to Mr Wynyard in the training summations, revolving around the inappropriate use of force during training and instances of conflict with his classmates, which were at odds with acceptable levels of professionalism (Exhibit R15, Statement of Allan Robert Adams, para 8). He spoke with Inspector Bradley. He noted the Running Sheet mainly dealing with the issue of force and professionalism. He expressed concerns about Mr Wynyard not possessing requisite skills and behavioural traits for the work environment of the Watchhouse. On Friday, 20 February 2009 he met with Mr John O'Brien of the WA Police Workplace Relations Branch, Inspector Kim Hutchison of the WA Police Academy and Senior Sergeant John Mawson, also of the WA Police Academy. As a result of this discussion it was agreed to further investigate and re-assess Mr Wynyard's suitability to continue in employment as a Custody Officer. Inspector Adams met with Mr Wynyard and advised him that this reassessment was to occur and that there would be a further psychological assessment of him on 3 March 2009. Mr Wynyard's participation in the training program was suspended (Exhibit 13, paras 12 – 15).

21 As part of the respondent's assessment of Mr Wynyard, a psychological assessment was undertaken on 3 March 2009 by Joseph Carrello, Manager, EAP and Psychological Services. Mr Carello's report and recommendations were based on an assessment tool called a "Fifteen Q + Fifteen Factor Personality Test" (Exhibit R15). He gave an overview to Inspector Adams on 4 March 2009 (Exhibit R15, para 17). The report indicated no adverse attributes or concerns in respect of Mr Wynyard's psychological profile. Mr Adams gave evidence that Mr Carrello had indicated to him the limitations of the assessment, that it was:

> "based on his observation on how you respond to certain situations verbally. He made it clear to me that obviously that's not in a dynamic work environment, and he did say that was one of the shortfalls of the psychological reporting process." (T:126)

22 Mr Adams met with Mr Wynyard on 4 March 2009 and directed him on leave pending an investigation into his suitability as a custody officer. He was advised of the incidents leading to that decision namely "use of excessive force, poor tactical communication, lack of self control, non-adherence to lawful command and acting in a manner that could potentially bring WA Police into disrepute" (Exhibit R15, Statement of Allan Robert Adams, para 24).

23 Also on 4 March 2009, Mr Wynyard received a letter from the respondent's Director of Human Resources, Mr Darian Ferguson, outlining concerns about his conduct during the training course and informing him that enquiries were being conducted about his conduct. The letter referred to:

> "allegations regarding your conduct in the workplace including disregard for lawful commands, poor tactical communication skills, excessive use of force, apparent lack of self control, acting in a manner unbecoming of a WA Police employee and acting in a manner that could potentially bring WA Police into disrepute."

24 Four particular allegations were set out in the letter and he was given an opportunity to respond before further action was taken. Those allegations were:

> "> Use of excessive force and lack of self control during physical aspects of OSTTU Custody Training including three separate occasions which resulted in injury to individual colleagues;
>
> > Wearing police issue accoutrement and Custody Officer uniform in transit from the Police Academy on two separate occasions despite having been instructed not to wear these items outside of the Academy;
>
> > Inadequate tactical communication skills; and
>
> > More recently, an allegation that you were actively involved in a major incident on 3 March 2009 involving a cyclist in Fremantle where it is alleged that you acted in a threatening manner, use of excessive force and identified yourself as a Police Officer." (Exhibit A5)

25 Mr Wynyard provided his response on 8 March 2009 (Exhibit A1). Mr Wynyard gave his explanations of the incidents relating to the injuries to Steven Coverdale, Barbara Wylie and Ross Leader.

26 He also noted that he had experienced pain in an exercise with Kelly Anne and Andrew Borthwick, and had sustained a shoulder injury in an exercise with Darrell Lawder and Anthony Brooks. He said that he reported these injuries but did not believe they were recorded. He said that the shoulder pain meant he could not complete the open hand tactic test, but subsequently failed and that the instructor had said he was not aggressive enough.

27 Mr Wynyard set out a list of 11 people he believed were injured during OSTTU training. This led him to believe he was being discriminated against.

28 As to the issue of his wearing his uniform and accoutrements in transit, he said he was not present when the initial instruction not to wear them in transit was given. He also recorded that on 26 February 2009, 10 people whom he named had worn their uniforms home. He said many people wore their uniform "and rig" off the campus to go to "Jundalop (sic) shopping mall, CCU campus canteen, bank, shops, food outlets etc", and to the Bentley Forum (Exhibit A1).

29 As to riding home in uniform with his accoutrements, he gave his explanation of this situation including that he was reported by two trainees who he said had bullied him during the course. He set out the circumstances of this alleged bullying.

30 As to his tactical communication skills, Mr Wynyard gave his explanation of the situation concerning the OSTTU strip search exercise. He said that where he was "corrected for using inadequate communication skills I have taken this information on board and I am putting it into practice".

31 Mr Wynyard gave his side of the situation involving the cyclist set out in the fourth allegation.

32 He went on to reiterate that he believed he was being bullied, that his concerns about that had largely been ignored, and expressed the hope that he had provided sufficient information to enable him to be reinstated and offered to provide any further information if required.

33 On 19 March 2009, Ms Tammie Kerr, the respondent's Acting Principal Employee Relations Officer, presented a report to Mr Ferguson on Mr Wynyard's suitability for the role of Custody Officer (Exhibit R17).

34 Ms Kerr's report included the following:

> "**FINDINGS**
>
> In reviewing all of the information and evidence gathered throughout the investigation into this matter, it is my view that overall Mr Wynyard has not completed his training to a level considered to be satisfactory for WA Police for the position of Senior Custody Officer. He has not obtained competency in the Open Hand Training component and has not completed the final assessment on scenario exercises designed to test officers' reactions under duress.
>
> Additionally I find that as a consequence of the traits demonstrated during the training program there is a reasonably high level of risk of injury associated with placing Mr Dion Wynyard in the position of Senior Custody Officer.
>
> The training program is designed with the long term goal of developing skills in officers to enable them to provide custodial services in the Perth Watch House in a safe and responsible manner in accordance with the values of the WA Police. I do not believe that Mr Wynyard has achieved the objectives of this course.
>
> **RECOMMENDATION**
>
> Based on the issues identified and my findings following this review, it is my belief that Mr Wynyard is not suited to the obligations and responsibilities required for the role of Senior Custody Officer. As such, I see no alternative, but to recommend that Mr Wynyard's appointment to Senior Custody Officer be revoked in accordance with provision 2 of the Custody Officers Conditions of Appointment (See Attachment A). I have attached a draft letter for your consideration (See Attachment B)."

35 Ms Kerr's report also identified a failing in the training program. She said:

> "I would also recommend that the competency based assessment approach to the course be reviewed as it makes it extraordinarily difficult to assess whether officers have achieved competency to a level considered satisfactory from an agency perspective as opposed to a broad based approach of pass or fail. In the current situation the officer's actions have raised clear concerns and yet he was deemed competent in areas where the trainers have expressed concerns. Had a different assessment method been utilised more realistic results could have been recorded, making this process more efficient."

36 It is noted that Mr Gough also gave evidence as to his opinion that the competency based training used for the Custody Officers' Training program allowed assessment of whether the person could perform the basic skill being taught but not the decision-making process behind it (T:66 - 67).

37 On 20 March 2009, Mr Adams met with Mr Wynyard in the presence of a Mr Shannon Elson, at which time Mr Wynyard was advised of the decision revoking his employment (Exhibit R15, paras 26 – 27).

38 Mr Wynyard received a letter dated 19 March 2009, from Mr Ferguson (Exhibit A6) which said that he was satisfied with Mr Wynyard's response to the incident of 3 March 2009 involving a cyclist and it was no longer an issue; however, he was found to be unsuitable for the position of Senior Custody Officer.

39 The letter said, amongst other things:

> "The training program is designed with the long term goal of developing skills in officers to enable them to provide custodial services in the Perth Watch House in a safe and responsible manner in accordance with the values of the WA Police Service. It is my view that overall you have not completed the training program to a level considered to be satisfactory by WA Police for the position of Senior Custody Officer.
>
> An example of your unsatisfactory performance in the training program is that you have been found to be not yet competent in the Open Hand Training component. These skills are essential to the position of Senior Custody Officer. Your trainers stated that you failed this component because of your inability to accurately assess risk levels in practical scenarios or respond to the scenarios with the appropriate level of force. The Trainers' assessment was that if placed in a confrontational situation you would act first before making an educated assessment and that it would most likely lead to an injury.
>
> Furthermore, your training is incomplete as you have not completed the scenario training which was conducted on the last two days of the course. Whilst I acknowledge that you have not had an opportunity to participate in this component of the training, it is my belief that you pose too great a safety risk to allow you to complete the course.

40 Mr Ferguson's letter said that Mr Wynyard had been found unsuitable for the position, his appointment to the position was thereby revoked, and he was paid a week's pay in lieu of notice.

Mr Wynyard's Grounds

41 In respect of the failure to complete the training course, Mr Wynyard says this was unfair because the respondent did not allow him to complete the course, and there were other officers who did not complete the course yet they graduated and commenced work. They were given further training and assessment opportunities not available to him.

42 As to his being a safety risk, Mr Wynyard says that he was not made aware during the training course that he was considered to be a safety risk and he was passed as competent in each of the components of the course, except open hand training. He did not complete the scenario training conducted on the last two days of the course because he was removed from the campus to undergo psychological and "attitude" training.

43 Mr Wynyard also said that he was denied procedural fairness as he was not given the opportunity to respond to the allegation that he posed a safety risk, only to the four allegations contained in Mr Ferguson's letter of 4 March 2009, which were not given as reasons for his dismissal.

44 Mr Wynyard also notes that the reasons given for his dismissal in the respondent's Notice of Answer and Counter Proposal filed on 26 April 2009 were different from those previously given in that they referred to the failure "to complete the training course to a standard acceptable to WA Police",

45 Mr Wynyard also notes that the termination was said to be in accordance with the *Public Service Award 1992* (WA), cl 8 – Contract of Service, subclause (1)(c) that "at any time during the period of probation the employer may annul the appointment and terminate the services of the officer by the giving of one week's notice or payment in lieu thereof". Mr Wynyard says that this is factually incorrect because he was not on probation at that stage, he was in training and that his letter of appointment said that the probationary period would not commence until the successful completion of training.

46 The reasons set out in the Notice of Answer and Counter Proposal were that:

> "1. The applicant continued the use of excessive force and displayed a lack of self control during the physical aspects of Operational Safety and Tactics Training Unit (OSTTU) Custody Officer Training, which resulted in injury to three individual colleagues;
>
> 2. The applicant displayed inadequate tactical communication skills;
>
> 3. The applicant disobeyed a lawful instruction by continuing to wear police issue accoutrement (his Custody Officer uniform) in transit from the Police Academy despite having been given clear instructions not to wear these items outside of the Academy;
>
> 4. The applicant failed to show any behavioural changes or improvement in the areas of dispute to a level acceptable to WAPOL despite receiving additional training, guidance and advice during his training period."

47 In respect of point 1. Mr Wynyard referred to his letter of response to the allegations dated 8 March 2009 (Exhibit A1) where he says that he explained the circumstances of what is said to have occurred in respect of the allegation of the use of excessive force and a lack of self control. He said that a number of Custodial Officers were injured during training, including himself. He set out the circumstances of the incidents he was involved in relating to Barbara Wiley and Steven Coverdale. As to the incident involving Barbara Wiley, he said:

> "Barbara Wiley and I were partnered up for a hand cuffing exercise. Barbara told me during the exercise she was in pain from the previous training exercise, so I was careful when applying the handcuffs to her. Using my hand cuffs, I applied them to both of her hands behind her back, and I made sure not to tighten the hand cuffs because of her injuries. Instructor Cecelia Robinson then told me that the handcuffs were not tight enough so I tightened them as instructed by Cecelia and conducted a pinch test. Barbara then complained she was in pain therefore Cecelia removed the handcuffs. I explained to Cecelia that I did everything correctly and as instructed and that Barbara was already experiencing pain from previous training exercises. This is the reason why she sat out most of the physical side of OSTTU training and is currently redoing her OSTTU training with the 2nd course."

48 In respect of Steven Coverdale he says:

> "Bree Daniels and I were partnered up during a training exercise & Steven Cloverdale [sic]was acting as the subject. Bree & I were demonstrating a kneeling wrist lock position to a standing wrist lock position. The movement requires both officers to bring the subject up to their feet in one movement. When demonstrating the move Bree's grip was not strong enough and subsequently she let go of the subject's wrist putting all the pressure on my side which caused Steven to be injured. I immediately stopped the movement to assist Steven and after the exercise was finished I explained what happened to Sergeant Horsfield & Sergeant Gough."

49 Mr Wynyard says that during OSTTU training everyone including himself, experiences some kind of injury and he listed the names of officers he believed suffered an injury during the course.

50 He also dealt with the issue raised in point 3 of the Notice of Answer and Counter Proposal of disobeying a lawful instruction by continuing to wear police issue accoutrement in transit from the Police Academy despite instructions to the contrary. He says he left the academy wearing his blue shirt, he was in his car with dark tinted windows and drove directly home. He says there is no police insignia on the uniform and that 90 per cent of the class wore the uniform to and from the Academy at some stage. He listed a number of people who he says wore their uniforms home and off campus.

51 There was also an occasion when he drove his motor bike home wearing uniform. He says his home was 3.5 kilometres away and he provided some photographs which he said were taken that night. It is not clear whether he means the photographs were taken that night or at 9.00pm on another night. He says he had his backpack on and his mock taser was in his bag. He was wearing "my rig with my handcuff pouch, however my taser was in my backpack." (T:14)

52 Mr Wynyard says that Officers Rooney and Hannah conspired to make up a story regarding his comment about being so angry that he would have used his Taser against someone.

ISSUES AND CONCLUSIONS

Mr Wynyard's status

53 Mr Wynyard's letter of appointment dated 1 December 2008 (Exhibit A3) said that he was being offered appointment in accordance with s 64(1)(a) of the *Public Sector Management Act 1994*, (the *PSM Act*) effective 5 January 2009.

54 It also noted that:

> "Your permanent appointment to this position is subject to the successful completion of a six-month probationary period. This probationary period commences immediately upon successful completion of the training. Prior to the conclusion of the probationary period an assessment will be made of your work performance and if this is satisfactory, together with the requirements outlined below being met, your appointment as a permanent officer will be confirmed."

55 The terms and conditions were those provided in the *PSM Act* and regulations, and the *Public Service General Agreement 2008* (the *General Agreement*).

56 The letter noted that the appointment is subject to him satisfactorily meeting a number of conditions:

"•
- …
- Successful completion of training within an agreed period of time
- The successful completion of Probationary requirements."

57 Section 64 - Appointment of Public Service Officers other than executive officers provides that:

> "(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"

58 The *General Agreement* makes no particular provision in respect of probationary employment arrangements but specifies the conditions under which the employment will be performed and the benefits arising. However, the *Public Service Award 1992* (*the Award*), cl 8 – Contract of Service provides for a probationary period of not more than 6 months and that "at any time during the period of probation the employer may annul the appointment and terminate the services of the officer by giving one week's notice or payment in lieu thereof."

59 Otherwise subclause (3) of cl 8 – Contract of Service of the Award provides for termination of employment upon notice.

60 Therefore the intention was for Mr Wynyard to be appointed as a permanent officer for an indefinite period in accordance with s 64(1) of the *PSM Act*, subject to:

- any binding award;
- successful completion of training within an agreed time period; and
- successful completion of probationary requirements.

61 The interesting aspect of the appointment which applied to Mr Wynyard was that his probationary period would not formally commence until the successful completion of the training. Therefore, one would have to ask what was his status while he was training. He was permanently appointed, but had to first *successfully* complete the training and then *successfully* complete the probationary period (emphasis added). Therefore at the time of the employment coming to an end, he was in training. How does this relate to probation?

62 The Commission has dealt with the issue of probation on a number of occasions in the past. In ***Westheafer v Marriage Guidance Council of WA*** (1985) 65 WAIG 2311 Fielding C noted that:

> "The concept of probationary employment is well known and well understood in employment law. It is that an employer by engaging someone on probation throughout the period of probation retains a right to see whether he wants the employee or not in his employment as if the employee was still at the first interview. Hence there is no obligation on the employer to even objectively consider whether or not he should re-engage an employee at the end of the probationary period. The principles associated with probationary employment are now so well established that it is sufficient to refer in passing to in *re* Alchin and South Newcastle Leagues Club Limited (1977) AR (NSW) 236, a case with many features in common with this one and also to the New South Wales Teachers Federation and the Education Commission of New South Wages [sic] (NSW Industrial Commission Application No. 969 of 1984; 13 September 1984), where it was pointed out that probationary employment is but a step in the selection process and should be distinguished from permanent employment."

63 More recently the Full Bench in ***East Kimberley Aboriginal Medical Service v The Australian Nursing Federation, Industrial Union of Workers, Perth*** (2000) 80 WAIG 3155, dealt with the issue of probation setting out the basis of the probationary employment and its effect upon an employee's rights. They are:

47 … There is no statutory or other bar in this State to a probationary employee pursuing a claim for unfair dismissal (see *Hutchinson v Cable Sands (WA) Pty Ltd* (FB)(op cit)).

48 …

49 Again, the following principles apply –

(a) The employer, throughout the period of probation, retains the right to see whether he/she wants the employee or not in his/her employment.

(b) (i) The employer is entitled to consider the employee as if the employee was still at first interview with the following modifications in this case.

…

(c) Probation is an extension of the selection process, a period of learning and a time for attention, assessment and adjustment to standards of performance and conduct. (Inherent in that is that it is a time for teaching, training and counselling.)

(d) (i) However, a probationary employee knows that he/she is on trial and that he/she must establish his/her suitability for the post. The employer, on his side, must give the employee a proper opportunity to prove him/herself, but he/she reserves the right to determine the employment with appropriate notice provided he has reason for so doing (see *Sommerville v Brinzz Pty Ltd Clerk Vehicle Repair Industry* [1994] SAIRComm 8 (31 January 1994), citing *Re J M Hamblin v London Borough of Ealing* (1975) IRLR 354 and see *Hutchinson v Cable Sands* (WA) Pty Ltd (FB)(op cit)).

(ii) Further, an employee on probation can expect to be counselled and informed that she/ he is not meeting the required standards of performance, to be given reasonable training in this respect, and to be warned of the possible consequences of a failure to improve. Provided this is done, an employee who is on probation would have little cause to complain if a decision was taken during the course of or at the end of a probationary period to terminate the employment (see *Sommerville v Brinzz Clerk Vehicle Repair Industry* (op cit), citing *Hull v F F Seeley Nominees Pty Ltd* (1988) 55 SAIR 550 at 562).

(e) (i) Consonant with those principles, a probationary employee is able to seek reinstatement, but an employer is entitled to terminate a probationary employee more easily, e.g length of service is not a factor generally, because probationary employment is for a finite period and, in that period, assessment, training and acquisition of skills and demonstration of ability can occur. In addition, any genuine question of compatibility between employer, employee and other employees can be assessed. (This is not a comprehensive inventory of such matters.)

(ii) However, probation is not a licence for harsh, oppressive, capricious, arbitrary or unfair treatment of a probationer (see *Hutchinson v Cable Sands (WA) Pty Ltd* (FB)(op cit) and the cases cited therein).

64 It is to be noted that the decisions referred to above relate to claims made by employees in the Commission's general jurisdiction. However, the principle of probation as set out in those decisions applies equally to a public service officer or government officer on probation.

65 The question then arises as to how that affects Mr Wynyard. Prior to permanent appointment, there were a number of hurdles, consecutively, to be overcome by Mr Wynyard. The first was to successfully complete the training. He was in a stage prior to being a probationer. It would seem contrary to the general purpose of probation for an employee's status to be unconditionally permanent for a period prior to probation, and then, on successful completion of the training period, and commencement of probation to revert to something more conditional or less secure than permanency.

66 Given that the Full Bench has said in ***East Kimberly Aboriginal Medical Service***, that probation is:

(a) part of the selection process;

(b) a period of learning and attention, assessment and adjustment to standards of performance and conduct – a time for teaching, training and counselling,

we conclude that while he was in training, although before the formal probationary period, Mr Wynyard was in fact in a probationary phase of the employment. He was being trained and assessed, and where his performance fell short of requirements, it was drawn to his attention and corrected where possible. Examples included in Exhibit R4 – Running Sheet include:

1. On 15 January 2009, Mr Wynyard was first spoken to about using his judgment;
2. On 6 February 2009, he was spoken to about exercising self control;
3. On 6 February 2009, he said that he had rushed the exam and was reminded by Cecilia Robinson to "take his time to read through questions properly" (See also Exhibit R9, Statement of Cecilia Mary Robinson, paras 17 – 18).

67 He was to establish his suitability for the post, and the employer was required to give him a proper opportunity to prove himself but reserved the right to determine the employment with appropriate notice provided there is a reason for doing so. In those circumstances, Mr Wynyard must have a lesser expectation of ongoing employment than an employee whose probation period has been satisfactorily completed. Mr Wynyard was required to satisfactorily complete the training.

68 One of the issues that has been identified in this case is that this was the first intake of and training course for, the Custody Officers. Certain failings within the processes have been established in that course including, as identified by Ms Kerr in her report, that the competency based assessment approach needed to be reviewed and modified. She identified that Mr Wynyard's actions raised concerns and yet he was deemed competent in the areas where the trainers had expressed concern. This is clearly an issue that has caused Mr Wynyard concern, that he was deemed competent in areas of training yet not permitted to complete the training.

69 In this regard, Ms Kerr is correct. Mr Wynyard would be justified in a belief that if he was found to be competent - that is that he could perform the appropriate manoeuvres and the technical moves - he would satisfactorily complete the training. However, this was not so. The real assessment of suitability for the position of Custody Officer, and in particular for Senior Custody Officer, included questions of judgment and attitude and in both of these areas he was considered to be lacking and to constitute a risk to safety. We find it difficult to accept that Mr Wynyard would not have appreciated that he would be assessed on his attitude and conduct as well as on his ability to apply the physical techniques being taught.

Conclusions Regarding Evidence

70 Part of the difficulty of this matter is that described earlier whereby Mr Wynyard declined to give sworn evidence and be subject to cross-examination but rather chose merely to make a statement. He cross-examined the respondent's witnesses. The respondent's witnesses generally gave their evidence in an honest and open way. With some minor exceptions, we accept that evidence.

71 Where the evidence of some of the witnesses conflict, such as whether Ms Wylie screamed, called out, or cried out during the handcuffing exercise is not to the point. The issue is that her wrists had been injured the day before and Mr Wynyard applied the handcuffs in a way which caused her pain. He was unable to release them and help was required to do so. Even if Mr Wynyard's version of that event is to be accepted, he knew of her injury when he was instructed by Constable Robinson to tighten the handcuffs on Ms Wylie. He should have explained that he knew her wrists had been injured the day before and so not tightened them. Instead he applied them too tightly, exacerbating her injury, and was unable to release them.

72 Apart from a couple of petty complaints about Mr Wynyard, it has been demonstrated that he was over zealous and hasty in attempting some of the skills training during the course.

73 We also find that Mr Wynyard lacked care in the application of the cell extraction exercise where the evidence is quite clear that he applied his weight to Mr Leader's neck and not to his shoulder, causing him injury. We do not accept Mr Wynyard's explanation of that situation. It is clear that the injury was caused because of Mr Wynyard's over zealous approach and his failure to apply his weight to the shoulder rather than the neck. The conflict in the evidence relates to Mr Leader's response, not to Mr Wynyard's actions.

74 We find that Mr Wynyard did cause injury to both Ms Wylie and Mr Leader due to his aggressive approach and not exercising appropriate care. He has not accepted responsibility for his actions and has sought to deflect blame to others.

75 We found Mr Coverdale's evidence very plausible, in particular his description of Ms Wiley's reaction to the injury, and of his own injury.

76 We find that the evidence demonstrates a number of things:

(a) from early in the course Mr Wynyard drew attention to himself by using his personal computer during class to download music and used the training program as an opportunity to promote his other businesses;

(b) his appearance and behaviour made him the target of attention for staff and trainees alike;

(c) the fact of Mr Wynyard being noticed early in the course and of his being in conflict with fellow trainees does not mean that he was unfairly targeted, discriminated against or bullied, rather his behaviour caused others to have genuine concerns about him and to believe that it was necessary to observe him;

(d) he was competent to perform most of the techniques and skills taught to him;

(e) his approach was perceived as, and was, aggressive and rough. Others came to be reluctant to undertake exercises with him for fear of being hurt;

(f) he could not be relied upon to think before he acted, did not make appropriate and timely choices where judgment was required, such as his original answer to questions about the appropriate target for the extendable baton in a situation which contained no threat of death or grievous bodily harm, and as to the means of gaining compliance for a strip search. He rushed his answers in the written extendable baton test, without thinking;

(g) his communication skills, both at an interpersonal level with other trainees and in training were less than satisfactory, causing personal conflict and preventing him from being a successful communicator in personal and professional ways;

(h) he was in conflict with a number of other trainees;

(i) he did not control his temper and his behaviour to the level required, including that he said he would have used a Taser on someone, if he had one available, when he was angry;

(j) he had a tendency to move rapidly to a more aggressive and confrontational style rather than use communication skills to calm a situation, thus creating or increasing volatility.

77 The role for which he was being trained and assessed as Senior Custody Officer required leadership, initiative, sensitivity, good communication skills and good judgment in circumstances of high pressure (see Exhibit R18 – Senior Custody Officer Position Description). Mr Wynyard's observed approach and behaviour meant he was not suitable for that role. We find that the respondent was entitled to conclude that the attitude and behaviour described above meant that Mr Wynyard posed a safety risk. This risk was to his fellow officers, those in custody and to himself.

Denial of Procedural Fairness

78 Although Mr Ferguson's letters of 4 March 2009 and 19 March 2009 express the allegations and conclusions in different terms, they amount to the same thing – that Mr Wynyard was not permitted to complete the training because there was real and genuine concern that he posed a risk to safety, and this meant he could not satisfactorily complete the training – a necessary precondition to permanency.

79 Mr Wynyard says he was denied procedural fairness in that he was not given an opportunity to respond to the allegation that he posed a safety risk. It is true that Mr Ferguson's first letter did not mention the question of a safety risk, but used the words "disregard of lawful commands, poor tactical communication skills, excessive use of force, apparent lack of self control …". Mr Wynyard responded to each of these.

80 That Mr Wynyard was a risk to safety is a conclusion which can be readily drawn from circumstances where a Custodial Officer training for work in the Watchhouse displays the type of behaviour and traits described in Mr Ferguson's letter. Therefore, we find that Mr Wynyard has not been denied procedural fairness because a conclusion has been drawn from the issues which were put to him, even though the conclusion itself was not put to him for his response.

Injuries to Other Officers

81 Mr Wynyard says that other officers were injured in training, and he was also injured. He suggests that he was not alone in causing injuries and therefore reliance on the injuries to Wylie, Coverdale and Leader was unfair.

82 We have noted that other officers were injured during the training exercises (Exhibit A2 – Injury Book). That is not the issue. One might expect that injuries will occur where people are being trained in methods of restraint and in physical conflict situations. The issue in this case was that Mr Wynyard's particular approach and conduct, being aggressive and rough, and not thinking before he acted, caused injuries. There is no evidence as to what caused the injuries to other trainees.

Wearing Uniform/Accoutrements in Transit

83 In respect of the question of Mr Wynyard wearing his uniform and accoutrements in transit, we accept the evidence of Sergeant McDonald that he noted Mr Wynyard's presence when the instruction not to wear them home was given (Exhibit R2, Statement of David Neil McDonald, para 8 and T:28). Therefore we conclude that Mr Wynyard was given the instruction. The evidence is also that while trainees were able to wear their uniforms at the Academy and ECU campus, they were not allowed to wear them home. Mr Wynyard did. The fact that no member of the public complained is not to the point.

Comment Regarding the Taser

84 Mr Wynyard suggests that Custody Officers Hannah and Rooney concocted the story that Mr Wynyard said that he was so angry he would have shot someone with his Taser. We find that Mr Wynyard made that statement based on our acceptance of Mr Leader's and Mr Coverdale's evidence (para 90 and para 79 of their respective statements). It demonstrates a lack of self-control and inappropriate behaviour which is inimical to a person charged with the responsibility of safely managing people in police custody.

Denial of Opportunity to Complete Training

85 Mr Wynyard complains that one of the reasons for his dismissal was that he had not completed the training program but says that this is unfair because the respondent stopped him participating and thereby denied him the opportunity to finish. However, we think that a proper reading of Mr Ferguson's letter of 19 March 2009 is not that Mr Wynyard did not finish the program but that he had not completed what he did to a *satisfactory* standard (emphasis added).

86 The second aspect of Mr Wynyard's complaint is that he was denied further opportunities to be passed as competent when others were given such opportunities. Evidence was given by a number of witnesses that where officers did not satisfactorily complete particular components of training they would be given the opportunity to repeat and satisfactorily complete that training. Some of them graduated and were allocated to work in the Perth Watchhouse prior to them having a further opportunity to demonstrate competency in those remaining modules, whereas the appellant was not. Mr Wynyard was denied that opportunity for good reason, in that he was deemed to be a risk to safety. If such a conclusion is reached, it is both pointless and inappropriate to allow him that further opportunity. There can be no requirement on an employer to allow an employee to complete training or probation if the employee is found to be unsatisfactory prior to its completion. (***East Kimberley Aboriginal Medical Service*** [para 49(d)(ii)])

Other Employment

87 Mr Wynyard suggests that because of his experience in working in the security industry, including his current employment as a transit officer, where he has not experienced any issues associated with his being a safety risk, this demonstrates that he is suitable to work in the Watchhouse.

88 It may be the case that Mr Wynyard has had no difficulty in his other work, however the respondent is entitled to set the standards it expects of its employees. It is entitled to assess its employees according to those standards. There is nothing to suggest that those standards are unreasonable. The requirements of another employer are not relevant in that regard.

89 Further, the respondent has a very important responsibility to the public of this State in its handling of people in its custody and must set the highest standards. That the respondent has not found Mr Wynyard meets its requirements is not a reflection on what others may assess as acceptable from their own observations.

Conclusions

90 Having considered all of the evidence we are satisfied that the respondent had good cause to be concerned that Mr Wynyard may pose a safety risk. Even if there were some procedural errors or omissions in the handling of his dismissal, given the overall conclusion we have drawn as to his suitability for the position of Senior Custody Officer at the Perth Watchhouse, we have no hesitation in stating that his unsuitability for the position would far outweigh any procedural difficulties had they been demonstrated.

91 We find that Mr Wynyard has not made out his appeal and we would dismiss it.

2009 WAIRC 01227

APPEAL AGAINST THE DECISION MADE ON 20 MARCH 2009 RELATING TO TERMINATION OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DION WYNYARD
	APPELLANT
	-v-
	WA POLICE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
	MR C FLOATE - BOARD MEMBER
	MS R LAVELL - BOARD MEMBER
DATE	WEDNESDAY, 25 NOVEMBER 2009
FILE NO	PSAB 5 OF 2009
CITATION NO.	2009 WAIRC 01227

Result	Appeal dismissed
Representation	
Applicant	The Applicant
Respondent	Ms T Kerr

Order

HAVING heard the appellant on his own behalf and Ms T Kerr on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this appeal be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

EMPLOYMENT DISPUTE RESOLUTION MATTERS—Notation of—

The following were matters before the Commission under the Employment Dispute Resolution Act 2008 that concluded without an order issuing.

Application Number	Matter	Commissioner	Dates	Result
APPL 52/2009	Request for mediation in relation to unfair dismissal	Commissioner S Wood	21/10/2009	Discontinued
APPL 54/2009	Request for mediation in relation to employee entitlements	Commissioner S Wood	12/10/2009	Concluded
APPL 69/2009	Request for mediation in relation to access to carers/personal leave	Acting Senior Commissioner PE Scott	8/12/2009	Withdrawn

RECLASSIFICATION APPEALS—

2009 WAIRC 01251

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHAEL ALEXANDER
	APPELLANT
	-v-
	MAIN ROADS WESTERN AUSTRALIA
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 27 NOVEMBER 2009
FILE NO	PSA 63 OF 2008
CITATION NO.	2009 WAIRC 01251

Result	Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS the matter was set down for hearing for mention on the 4th day of December 2009; and

WHEREAS on the 20th day of November 2009 the appellant filed a Notice of Discontinuance in respect of the matter;

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

THAT this appeal be, and is hereby dismissed.

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

2009 WAIRC 01242

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GEOFFREY THOMAS AUGUSTAT
	APPELLANT
	-v-
	MAIN ROADS WESTERN AUSTRALIA
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 27 NOVEMBER 2009
FILE NO	PSA 46 OF 2008
CITATION NO.	2009 WAIRC 01242

Result	Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS the matter was set down for hearing for mention on the 4th day of December 2009; and

WHEREAS on the 20th day of November 2009 the appellant filed a Notice of Discontinuance in respect of the matter;

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

THAT this appeal be, and is hereby dismissed.

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

2009 WAIRC 01241

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RHONDA A. BYWATERS
	APPELLANT
	-v-
	MAIN ROADS WESTERN AUSTRALIA
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 27 NOVEMBER 2009
FILE NO	PSA 45 OF 2008
CITATION NO.	2009 WAIRC 01241

Result	Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS the matter was set down for hearing for mention on the 4th day of December 2009; and

WHEREAS on the 20th day of November 2009 the appellant filed a Notice of Discontinuance in respect of the matter;

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

THAT this appeal be, and is hereby dismissed.

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

2009 WAIRC 01243

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHARLES FREELAND DUTHIE
	APPELLANT
	-v-
	MAIN ROADS WESTERN AUSTRALIA
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 27 NOVEMBER 2009
FILE NO	PSA 47 OF 2008
CITATION NO.	2009 WAIRC 01243

Result	Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS the matter was set down for hearing for mention on the 4th day of December 2009; and

WHEREAS on the 20th day of November 2009 the appellant filed a Notice of Discontinuance in respect of the matter;

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

THAT this appeal be, and is hereby dismissed.

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

2009 WAIRC 01248

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROD GILLIS
	APPELLANT
	-v-
	MAIN ROADS W.A.
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 27 NOVEMBER 2009
FILE NO	PSA 59 OF 2008
CITATION NO.	2009 WAIRC 01248

Result Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS the matter was set down for hearing for mention on the 4th day of December 2009; and

WHEREAS on the 20th day of November 2009 the appellant filed a Notice of Discontinuance in respect of the matter;

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

THAT this appeal be, and is hereby dismissed.

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

2009 WAIRC 01246

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	FREDERICK. JOHN HERMON
	APPELLANT
	-v-
	MAIN ROADS WESTERN AUST
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 27 NOVEMBER 2009
FILE NO	PSA 51 OF 2008
CITATION NO.	2009 WAIRC 01246

Result Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS the matter was set down for hearing for mention on the 4th day of December 2009; and

WHEREAS on the 20th day of November 2009 the appellant filed a Notice of Discontinuance in respect of the matter;

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

THAT this appeal be, and is hereby dismissed.

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

2009 WAIRC 01249

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES PETER JOHN EDWARD LEWIS

APPELLANT

-v-

MAIN ROADS WA

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE FRIDAY, 27 NOVEMBER 2009

FILE NO PSA 61 OF 2008

CITATION NO. 2009 WAIRC 01249

Result Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS the matter was set down for hearing for mention on the 4th day of December 2009; and

WHEREAS on the 20th day of November 2009 the appellant filed a Notice of Discontinuance in respect of the matter;

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

THAT this appeal be, and is hereby dismissed.

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

2009 WAIRC 01245

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES HALLIE MARY MARTYN

APPELLANT

-v-

MAIN ROADS WESTERN AUSTRALIA

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE FRIDAY, 27 NOVEMBER 2009

FILE NO PSA 49 OF 2008

CITATION NO. 2009 WAIRC 01245

Result Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS the matter was set down for hearing for mention on the 4th day of December 2009; and

WHEREAS on the 20th day of November 2009 the appellant filed a Notice of Discontinuance in respect of the matter;

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

THAT this appeal be, and is hereby dismissed.

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

2009 WAIRC 01240

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES KENT WILLIAM MULLINS

APPELLANT

-v-

MAIN ROADS WA

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE FRIDAY, 27 NOVEMBER 2009

FILE NO PSA 43 OF 2008

CITATION NO. 2009 WAIRC 01240

Result Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS the matter was set down for hearing for mention on the 4th day of December 2009; and

WHEREAS on the 20th day of November 2009 the appellant filed a Notice of Discontinuance in respect of the matter;

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

THAT this appeal be, and is hereby dismissed.

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

2009 WAIRC 01247

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES STEPHEN MURRISON

APPELLANT

-v-

MAIN ROADS WESTERN AUSTRALIA

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE FRIDAY, 27 NOVEMBER 2009

FILE NO PSA 53 OF 2008

CITATION NO. 2009 WAIRC 01247

Result Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS the matter was set down for hearing for mention on the 4th day of December 2009; and

WHEREAS on the 20th day of November 2009 the appellant filed a Notice of Discontinuance in respect of the matter;

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

THAT this appeal be, and is hereby dismissed.

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

2009 WAIRC 01239

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES GRAHAM NEIL PATERSON

APPELLANT

-v-

MAIN ROADS WA

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE FRIDAY, 27 NOVEMBER 2009

FILE NO PSA 42 OF 2008

CITATION NO. 2009 WAIRC 01239

Result Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS the matter was set down for hearing for mention on the 4th day of December 2009; and

WHEREAS on the 20th day of November 2009 the appellant filed a Notice of Discontinuance in respect of the matter;

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

THAT this appeal be, and is hereby dismissed.

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

2009 WAIRC 01252

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES JOHN PHILLIPS

APPELLANT

-v-

MAIN ROADS WEST AUST

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE FRIDAY, 27 NOVEMBER 2009

FILE NO PSA 64 OF 2008

CITATION NO. 2009 WAIRC 01252

Result Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS the matter was set down for hearing for mention on the 4th day of December 2009; and

WHEREAS on the 20th day of November 2009 the appellant filed a Notice of Discontinuance in respect of the matter;

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

THAT this appeal be, and is hereby dismissed.

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

2009 WAIRC 01253

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ROBERT L SEAGER

APPELLANT

-v-

MAIN ROADS WEST AUST

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE FRIDAY, 27 NOVEMBER 2009

FILE NO PSA 52 OF 2008

CITATION NO. 2009 WAIRC 01253

Result Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS the matter was set down for hearing for mention on the 4th day of December 2009; and

WHEREAS on the 20th day of November 2009 the appellant filed a Notice of Discontinuance in respect of the matter;

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

THAT this appeal be, and is hereby dismissed.

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

2009 WAIRC 01250

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES NICK SOURIS

APPELLANT

-v-

MAIN ROADS WA

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE FRIDAY, 27 NOVEMBER 2009

FILE NO PSA 62 OF 2008

CITATION NO. 2009 WAIRC 01250

Result Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS the matter was set down for hearing for mention on the 4th day of December 2009; and

WHEREAS on the 20th day of November 2009 the appellant filed a Notice of Discontinuance in respect of the matter;

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

THAT this appeal be, and is hereby dismissed.

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

2009 WAIRC 01254

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LARRY C. TAYA

APPELLANT

-v-

MAIN ROADS WESTERN AUSTRALIA

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE FRIDAY, 27 NOVEMBER 2009

FILE NO PSA 50 OF 2008

CITATION NO. 2009 WAIRC 01254

Result Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS the matter was set down for hearing for mention on the 4th day of December 2009; and

WHEREAS on the 20th day of November 2009 the appellant filed a Notice of Discontinuance in respect of the matter;

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

THAT this appeal be, and is hereby dismissed.

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

2009 WAIRC 01244

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES DAVE VAN HEEK

APPELLANT

-v-

MAIN ROADS WESTERN AUSTRALIA

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE FRIDAY, 27 NOVEMBER 2009

FILE NO PSA 48 OF 2008

CITATION NO. 2009 WAIRC 01244

Result Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS the matter was set down for hearing for mention on the 4th day of December 2009; and

WHEREAS on the 20th day of November 2009 the appellant filed a Notice of Discontinuance in respect of the matter;

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

THAT this appeal be, and is hereby dismissed.

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

RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 7/2007	Marie-Helene Mallet	Dept. of Consumer & Employment Protection	Acting Senior Commissioner PE Scott	Dismissed	27/11/2009

NOTICES—Union Matters—

2009 WAIRC 01297

NOTICE

FBM 7 of 2009

NOTICE is given of an application by the "Western Australian Principals' Federation" to the Full Bench of the Western Australian Industrial Relations Commission for registration of an organisation pursuant to Section 53 of the *Industrial Relations Act 1979*.

The rules of the proposed new organisation relating to the qualification of persons for membership including any rule by which that area of the State within which the organisation operates, or intends to operate is limited, are as follows:

"4 ELIGIBILITY FOR MEMBERSHIP

(a) The Federation shall consist of persons in the following categories:

(i) Principals (as defined in Rule 3) employed or usually employed by the Department as Principals or Deputy Principals (or in the role traditionally designated as Principal or Deputy Principal (howsoever those positions may be described))in Western Australian Public schools and colleges; and

(ii) Any person elected to an office in the Federation."

The matter has been listed before the Full Bench at 10:30 am on Thursday, 28 January 2010 in the Court 3 (Floor 18). A copy of the rules of the proposed new organisation may be inspected on the 16th Floor, 111 St Georges Terrace, Perth.

Any organisation/association registered under the *Industrial Relations Act 1979*, or any person who satisfies the Full Bench that he/she has a sufficient interest or desires to object to the application may do so by filing a notice of objection (Form 13) in accordance with the *Industrial Relations Commission Regulations 2005*.

S. HUTCHINSON

DEPUTY REGISTRAR 7 December 2009

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2009 WAIRC 01217

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	MATTHEW GIBBS AND OTHERS
	APPLICANTS
	-v-
	HITACHI PLANT TECHNOLOGIES LTD AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 20 NOVEMBER 2009
FILE NO/S	OSHT 2 OF 2009, OSHT 4 OF 2009, OSHT 5 OF 2009, OSHT 6 OF 2009, OSHT 18 OF 2009, OSHT 23 OF 2009, OSHT 24 OF 2009, OSHT 25 OF 2009, OSHT 27 OF 2009, OSHT 29 OF 2009
CITATION NO.	2009 WAIRC 01217

Result	Order issued
Representation	
Applicant	Mr T Kucera (of counsel) on behalf of Matthew Gibbs, Matthew Dempsey, Clayton Higgins, Dean Lloyd, Antony Thompson, Colin Jones and Rodney Martin
	Mr S Millman on behalf of Grant Veal, Dane Pridmore and Tony Woodhead
Respondent	Mr J Blackburn and Ms L Gibbs (both of counsel)

Order

WHEREAS at the hearing of these matters on 17 November 2009 Mr Kurera (of counsel) made applications to the Tribunal for OSHT 5 of 2009 and OSHT 18 of 2009 to be adjourned sine die;

AND WHEREAS Mr Blackburn (of counsel) on behalf of the respondents opposed the applications and sought dismissal of OSHT 5 of 2009 and OSHT 18 of 2009;

AND WHEREAS at the hearing on 16 November 2009 with respect to OSHT 24 of 2009 Mr Millman (of counsel) made application for Mr Pridmore's evidence to be adjourned until Monday 23 November 2009 due to his unavailability to give evidence at the time scheduled;

AND WHEREAS Mr Blackburn opposed the application to adjourn with respect to OSHT 24 of 2009 submitting the respondents would be prejudiced if the applicant's evidence was commenced after the respondents commenced their case;

AND WHEREAS having considered the issues and submissions of the parties and applying the principles relating to adjournment the Tribunal informed the parties in OSHT 5 of 2009 and OSHT 18 of 2009 the applications would be discontinued;

AND WHEREAS having considered the issues and submissions of the parties and applying the principles relating to adjournment the Tribunal determined in OSHT 24 of 2009 the application would be adjourned recognising the evidence of the applicant must be given before the respondents commence submissions.

NOW THEREFORE, I the undersigned pursuant to the powers conferred on the Tribunal under the *Occupational Safety and Health Act 1984* hereby order:

1. THAT OSHT 5 of 2009 and OSHT 18 of 2009 be discontinued; and
2. THAT with respect to OSHT 24 of 2009 the presentation of Mr Pridmore's evidence to be completed prior to the commencement of the respondents' submissions.

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

2009 WAIRC 01226

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	MATTHEW GIBBS AND OTHERS
	APPLICANTS
	-v-
	HITACHI PLANT TECHNOLOGIES LTD AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 24 NOVEMBER 2009
FILE NO/S	OSHT 2 OF 2009, OSHT 4 OF 2009, OSHT 6 OF 2009, OSHT 23 OF 2009, OSHT 24 OF 2009, OSHT 25 OF 2009, OSHT 27 OF 2009, OSHT 29 OF 2009
CITATION NO.	2009 WAIRC 01226

Result	Applications adjourned sine die
Representation	
Applicant	Mr T Kucera (of counsel) on behalf of Matthew Gibbs, Matthew Dempsey, Clayton Higgins, Dean Lloyd, Antony Thompson, Colin Jones and Rodney Martin
	Mr S Millman on behalf of Grant Veal, Dane Pridmore and Tony Woodhead
Respondent	Mr J Blackburn and Ms L Gibbs (both of counsel)

Order

WHEREAS these applications were listed for conciliation before the Occupational Safety and Health Tribunal (the Tribunal) on 20 and 23 November 2009;

AND WHEREAS at the conclusion of conciliation proceedings on 23 November 2009 the parties reached a preliminary agreement with respect to events that occurred at Bluewater Construction Site for the period from 1 to 5 May 2009;

AND WHEREAS the parties agreed OSHT 2 of 2009, OSHT 4 of 2009, OSHT 6 of 2009, OSHT 23 of 2009, OSHT 24 of 2009. OSHT 25 of 2009, OSHT 27 of 2009 and OSHT 29 of 2009 be adjourned sine die;

AND WHEREAS the Tribunal formed the view it was appropriate to adjourn the applications sine die.

NOW THEREFORE, I the undersigned pursuant to the powers conferred on the Tribunal under the *Occupational Safety and Health Act 1984* hereby order:

- THAT OSHT 2 of 2009, OSHT 4 of 2009, OSHT 6 of 2009, OSHT 23 of 2009, OSHT 24 of 2009. OSHT 25 of 2009, OSHT 27 of 2009 and OSHT 29 of 2009 be adjourned sine die

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

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2009 WAIRC 01174

REFERRAL OF DISPUTE RE PAYMENT OF CLAIM

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	COTTER FAMILY TRUST T/A TILT-A-CRANE
	APPLICANT
	-v-
	MR MICHAEL GALEA
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	WEDNESDAY, 11 NOVEMBER 2009
FILE NO	RFT 18 OF 2009
CITATION NO.	2009 WAIRC 01174

Result	Change of name of respondent
Representation	
Applicant	Mr B Cotter
Respondent	No appearance

Order

HAVING heard Mr B Cotter for the applicant and there being no appearance from the respondent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders:

THAT the name of the respondent be deleted and substitute instead the name, The Galea Group T/A WA Stonemasons.

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

2009 WAIRC 01201

REFERRAL OF DISPUTE RE PAYMENT OF CLAIM

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	COTTER FAMILY TRUST T/A TILT-A-CRANE
	APPLICANT
	-v-
	THE GALEA GROUP T/A WA STONEMASONS
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	MONDAY, 16 NOVEMBER 2009
FILE NO	RFT 18 OF 2009
CITATION NO	2009 WAIRC 01201

Catchwords	Owner-driver contract - Referral of dispute re payment of claims - Owner-Drivers (Contracts and Disputes) Act 2007 - ss 38, 44 and 47
Result	Unpaid entitlements awarded
Representation	
Applicant	Mr B Cotter
Respondent	No appearance

Reasons for Decision

1 The respondent did not attend at hearing. I chose to conduct the hearing for the reasons expressed at hearing. In essence the respondent has paid no attention to this application, and the respondent was advised by my Associate of the date of hearing and that if he did not attend, the hearing would proceed in his absence. The applicant, Tilt-a-Crane, is a transportation business run by Mr Cotter. He claims for three jobs which he says he did for The Galea Group, and for which he says he was not paid. His claim is as follows:

Invoice #5821 for $22.94. Date of job 01/06/08

Invoice #6307 for $342.34. Date of job 06/09/08

Invoice # 6753 for $737.88. Date of job 27/01/09

2 Mr Cotter's evidence is that in respect of the job on 1 June 2008 Mr Galea paid him $800 of the bill and said that he would pay the remaining amount on the next bill. This never occurred. For the job on 6 September 2009 Mr Galea again said that he would pay Mr Cotter on the next bill and this did not happen. Mr Cotter then did one more job for Mr Galea and was not paid for that either.

3 All the jobs involved moving equipment for Mr Galea. Mr Galea would telephone Mr Cotter 24 hours in advance to give him the details of the move. On the advice of his credit agency Mr Cotter got Mr Galea to fill out and sign a credit application

which described the terms of trade as payment due within 30 days of invoice [Exhibit A1]. Included in this exhibit is a letter of demand from Mr Cotter to Mr Galea of 9 June 2009 specifying the amounts as claimed being overdue for payment. Mr Galea specified the work carried out for each of the jobs. The hourly rate for the jobs was $78 per hour plus GST.

4 Mr Cotter stated at hearing that he was not seeking to include any administration fee or interest in his claim. He sought a change to the respondent's name which has already been effected by an order of the Commission.

5 I have no difficulty accepting the evidence of Mr Cotter. I accept that his business did undertake the work as claimed for Mr Galea and that he has not been paid for the work. The amount outstanding totals $1,103.16 which I find is due to the applicant. I will issue an order that this amount be paid to the applicant by the respondent within 7 days of the order.

2009 WAIRC 01223

REFERRAL OF DISPUTE RE PAYMENT OF CLAIM

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	COTTER FAMILY TRUST T/A TILT-A-CRANE
	APPLICANT
	-v-
	THE GALEA GROUP T/A WA STONEMASONS
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	TUESDAY 24 NOVEMBER 2009
FILE NO	RFT 18 OF 2009
CITATION NO.	2009 WAIRC 01223

Result	Unpaid entitlements awarded
Representation	
Applicant	Mr B Cotter
Respondent	No appearance

Order

HAVING heard Mr B Cotter on behalf of the applicant and there being no appearance on behalf of the respondent, the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007, hereby orders:

THAT the said respondent, The Galea Group T/A WA Stonemasons do hereby pay the amount of $1,103.16 to the applicant, Cotter Family Trust t/a Tilt-A-Crane within 7 days of the date of this order.

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