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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Appeals against decision of Commission—

2010 WAIRC 00262

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2010 WAIRC 00262
CORAM	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT COMMISSIONER S J KENNER COMMISSIONER J L HARRISON
HEARD	:	WEDNESDAY, 24 FEBRUARY 2010
DELIVERED	:	WEDNESDAY, 12 MAY 2010
FILE NO.	:	FBA 8 OF 2009
BETWEEN	:	NICHOLAS READ Appellant AND ROBERT BRODIE-HALL; LEATHER-LIFE Respondent

ON APPEAL FROM:

Jurisdiction	:	Western Australian Industrial Relations Commission
Coram	:	Commissioner S Wood
Citation	:	[2009] WAIRC 01300; (2009) 89 WAIG 2463
File Nos	:	U 161 of 2009; B 161 of 2009

CatchWords	:	Industrial Law (WA) - Appeal against orders made by the Commission dismissing claim of alleged harsh, oppressive and unfair dismissal and claim for contractual benefits - whether Commission erred - turns on own facts - principles of intention to create legal relations and requirement for consideration considered - appeal dismissed - *Industrial Relations Act 1979* (WA) s 23A, s 29(1)(b)(i), s 29(1)(b)(ii), s 49; *Industrial Relations Commission Regulations 2005* (WA) reg 102(2), reg 102(3); *Mental Health Act 1996* (WA) s 4.
Result	:	Appeal dismissed
Representation:		
Appellant	:	In person
Respondent	:	Mr D Jones and with him Mr M Haylett (as agents)

Reasons for Decision

THE FULL BENCH:

The Appeal

1 This is an appeal instituted under s 49 of the *Industrial Relations Act 1979* (WA) (the Act). The appeal is against orders dismissing applications U 161 of 2009 and B 161 of 2009. These orders were made by the Commission on 8 December 2009.

2 In application U 161 of 2009 the appellant applied to the Commission under s 29(1)(b)(i) of the Act for an order of reinstatement under s 23A of the Act in respect of an alleged claim of harsh, oppressive or unfair dismissal (herein after referred to as the claim for unfair dismissal).

3 In application B 161 of 2009 the application was referred under s 29(1)(b)(ii) of the Act. In this application the appellant claims that he had not been allowed by the respondent a benefit, not being a benefit under an award or an order, to which he was entitled under his contract of employment. The benefit claimed is a recommendation by the respondent that Robert Brodie-Hall be employed with the Corruption and Crime Commission of Western Australia and other employers.

4 The appellant was employed by the respondent as a factory hand engaged in the manufacture of ugg boots from 16 July 2008 until 20 August 2009. The appellant's appointment was terminated by the respondent on the latter date. The respondent submitted in the hearing at first instance that the appellant's employment was terminated because of serious misconduct in the workplace.

The Grounds of Appeal

5 The appellant was unrepresented at first instance and in the appeal before the Full Bench. His grounds of appeal are lengthy and are in the nature of a submission. The grounds also appear to substantially follow the grounds which were set out in a statement of claim which was attached to applications U 161 of 2009 and B 161 of 2009. The grounds of appeal do not, to any extent, comply with the requirements of reg 102(2) and reg 102(3) of the *Industrial Relations Commission Regulations 2005* (WA) which require an appellant to set out clearly and concisely the grounds of appeal and to identify with particularity, how it is that the decision under appeal is against the evidence or the weight of the evidence or is wrong in law.

6 Part of the appellant's grounds of appeal addressed reasons why the appellant says it is important that, in the public interest, an appeal should lie. In the hearing of the appeal members of the Full Bench explained to the appellant that it was not necessary for him to address any issues of public interest as he is able to institute an appeal as of right against a decision to dismiss as each decision is a final decision and not a decision in the nature of a finding made by the Commission.

7 The appellant's grounds of appeal are set out in three parts. Part A of the appellant's grounds of appeal addresses 15 points which he says supports a contention that the respondent, Robert Brodie-Hall, treated him differently to other employees and thus discriminated against him. It is on this basis that the appellant contends that his dismissal was unfair.

8 Part A of the appellant's grounds states as follows:

> The company, Leather-Life, Shop/Factory – 2/1291 Albany Hwy, Cannington, 6107, WA. Via employer/proprietor, Robert Brodie-Hall has bullied myself, Nicholas Steven Read for my full term of employment, being some year and one month. This is not in relation to the Industrial Relations Act, but is in relation to the Mental Health Act as per meaning of 'mental illness' as in my opinion my employer has a detrimental state of mind as Robert Brodie-Hall has:-
>
> > A disturbance of thought
> >
> > Suffers from volition
>
> And therefore, for this reason it is important that in the public's interest an appeal should lie:
>
> See attachment No 1 (Mental Health Act 1996 4 meaning of 'mental illness'. The evidence for the above is as follows:-
>
> > My employer, Robert Brodie-Hall treats me differently from other employees, when I am bullied by other employees I have a right to defend myself.
> >
> > 1. Other employees – all, work less than 38 hrs a week, but get paid for the full 38 hrs a week. Some (Chris, Marcus may only work 25 hrs a week). I, Nicholas Steven Read, work for 38 hrs/week, get paid 38 hrs/week, at full production rate, and not making any mistakes.
> >
> > 2. Other employees (I think many, eg Chris & Marcus, do work with their own businesses, at Leather-Life Factory/Shop in the same time period as they should be doing work making ugg boots or they are doing other things i.e. not at work at all.
> >
> > Note:- Time cards may lie as another individual may record false times.
> >
> > 3. Other employees are allowed to bully me:-
> >
> > Eg: - Chris tells me to 'FUCK OFF'.
> >
> > This is inappropriate behaviour, my employer disciplines him, but has not been given a letter of written warning of inappropriate behavior (sic) and his employment has not been terminated.
> >
> > 4. I design my own ugg boots. I call them F117's (after the American bomber, Stealth). The company made 5 pairs and others at a cost to me of $150 a pair, except my own pair, I got a company discount of $75.00.
> >
> > I am of the opinion that I am of benefit to the company. My employer thinks differently. I do not know why.

5. Some employees do not provide medical certificates on the first day when they see a doctor. On the few occasions when I see a doctor, on the first, for one day, my employer asks me for a medical certificate. I supplied him with a medical certificate when I was assaulted by Paula Brodie-Hall, of Leather-Life.

6. My employer holds back my superannuation from the fund I selected. He tells me this is a mistake or error.

7. I am told to wear safety boots, I do so all the time, other employees (all) do not wear safety boots. There is a notice on the factory floor for all employees to wear safety boots.

8. Other employees are allowed to use mobil (sic) telephones during working hrs. I am told I am not allowed to do this. There is a notice on the factory floor for all employees not to use mobil (sic) phones during working hrs.

9. I discovered toward the end of my employment that some employees get paid more than $17.00 hr, when I do more work, varied jobs for making ugg boots and a higher quality job for the same period of work per week, but the period of work (time in a week) of 38 hrs is not done by other employees.

10. I only take 15 minutes for morning tea and 30 minutes for lunch. Other employees take longer. This is acknowledged by my employer and is justified in his mind. The employees who do this are:-

    Bianca, Kate, Chris, Marcus.

11. I am told everyone is my boss at work by Robert Brodie-Hall. I acknowledge this. I do not tell anyone else what to do.

12. I was assaulted by Paula Brodie-Hall at 10.02am on 19/08/09. It is acknowledged by Robert Brodie-Hall that she may do this. I have not assaulted anyone.

13. I was purchasing a property, my employer says he made an error in putting a date of 29/8/09 on a letter of employment to a bank. This date is after my termination of employment, dated 20/8/09. He would not do this with other employees. This is the same excuse as with my superannuation.

14. My employer takes $5.00 which I have given Rose (employee of Leather-Life). She was pregnant. He gave $5.00 back to me via post. He did not do this with other employees. (This is against the law)

15. My employer says I have a threatening attitude towards employer (himself) and work colleagues, with no evidence, whereas other employees, eg Chris are allowed to tell me to fuck-off. See No. 3.

For the points 1 to 15 above as evidence as per transcript, my employer, Robert Brodie-Hall makes me, Nicholas Steven Read carry more weight for the company and I am discriminated against. His will or volition to do this is characterised by a disturbance of thought (as mental illness definition) puts me in a defensive position. The defence I have made are not a breach of law, being; the particulars relied on, (inappropriate behaviour) & non breach of contract. The evidence is against the above.

An Australian company, in a capitalist environment (as Australia is) should not commit points 1 to 15 above to an employee, being myself Nicholas Steven Read.

The best should be rewarded or the company should not exist. This is basic intelligence for all companies. At the same time there is a social network, within companies, to protect other employees, sometime this may be myself, this is what mateship is all about. Australia has won wars this way.

My employment should not have been terminated.

9 In Part B of the appellant's grounds of appeal, the appellant sets out particulars of inappropriate behaviour which was alleged to have been committed by him at the workplace which he says have been not made out and are against the evidence and weight of evidence given in the proceedings before the Commission at first instance. The particulars of this ground are as follows:

Inappropriate behaviour (see Attachment *C – U & B 161 files)

* and Attachment A – U & B 161 files

* and letter to police woman Jo ……. ? of Cannington Police Station

Copy to:-

Copy to:- Leather Life, Shop 2/1291 Albany Hwy, Cannington 6107, WA,

From: - Myself, Nicholas Read.

Dated:- 14/4/09 at 1948 hrs.

Attached (exhibit R)

* and letter to Commissioner Wood from me – Assault (exhibit X) from Paula.

The particulars relied on, being inappropriate behavior (sic), is against the evidence and the weight of evidence and the specific reasons why inappropriate behaviour is wrong in law are:-

A) That the evidence is irrelevant

B) I, Nicholas Steven Read was in defence, as I was bullied

C) And as a result I have been harshly, oppressively or unfairly dismissed from my employment. I.R.A 1979 29(1)(b)(i).

I ask you to hear tape (Attachment B for U & B 161 files) I refer to (Attachment C) U & B 161 file. My employer talks about event on 15th July, during lunch break. My employer found me guilty, even thought I did not have the chance to explain that I was in defence.

I refer to points 1 to 5 in letter 17 July (Attachment C) U & B 161 files.

No 1 This is simple;

Some months prior to the 15 July, Kate, employee of Leather-Life came up to me, during working hrs/as she usually does and started telling me her husband, Trevor, did police/asked for police clearances for employees he employs. I said I had a job and asked her why she was telling this? She walked off.

She then further states that she said this to all employees.

It is a fact that I felt intimidated by this as I had a job and all employees had a job, so why would she tell me this and publicly tell all other employees this. She told me during working hrs, when I should of (sic) been concerntrating (sic) on my work, as my employer wanted me to do.

After this, Kate was of the knowledge that a woman said to me that I had the right to have sex with a sixteen year old girl.

Kate was asking me questions about events that happened outside of work. I told Kate my black eye did not hurt.

Kate knew that the police were involved (see Attachment E) U & B 161 file issued me with move on notice.

As a consequence of this I told Kate outside of working hrs (lunch) that I wanted nothing to do with her husband who she says did police/asked for police clearances.

The police issued me with the move on notice on false grounds. The Corruption and Crime Commission of WA are doing an investigation about this (see Attachment E) – U & B 161 files.

Whilst I was telling Kate I wanted nothing to do with her husband, Bianca butted in 3 times. I told her 3 times to stop butting in.

Kate did not tell me to go away.

I did not follow Kate outside to show room.

I did see Kate in show room 1 minute later to tell again that I wanted nothing to do with her husband, as Bianca butted in.

I was not aggressive or threatening or abusive toward Kate Howley, but I was direct as I was in defence as I was bullied by Kate Howley.

I did tell Bianca to fuck off you fat, ugly, bitch as she kept butting in to the conversation I was having with Kate Howley. I was in defence they ganged up. I only said this once.

It is common for other employees to swear at me. I put up with this. When other employees swear at me they do not get a written warning of inappropriate behaviour and their employment is not terminated. eg:- Employee Chris:-

No 2 My employer says I have engaged in conversation or correspondence of a suggestive or sexual nature. I have not engaged in conversation of a sexual nature there is no evidence, therefore this is irrelevant. I have not made correspondence of a suggestive or sexual nature. Therefore this is irrelevant.

My employer refers to letter to Jo police woman, Cannington Police Station (exhibit R) attached.

I have no complaints from police about the matter.

The penalties my employer refers to have no grounds. Therefore they are irrelevant.

No 3 Any issues I have with the way my employer runs his business should be addressed to him, my employer says. He says he will decide whether or not to deal with them, my employer says.

I acknowledge that it is not my business. There is no evidence to support the above, therefore this is irrelevant.

No 4 Do not concern myself with anyones (sic) time card my employer says, my employer says they are none of my business. I disagree with my employers (sic) statement. I refer to Grounds Part A being 1 & 2 & 10 in relation to my employers (sic) strategy to get the job done.

I was/am in defence of my good work as far as capacity is concerned. Other employees capacity is detrimental to the company (being Leather-Life), but this is excepted (sic) by Robert Brodie-Hall.

No 5 I did make one note on my time card that I arrived about 1 hour late to work, on one day. The note said I was tired and did not get up in time. I did not get paid for this. It is a fact that other employees do get paid for not doing the full 38 hrs/week. See Grounds Part A No 1.

By negotiation I am allowed to ask for a pay rise.

The above is irrelevant.

My employer says I should consider these points over the weekend before deciding how to respond. He made me sign the letter or I would not have a job. This is duress. He told me this when the tape, Attachment B, stopped. On the tape Robert Brodie-Hall states:

A) My future employment was at risk.

B) I could not have an opinion.

See Tape:- Attachment 'B' on U & B 161 files.

I now refer to Attachment: – A – U & B 161 files being notice of termination of employment. I will inform the Bench now that what actually terminated my employment was the fact that Paula Brodie-Hall assaulted me on 19/8/09 at 10.02. See Doctor Report & Medical Certificate enclosed. Attached – exhibit XX & XXX.

It is not up to Commissioner Wood to decide whether I was assaulted or not, by a definition in the dictionary. Assault is assault. The decision is made by doctor and police and backed up by witnesses. Commissioner Wood has no right to comment on Paula Brodie-Halls defence? See letter to Commissioner Wood from me. – Assault from Paula. Attached (exhibit X).

On the morning of 19/8/09 I ask Paula Brodie-Hall & Robert Brodie-Hall two questions:-

1 Are other employees paid more than $17.00/hr? – The answer was yes.

2 Are other employees paid more superannuation?

I did ask on the factory floor:- 'Who is this person(s) who get paid more than $17.00 hr', as it was a secret. There was a conversation I had with Robert Brodie-Hall about the man from Snowy River.

At 10.01 (not during working hrs) I had a private conversation with a person from Rifos Cafe, in Maylands on the phone. I simply said my name and ask:- 'How much was the pizza without the slut'. This is when Paula Brodie-Hall assaulted me and I went directly to police, Cannington Police Station to report and make charges of assault. It was a private conversation which had nothing to do with her.

As per the letter (Attachment A) there is no view/evidence that constitutes a threat to all employees. – U & B 161 files. He/Robert Brodie-Hall talks about a duty of care he owes to all employees.) Take note:-

I, Nicholas Steven Read have a duty of care to myself, being:-

I.R.A. 1979 (s29(1)(b)(i) & (ii).

The above, my employer refers to in notice of termination of employment as far as evidence is concerned is irrelevant to inappropriate behaviour.

I now refer to letter to policewoman Jo Cannington Police Station. 14/4/09 at 1948 hrs (exhibit R) two pages.

As people in my life like to use police to my detriment eg: - Kate Howley telling me about police clearances in relation to her husband, I asked the question:- during lunch – outside of working hrs:- 'Who thinks a policeman is better than me?' Bill, employee of Leather-Life said 'I think a policeman is better than you.'

I did not like this, so I went to the Cannington Police Station and challenged the station to a sprint race. No one turned up. So I won by forfeit. I organised this outside of working hrs.

I wrote a letter to Jo …? policewoman Cannington Police Station. As a man in competition for resources I am allowed to do this. This is what men do. I have had no complaint from police about this. We respect each other. However if an employee (Bill) wants to say a policeman is better than me, Nicholas Read, then I will prove Bill, other men, women, wrong. There is no sexual content in the letter see (exhibit R) nor is it sexual harassment. The letter and events with it can not be related to inappropriate behaviour therefore the evidence irrelevant (sic) as I was in defence of the false statement that Bill said a policeman/person was better than me, Nicholas Read.

Finally, Mr Robert Brodie-Hall has a problem that I put glue on the boots (ugg) that I designed (F117's) and paid for. I did this outside of working hrs.

It is none of his business what I do to my property. My boots are the best, that's why I put glue on them. It happens in society all the time:-

Eg * The best red dress get ripped.

* Far Lap carried the most weight.

* Solar cars/vehicles get damaged.

* My employment gets terminated.

(My capacity is very good) (Robert Brodie-Hall would never admit this, in relation to other employees in the company.

The girls who I gave my boots to, loved them, they are Russian. They felt save (sic) in them. They are white which means they represent the truth and they have a pen (red) on the side. Not the girls, but the boots. Robert would never understand the above. Robert Brodie-Halls' reasoning for inappropriate behaviour by me putting glue on my boots is irrelevant to law.

It is important that in the publics (sic) interest an appeal should lie:- in relation to Grounds Part B. As I work in a company where my capacity is very good but the alleged evidence is either irrelevant or there is a fact that I was in defence.

Also in relation to letter to Jo …? policewoman (attached exhibit R) I say I take my prize:- read entire letter.

It is beneficial to society and beneficial to her and myself if I take her, if she wants me to, so prostitution does not exist. This is in the publics (sic) interest. It would stop drugs, crime, married men having sex with a girl who would want to be with me. I dare you to challenge my thoughts.

I have had no communications from police about the matter.

Note:- Attachment 'B' – the speed of the tape is fine. I checked it myself. It is the equipment it is played on. You can use my machine. Attachment 'B' on U & B 161 files.

10 In respect of application B 161 of 2009, the appellant's grounds of appeal are that he had capacity to enter into a verbal contract with his employer and did do so. He says his employer (the respondent) agreed to recommend to the Corruption and Crime Commission of Western Australia and to any other employer to whom he makes application for employment that he be employed. The grounds of the appellant's appeal which go to B 161 of 2009 are set out in Part C of the grounds of appeal and are as follows:

Non contractual benefit.

Please be informed I have been denied a contractual benefit being that:- I be recommended to another employer being:-

A) The Corruption and Crime Commission of WA

B) Any employer who I make application to.

This is verbal contract law:- See tape Attachment 'B' - U & B 161 files & Attachment 'G' - U & B 161 files.

The particulars relied on being non contractual benefit, is against the evidence and the weight of the evidence because my employ (sic) has said, verbally that he would recommend me to the Corruption and Crime Commission of WA and to any employer I make application to, but he has not done so. The specific reason why this is wrong in law is because when an employer says he or she will do something, they should do it – verbal contract law. I.R.A. 29(1)(b)(ii).

Also see counter proposal – my employer states:- The respondent does not dispute that where requested to do so, the respondent would be prepared to provide an employment related reference, should this be sought from the respondent by a prospective employer (Attached) (exhibit XXXX) two pages.

So it can be seen that in one hand my employer would recommend me to another employer and in another he wants to terminate my employment. This is evidence that my employment should not of (sic) been terminated in the first place and this is why it is in the interests of the public that an appeal lie.

The contract can be evidenced by other tangible evidence, other than in writing. It is on tape 'Attachment B' – U & B 161 files.

My employer's only way out is:-

* Insane persons and intoxicated persons - general rule:- contract with a mentally disturbed or drunken person is valid, but voidable at the option of the incapacited (sic) person (or their legal representative) if:-

A) Person was so incapacitated at the time that could not understand the nature of the contract, and;

B) The other party to the contract was aware (or ought to have been aware) of the extent of the disability, and

C) The person (or their legal representative) repudiates the contract within a reasonable amount of time

See Grounds Part A.

The Alternative Decisions are:-

Orders to Make

That I, Nicholas Steven Read be reinstated.

That my employer, Robert Brodie-Hall recommend me, Nicholas Steven Read, to the Corruption & Crime Commission of WA or/and any employer I make application to, for employment.

Please read:-

My Summary of Events/Statements being: Transcript pages 133 – 138.

The Reasons of the Commissioner

11 The Commissioner's reasons for decision set out and considered the facts in some detail which led him to conclude that the applications by the appellant should be dismissed.

12 It is important to note that neither party took issue with the summary of facts as set out in the Commissioner's reasons for decision.

13 The Commissioner records in his reasons for decision that the respondent based his reason for dismissing the appellant on three incidents which occurred in April, July and August 2009. In April 2009, the appellant challenged police officers at the Cannington Police Station to a sprint race. When no police officer took up the challenge the appellant claimed he had won the

race by default and he wrote a letter to a woman named Jo who was a police officer at the Cannington Police Station. The appellant delivered the letter to the Cannington Police Station and also handed a copy of the letter to a fellow employee, Ms Paula Brodie-Hall, who is also the daughter of the respondent. 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.

14 The appellant was not counselled about the first incident. In July 2009, a second incident occurred. The Commissioner summarised the evidence of the appellant in relation to the events of 15 July 2009 in his reasons for decision as follows [10] – [12]:

> [T]he 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.
>
> 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)
>
> 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'.

15 The Commissioner summarised the evidence of Mrs Howley and Ms Andrews as follows [24] - [27]:

> 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)

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.

…

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." (ts 106 - 108)

16 Mrs Howley and Ms Andrews maintained that the appellant acted towards them in an aggressive, threatening and abusive manner. The employer adopted the view put by both women and disciplined the appellant. The appellant says 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. The tape recording was made by the appellant.

17 The Commissioner noted that the tape recording was in part difficult to follow, not because of audibility but because the tape had been recorded at too fast a speed and the conversation rambled through many issues.

18 The relevant part of tape of conversation between Mr Brodie-Hall and the appellant about the incident on 15 July 2009 is 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.

…

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.

19 At the end of this conversation the appellant was provided with a letter of warning. The letter of warning in exhibit A1 reads 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.

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.

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.

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.

Do not concern yourself with anyone else's time card. They are none of you business.

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."

20 After Mr Brodie-Hall handed the appellant the official warning for unacceptable, inappropriate behaviour he told the appellant, '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 on – I want you to decide for yourself whether you want to come back here and work under those conditions.' Mr Brodie-Hall says the appellant responded, 'Yes I've already said Robert I will come to work and I will work under these conditions.' (see [32] of the Commissioner's reasons for decision).

21 The appellant maintained that this incident was not during work. He took the view that during his breaks and at lunch time and after work he was entitled to do whatever he wanted to do irrespective of whether he was at the employer's premises or not. He also claimed that his behaviour was not inappropriate and he merely acted in his defence. The Commissioner observed the attitude of the appellant was as follows [13] - [14]:

> 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.
>
> 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.

22 In relation to the events that occurred on 19 August 2009, the Commissioner made the following observations about the evidence:

> 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. [22]
>
> 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. [23]
>
> 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. [26]

23 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 that Ms Brodie-Hall told him to stop using that language and to get off the phone. When asked whether she could recall approximately how many times Paula told him to stop using that language and get off the phone, she said, 'Probably about five, maybe more.' (ts 109).

24 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" (ts 37, ts 38).

25 The Commissioner summarised Mr Brodie-Hall's evidence about this event as follows [20] - [21]:

> 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.
>
> 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.

26 The appellant summonsed Mr Brodie-Hall as a witness. During the hearing they had the following exchange:

"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.

You don't remember that? Actually, what happened on my rekindled new memory because I made a complaint to yourself and you came back to me saying, 'Yes, I've discussed it with Chris and I've told him off because he told me to fuck off.' Does that rekindle your memory?---

'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.' (ts 46).

27 The Commissioner also noted that the appellant 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 and concluded that in essence, Mr Brodie-Hall perceived that the appellant is a different individual to others in the workplace but says he was not treated differently in relation to his terms and conditions of employment.

28 After the Commissioner had regard to the evidence about the appellant's conduct in the workplace, the Commissioner observed that the quality of the appellant's work was not in contention, that he was said to be a diligent worker, but it was his conversation and behaviour that his employer questioned and specifically his conduct in the three incidents in April, July and August of 2009. The Commissioner then had regard to what was said by both speakers in the recorded conversation. He said it was apparent that there was considerable argument during the conversation and that Mr Brodie-Hall had expressed considerable frustration with the way the appellant raised, in Mr Brodie-Hall's view, irrelevant, sexual and inappropriate matters in conversations at work, and the way the appellant treated breaks as being completely separate from work and thought he could do as he liked.

29 In relation to the incident in April 2009, the Commissioner found that it is not clear why the appellant gave Ms Brodie-Hall a copy of the letter addressed to the police officer named Jo. He observed the contents of the letter had no connection to his work other than the whole event started with some exchanges at work. The Commissioner observed that there was some conflicting evidence as to what had transpired earlier that day and also observed that the appellant said it arose from him asking questions as to whether police officers are better people. The respondent had made a submission that the issue arose because the appellant appeared concerned about his pay and had discovered that police officers appeared to be getting a pay rise. The Commissioner found it was not relevant which version was correct as the uncontested fact was that the appellant left his workplace without notice and attended at the police station. His employer did not complain about that misconduct at the time and did not rely on this in the hearing before the Commission, but the respondent's objection was that the appellant's letter to the police was inappropriate, offensive and the sexual content of the correspondence upset Ms Brodie-Hall. The Commissioner also noted that the respondent complained that the content of the letter formed a pattern of unpredictable or irrational behaviour on the part of the appellant, as the appellant could see nothing wrong with what he had written.

30 In relation to the events that occurred on 15 July 2009, the Commissioner observed that the appellant complained that Mr Brodie-Hall did not have the correct impression of what had actually occurred on 15 July 2009, 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. The Commissioner observed that whilst it is true that Mr Brodie-Hall did believe Mrs Howley and Ms Andrews, and the conversation between the appellant and the respondent started as a warning to or counselling of the appellant, not an investigation, the Commissioner found that the appellant was given an opportunity to present his case. The Commissioner also found that if one listens to the taped conversation as a whole, Mr Brodie-Hall had other complaints about the way the appellant conducted himself and the conversations he (the appellant) had in the workplace. The Commissioner also found that Mr Brodie-Hall tried hard to get the appellant to understand his concerns.

31 The Commissioner made a finding that having heard all of the evidence he was of the view that Mr Brodie-Hall should have believed Mrs Howley and Ms Andrews over the appellant. The Commissioner said that he unreservedly accepted the evidence of Mrs Howley and Ms Andrews over that of the appellant. He also made a finding that on the appellant's evidence alone, the appellant abused Ms Andrews in a very demeaning way. Whilst the appellant simply said that he was acting in defence because she tried three times to 'butt' into his conversation with Mrs Howley, the Commissioner found that this was no excuse for calling a fellow employee, "You fucking, fat, ugly bitch." Importantly, the Commissioner found that the appellant at the hearing could see no problem with the term he used and sought to justify it by attempting to cross-examine Ms Andrews as to whether she in fact fitted this description. The Commission found that this questioning did the appellant no credit and the Commissioner stopped this line of questioning. The Commissioner then found that given the abuse of two employees by a fellow employee, Mr Brodie-Hall had a duty to act and the warning he gave to the appellant was fairly measured in its content. Consequently, the Commissioner found that on 15 July 2009 the appellant acted towards Mrs Howley and Ms Andrews in an abusive and threatening manner which left them shaken and in tears and in doing so the appellant put his employment in jeopardy by his actions on 15 July 2009.

32 The Commissioner also made findings that the evidence of Mrs Howley and Ms Andrews was consistent and plausible and he questioned why Ms Andrews thought it necessary to intervene on Mrs Howley's behalf three times if the appellant had not been unwelcomely pursuing Mrs Howley.

33 In relation to the events that occurred in April 2009 when the appellant handed Ms Brodie-Hall a letter, the Commissioner found he did not put great weight on those events. This appeared to be because the employer took no corrective action or counselling at that point in time. The Commissioner, however, found that he could understand why Ms Brodie-Hall was offended and unsettled by the content of the letter which claimed some sort of sexual encounter as a prize for an illusionary sprint race. This clearly was inappropriate behaviour. The Commissioner also found that to then introduce this into the workplace was both wrong and understandably disturbing and the problem was that the appellant simply did not comprehend this for two reasons.

34 The Commissioner again referred to the claim made by the appellant at his workplace and at the hearing that anything he did during his breaks was his own business and was not work related. The Commissioner importantly observed that it was the appellant 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 and 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 16-year-old girl as a prize for winning a sprint race. Also he spoke loudly over the telephone at work and close to fellow employees about the price of a pizza without the slut.

35 The Commissioner also found most importantly that each of these acts was not disputed by the appellant. He could see nothing wrong with them and clearly could not understand how they could offend his fellow employees, yet understandably they did. The Commissioner noted that there was no sense on the appellant's part that his behaviour was inappropriate and that discussions of such a sexual nature in the workplace may not be welcome. The Commissioner also found that if the appellant had truly listened to Mr Brodie-Hall during the conversation that was taped he should have been fully aware that Mr Brodie-Hall found his actions and conversation about sexual matters to be completely inappropriate.

36 In relation to the event that occurred on 19 August 2009, the Commissioner noted that there were minor inconsistencies in the evidence for the respondent. These included whether Ms Andrews was in the vicinity to hear the appellant's telephone call and what contact Ms Brodie-Hall made with Mr Read's forearm. The Commissioner, however, found that these inconsistencies were not material to whether the appellant should have been dismissed as the appellant's own evidence substantiated that he acted inappropriately on that day. The Commissioner also said it would be wrong to view the telephone conversation in isolation from earlier events and diminish its relevance. He found that the appellant had been put on notice about one month earlier not to use such language in the workplace and that the appellant knew his employment was at stake but did not seem to comprehend the effect such a conversation has on fellow employees. The Commissioner then found the appellant was clearly told by Mr Brodie-Hall that he should not engage in such behaviour in the workplace yet the appellant randomly chose to make the telephone call and act inappropriately in front of two or three of his work colleagues. The Commissioner found the appellant continued to do so even after he was told to stop. The Commissioner observed that the appellant did not accept this last point but the Commissioner accepted the evidence of Ms Brodie-Hall over that of the appellant.

37 As to the alleged assault by Ms Brodie-Hall, the Commissioner found that this did not change his view as to whether the appellant's dismissal was justified. He found it was clear that Ms Brodie-Hall tried to get the telephone from Mr Read's grasp and in doing so she made contact with his arm, but not with such force as to dislodge the telephone from his hand. The Commissioner observed that Mr Brodie-Hall testified that his daughter reported that she had hit Mr Read but that Ms Brodie-Hall and Mrs Howley gave evidence that the contact was less severe. The Commissioner had regard to a medical certificate tendered by the appellant which stated that:

> 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.

38 After having regard to the contents of the medical certificate, the Commissioner found that the medical certificate supported the view that contact of some force was made to Mr Read's forearm. The Commissioner found that Ms Brodie-Hall should not have touched the appellant, even though he refused to obey a lawful direction. The Commissioner then found that having weighed all the evidence he did not consider it a reasonable description to say that Ms Brodie-Hall assaulted Mr Read. The Commissioner reached this conclusion on the basis of the Concise Oxford Dictionary defining an assault as "a violent physical or verbal attack".

39 The Commissioner then had regard to the observations of Brinsden J in *Undercliffe Nursing Home v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385, 386 where his Honour discussed the concept of a fair go all around and pointed 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". The Commissioner found after having regard to this principle, that in circumstances where the appellant was warned, and correctly so about his behaviour, and where he again displayed inappropriate behaviour about one month later in disregard of the warning, that the appellant had received a fair go and that he breached the trust his employer held in him.

40 The Commissioner also had a regard to the fact that Mr Brodie-Hall chose on 19 August 2009 to send a letter of termination to Mr Read rather then dismiss him in person. The Commissioner said that a telephone call to Mr Read would have been more preferable if the termination could not have been done in person, but nevertheless, it did not matter as the appellant 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. The Commissioner found that the appellant had acted poorly by refusing to leave the workplace until such time as the police were called. Finally, the Commissioner found the dismissal of the appellant to be wholly justifiable.

41 In respect of the applicant's claim for contractual benefits in B 161 of 2009, the Commissioner had regard to the part of the telephone conversation recorded by the appellant which was relevant to the denied contractual benefit claim. The appellant says that during that conversation Mr Brodie-Hall promised him that he would write to the Corruption and Crime Commission and recommend him (the appellant) for employment by that Commission. The appellant maintains that this promise then became a condition of his contract of employment. The respondent says that he agreed to give a reference for the appellant to any prospective employer who may contact him and the Corruption and Crime Commission was mentioned in that context.

Mr Brodie-Hall gave evidence that he had never been contacted by any prospective employer about Mr Read. In any event the respondent submitted at first instance and on appeal that the promise did not amount to a legally enforceable term of the appellant's contract of employment.

42 The Commissioner set out the part of the tape recording relevant to the denied contractual benefits claims 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

43 The appellant informed the Full Bench that he agreed that the conversation had been correctly transcribed by the Commission in the reasons for decision. However, the appellant maintains that the record of that conversation establishes a contractual term which is enforceable.

44 The Commissioner concluded that the exchange in the conversation could not be construed as varying the contract of employment or adding a legally enforceable condition to the terms and conditions of employment of the appellant. He found that Mr Brodie-Hall was responding to the appellant's desire to obtain a higher paid job and so offered to provide a reference, which specified certain attributes of the appellant as a worker, if he was contacted by that prospective employer. The prospective employer mentioned specifically was the Corruption and Crime Commission. Relevantly the Commissioner found that there was no evidence that the Corruption and Crime Commission had contacted Mr Brodie-Hall about the appellant. The Commissioner also found the conversation had nothing to do with the appellant's employment at Leather-Life. It concerned only Mr Brodie-Hall agreeing to assist the appellant obtain a higher paid job elsewhere.

45 The Commissioner then had regard to the Full Bench decision in *Hotcopper Australia Ltd v Saab* (2001) 81 WAIG 2704 where Sharkey P at 2707 set out a number of principles which are limitations and/or conditions precedent to the exercise of jurisdiction under s 29(1)(b)(ii) of the Act. After having regard to the principles set out by Sharkey P, the Commissioner found that the appellant's claim failed the criterion that the benefit claimed must be a contractual benefit, that is, the claimant must be entitled to the claim under his contract of service. He also found that the condition that the benefit must have been denied by the employer was not satisfied in that no employer had contacted Mr Brodie-Hall on the appellant's behalf. The Commissioner also found that Mr Brodie-Hall did consider writing to the Corruption and Crime Commission but decided against it as he checked and no positions had been advertised.

46 Consequently, in light of these findings, the Commissioner made orders to dismiss the appellant's claim for unfair dismissal and the claim for a denied contractual benefit.

The Appellant's Submissions

47 The first point the appellant makes is that the Commissioner wrongly accepted the evidence of Mr Brodie-Hall, whose evidence was against the weight of the evidence of inappropriate behaviour and breach of contract. The appellant says at page 54 of the transcript of the hearing at first instance that Mr Brodie-Hall firstly admitted that he (the appellant) had been a good employee but then changed his mind and said that he had not done a good job with regards to conduct in the workplace over the entire period of employment. The appellant also says that Mr Brodie-Hall's evidence should not have been accepted because if Mr Brodie-Hall did not regard him as being a good employee over the entire period of employment why would he recommend him to another employer if he (the appellant) had engaged in inappropriate behaviour.

48 The appellant then made a submission that his employer has a detrimental state of mind within the meaning of the definition of 'mental illness' in s 4 of the *Mental Health Act 1996* (WA). Section 4 of the *Mental Health Act* defines 'mental illness' as:

> (1) For the purposes of this Act a person has a mental illness if the person suffers from a disturbance of thought, mood, volition, perception, orientation or memory that impairs judgment or behaviour to a significant extent.
>
> (2) However a person does not have a mental illness by reason only of one or more of the following, that is, that the person —
>
> (a) holds, or refuses to hold, a particular religious, philosophical, or political belief or opinion;
>
> (b) is sexually promiscuous, or has a particular sexual preference;
>
> (c) engages in immoral or indecent conduct;
>
> (d) has an intellectual disability;
>
> (e) takes drugs or alcohol;
>
> (f) demonstrates anti-social behaviour.

49 In particular, the appellant says that Mr Brodie-Hall suffers from a disturbance of thought and suffers from volition and the evidence which proves this is the evidence that the appellant refers in points 1 – 15 of the particulars to Part A of his grounds of appeal. The appellant also says that points 1 – 15 of the particulars provide evidence that he, the appellant, was bullied by his employer over the period of his entire employment. It appears to be inherent in the appellant's argument that the appellant puts forward a view that points 1 – 15 are matters that Commissioner Wood should have taken into account when making his decision as to whether the appellant was unfairly dismissed.

50 The appellant's second ground of appeal is contained in Part B of his grounds of appeal in which he says that he was unfairly dismissed because the conduct which the respondent relied upon in justifying his dismissal was irrelevant and he was 'in defence' because he was bullied.

51 In respect of the incident that occurred in July 2009, the appellant made a submission that Mrs Howley did not tell him to go away while he was telling her that he wanted nothing to do with her husband. He also said that Ms Andrews butted in three times and he told her three times to stop butting in. He says that he was not aggressive or threatening or abusive towards Mrs Howley but he was direct as he was 'in defence' as he was bullied by Mrs Howley. He concedes that he did tell Ms Andrews to 'fuck off, you fat, ugly, bitch' as she kept butting in to the conversation that he was having with Mrs Howley. He said he was 'in defence' as they 'ganged up' and he only said this once. He also made the submission that it was common for other employees to swear at him and he put up with this and that when other employees swore at him they did not get a written warning of inappropriate behaviour and their employment was not terminated. The appellant also said that he had not engaged in any conversation of a sexual or suggestive nature. He said his letter to Jo the policewoman at Cannington Police Station (exhibit R) which is the letter that the appellant provided to Ms Brodie-Hall in April 2009, was not suggestive or of a sexual nature and was therefore irrelevant. The appellant also claims that when he had the conversation with Mr Brodie-Hall about the incident in July 2009 that after the tape stopped Mr Brodie-Hall made him sign the letter or he would not have a job and that was duress. The appellant also says the tape of the conversation records that Mr Brodie-Hall stated that his future employment was at risk.

52 In relation to the incident that occurred on 19 August 2009, the appellant submits that Ms Brodie-Hall did assault him and that it was not up to the Commissioner to decide whether he was assaulted or not by a definition in a dictionary. The appellant says that the decision as to whether he was assaulted should be made by a doctor and police and backed up by witnesses. He said when Ms Brodie-Hall assaulted him he went directly to the Cannington Police Station to report and make charges of assault. He also said when he had the conversation with a person from Rifo's Café in Maylands on the phone, he simply said his name and asked, "How much is the pizza without the slut?" He claims this was a private conversation which had nothing to do with Ms Brodie-Hall as it was a conversation outside of working hours. Consequently he says it follows that the conversation had nothing to do with the employer. He also said that he should not lose his job for asking 'how much is the pizza without the slut' when Chris tells him to 'fuck off' and his employer allowed him (Chris) to say that.

53 When making his submissions to the Full Bench, the appellant explained about the incident in July 2009 as follows:

> Exhibit R. That's correct, one, right at the end. As people in my life like to use police to my detriment, eg, Kate Howley, telling me about police clearances in relation to her husband, I asked the question during lunch outside of working hours. I asked the question, "Who thinks a policeman is better than me?" question mark. Bill, employee of Leather Life said, "I think a policeman is better than you." I did not like this so I went to the Cannington police station and challenged the police station to a sprint race. No-one turned up, so I won by forfeit. I organised this outside … outside of working hours. So that wasn't on the premises. I wrote a letter to Jo, policewoman, Cannington police station, as a man in competition for resources and am allowed to do this. This is what men do. I've had no complaint from police about this. We respect each other. However, if an employee, Bill, wants to say a policeman is better than me, Nicholas Read, then I will prove Bill, other men, women, wrong. There is no sexual content in the letter, see exhibit R, nor is it sexual harassment (ts 15).

54 When asked by the Full Bench to explain why he thought the letter to the policewoman did not contain any suggestions of a suggestive or sexual nature he said:

> It is beneficial to society and beneficial to her and myself if I take her, if she wants me to, so prostitution does not exist. It is in the public's interest. It would stop drugs, crime, married men having sex with a girl who would want to be with me. I dare you to challenge my thoughts (ts 17).

55 In relation to the appellant's claim that he had been denied a contractual benefit, the appellant said that he had a conversation with his employer about the fact that he would recommend him to another employer because the employer knew he (the appellant) wanted a higher rate of pay than he was currently receiving which was $17.00 an hour. The appellant also says he had a verbal agreement that the employer would recommend him (the appellant) to the Corruption and Crime Commission of Western Australia and to any employer he made application to, but he has not done so.

56 The appellant then made a submission that the only way in which the employer could avoid his contractual obligation was under the insane persons and intoxicated persons - general rule, that is, a contract with a mentally disturbed or drunken person is valid, but voidable at the option of the incapacitated person (or their legal representative).

The Respondent's Submissions

57 In relation to the appellant's appeal insofar as it relates to his claim for a contractual benefit the respondent points out that the contractual benefit asserted by the appellant is said to arise out of a conversation he had with the respondent. The respondent says that the Commissioner accurately transcribed the conversation but the content of the conversation does not reveal any intention upon the part of the employer to create a new contractual right that is legally enforceable. Nor is there any evidence of any intention by the employer to be bound by any discussion in passing. The respondent simply indicated to the appellant that if he wanted to make application to other persons for employment to obtain a higher hourly rate of pay that he (the respondent) would give him a recommendation because the respondent was not dissatisfied with the appellant's performance of his duties and the quality of the work.

58 In relation to the claim for unfair dismissal and the appeal against the Commissioner's decision, the respondent points out that this part of the appeal is an appeal against a discretionary decision: *Norbis v Norbis* (1985) 161 CLR 513. An appellant who appeals against a decision of the Commission must establish that there has been a miscarriage of the Commissioner's discretion in accordance with established principles: *House v The King* (1936) 55 CLR 499. If the principles are not satisfied by the appellant, there is no warrant for the Full Bench to substitute its own exercise of discretion of the Commissioner: *Bone Densitometry Australia Pty Ltd t/a Perth Bone Densitometry v Lenny* (2005) 85 WAIG 2981, 2985.

59 The respondent also says that s 49 of the Act requires the Full Bench to exercise its statutory function by way of the rehearing of the evidence provided to the Commission at the hearing. However, it must not set aside findings of fact made at first instance, unless it is satisfied that an error has been shown to manifest itself in the Commissioner's decision: *Fox v Percy* (2003) 214 CLR 118, 126; or that important evidence has been overlooked or that insufficient weight has been given to that evidence: *Skinner v Broadbent* [2006] WASCA 2 [37].

60 The respondent contends that all relevant evidence was considered by the Commissioner at first instance and is accurately reproduced in his decision and the conclusions drawn from that evidence are set out by the Commissioner in reaching the decision to reject the appellant's claim.

61 The respondent says that critically, the Commissioner makes important findings of credibility in favour of the respondent's witnesses in respect of events that resulted in the appellant being given a written warning. The respondent points out that having been put on notice as to his unacceptable behaviour in July 2009, the appellant repeated his poor behaviour on 19 August 2009 and the resulting termination was found by the Commissioner to be wholly justifiable in accordance with accepted principles.

62 The respondent says the appellant cannot point to any critical evidence, overlooked by the Commissioner, that may have altered the Commissioner's finding. Consequently, the respondent says the appeal should be dismissed.

63 In relation to the first of the three incidents, the respondent says it shows a pattern of irrational behaviour on behalf of the appellant during the employment period. The respondent says the letter to the Cannington Police Station in April 2009 related to conduct that occurred outside of work when the appellant on his own evidence challenged the Cannington police to a sprint race. It appears on the evidence that no-one turned up and the appellant wrote a letter to the police claiming certain things and he gave a copy of that letter to Ms Brodie-Hall. Her evidence demonstrates that she was shocked about the contents of that letter. The employer did not discipline in any way the appellant over that incident, but in July 2009 and August 2009 other incidents took place which enlightened the respondent as to the harm or possible harm that the appellant could inflict upon the workforce in his absence. The respondent says that Mr Brodie-Hall often was away from the business premises in Cannington and would leave his daughter and other employees at the business premises, most of whom were women.

64 The respondent points out that the Commissioner made an important finding of credibility about the evidence given in respect to the events that occurred in the July 2009 incident and unreservedly accepted the evidence of Mrs Howley and Ms Andrews over the appellant. The respondent says the evidence of these two witnesses demonstrated unequivocally that the appellant was the aggressor and caused the two ladies to break down in a tearful response. The respondent contends that the evidence demonstrates that Ms Andrews tried to intervene to protect Mrs Howley who was retreating outside the premises for a cigarette, and on three occasions she tried to tell the appellant to stop annoying Mrs Howley but the appellant said in coarse language on a number of occasions to Ms Andrews, "You fucking, fat, ugly bitch." The respondent says the appellant conducted himself in the same ugly, non-professional manner in the hearing before the Commission by trying to question the witness in the witness box as to whether she was truly a 'fat, ugly bitch'. However, the Commissioner stopped that questioning. The incident in July 2009 led Mr Brodie-Hall to accept the versions put forward by Mrs Howley and Ms Andrews over that of the appellant and led to the letter of warning which was given to the appellant.

65 The respondent says the Commissioner properly observed that when you are present at a workplace you cannot conduct yourself in a debased way in talking to fellow colleagues and consequently the written warning given by the respondent to the appellant was properly given on 17 July 2009. The respondent says that Mr Brodie-Hall as an employer had a duty of care to his employees in accordance with occupational health and safety laws, and the letter of warning was clearly a warning to the appellant that his behaviour was not acceptable and if there were any other incidences of such behaviour his employment would be terminated.

66 The respondent points out that when the letter of warning is read the respondent cannot be criticised in any way. It is a well thought out letter written by a small businessman who has consideration for his staff and who addressed the issues in a professional way.

67 The third incident was the incident that occurred on 19 August 2009. The respondent points out that the transcript of the hearing at first instance reveals that that incident occurred during a break which was not a lunch break, but a break in work, where employees could access an internal telephone to make external calls. The telephone location is in the hearing of a number of employees and that was demonstrated by the evidence. During this conversation, the appellant was overheard to be speaking to some party unknown at the time about ordering a pizza or inquiring about a pizza order 'without the slut'. When the appellant refused to put down the phone Ms Brodie-Hall intervened and she either touched or struck the appellant in such a way that resulted in some contusion or other injury. The respondent contends the issue is that he (the appellant) was making an inappropriate and insulting telephone call from a business telephone to an outside location and he was told on a number of occasions to cease making that call, yet he refused to do so. Consequently, the respondent says as an employer he had a duty and a right to intervene in that conversation.

68 It is submitted on behalf of the respondent that the three incidents caused Mr Brodie-Hall to decide to terminate the appellant's employment. The appellant left the workplace after Ms Brodie-Hall had purportedly struck him and told him to put the phone down. He did not return to work that day. In the interval Mr Brodie-Hall wrote the letter of termination and posted the letter to the appellant because he did not expect him to return. However, when the appellant reported to work the following day Mr Brodie-Hall told him he had been dismissed and that a letter had been sent to him. However, the appellant refused to leave the building, placed himself in a chair, put his feet up on the table, and notwithstanding further requests for him to leave the premises, he refused. This caused Mr Brodie-Hall to telephone the police. When the police arrived the appellant left the premises quietly.

69 The respondent points out the issue is whether the employer's right to terminate the appellant's employment was exercised unfairly. The respondent says that the Commissioner correctly applied the test enunciated by Brinsden J in *Undercliffe* and in all the circumstances on the basis of the evidence before the Commission, the termination of the employment of the appellant was not unfair.

70 The respondent also contends that the appellant is unable to demonstrate an error in the exercise of discretion of the Commission at first instance and that when regard is had to the authorities referred to by the respondent, the Full Bench should dismiss the appeal.

71 The respondent says that there is no merit in the submission that the employer had a detrimental state of mind or a disturbance of thought and this led to inappropriate treatment of the appellant by the employer. When regard is had to the letters that were provided to the appellant, the tone of the letters demonstrate a person of above average intelligence who was thoughtful in the words he used, and that when one listens to the tape of conversation it is apparent that during the conversation Mr Brodie-Hall was a very considerate man who is a conservative employer of a small business. The respondent says the appellant was treated no differently from anyone else in the workplace. He was given warnings when they were required. Whilst the appellant referred to another employee using offensive language towards him the respondent submits the evidence demonstrates that the employer told the employee not to "rev up" or upset the appellant. The respondent says that that was an appropriate response

to the appellant's complaint. However, the complaints Mr Brodie-Hall received about the conduct of the appellant were much more serious and were dealt with appropriately by Mr Brodie-Hall. Further, the respondent says that Mr Brodie-Hall's conduct at all times demonstrated a conservative man who conducted himself appropriately in the circumstances.

U 161 of 2009 – Claim for Unfair Dismissal – Legal Principles

72 This is a matter where the Commissioner had a discretionary decision to make. In an appeal against a discretionary decision it is for the appellant to establish that the Commissioner erred at first instance in the exercise of discretion and that the exercise of discretion miscarried: *House v The King*.

73 The Full Bench as an appeal court will rarely interfere with findings of facts which have been made in a hearing at first instance which are found on an assessment of the credibility of witnesses. Relevant principles of appellate review and the circumstances where an appellate court has considered it appropriate to intervene and decide for itself what factual findings should be made were recently summarised by Owen JA (with whom Martin CJ and Miller JA agreed) in *Brett v Rees* [2009] WASCA 159 where his Honour observed:

> There has long been two somewhat different descriptions of the appellate approach. One approach (that has come to be called 'the traditional view') emphasises the duty of the appellate court to decide for itself on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge: see, for example, *Paterson v Paterson* [1953] HCA 74; (1953) 89 CLR 212, 218 – 224. The other view placed restraints on appellate intervention, certainly where the findings were based on witness credibility or demeanour, but generally if the findings made by the trial judge were reasonably open on the evidence: see, for example, *Edwards v Noble* [1971] HCA 54; (1971) 125 CLR 296, 307. The plot thickened as the traditional view came to be associated with an approach that seemed to derogate from the previously perceived wisdom that a trial judge was in an advantageous position when it came to making findings on disputed facts based on credibility assessments. Some of the cases have been interpreted as suggesting that this applies even where the finding is based wholly or in part on credibility: see, for example, *Voulis v Kozary* [1975] HCA 44; (1975) 180 CLR 177, 196.
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> By the time *Warren v Coombes* [1979] HCA 9; (1979) 142 CLR 531 came to be decided the traditional view was firmly in the ascendancy; see 542 – 543. But there was a movement back towards the view emphasising the advantages enjoyed by the trial judge: see, for example, *Devries v Australian National Railways Commission* [1993] HCA 78; (1993) 177 CLR 472 ; (1993) 112 ALR 641, 479. This divergence of authority was examined in detail by Kirby J in *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (in liq)* [1999] HCA 3; (1999) 160 ALR 588 [81] – [86]. His Honour's conclusion seems to have tended more towards the traditional view: [86].
>
> The High Court returned to this question in two cases decided in 2003: *Fox v Percy* and *Suvaal v Cessnock City Council* [2003] HCA 41; (2003) 200 ALR 1; (2003) 77 ALJR 1449. In *Fox v Percy* Gleeson CJ, Gummow and Kirby JJ observed [23] (footnotes omitted):
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> > [The appellate court] must, of necessity, observe the 'natural limitations' that exist in the case of any appellate court proceeding wholly or substantially on the record. These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses' credibility and of the 'feeling' of a case which an appellate court, reading the transcript, cannot always fully share. Furthermore, the appellate court does not typically get taken to, or read, all of the evidence taken at the trial. Commonly, the trial judge therefore has advantages that derive from the obligation at trial to receive and consider the entirety of the evidence and the opportunity, normally over a longer interval, to reflect upon that evidence and to draw conclusions from it, viewed as a whole.
>
> Despite these limitations however, the appellate judges may still draw their own inferences and conclusions. The mere fact that a trial judge necessarily reached a conclusion favouring the witnesses of one party over those of another does not, and cannot, prevent the performance by a court of appeal of the functions imposed on it by statute: *Fox v Percy* [28]. In the joint judgment their Honours also observed at [25] (footnotes omitted):
>
> > Within the constraints marked out by the nature of the appellate process, the appellate court is obliged to conduct a real review of the trial and, in cases where the trial was conducted before a judge sitting alone, of that judge's reasons. Appellate courts are not excused from the task of 'weighing conflicting evidence and drawing [their] own inferences and conclusions, though [they] should always bear in mind that [they have] neither seen nor heard the witnesses, and should make due allowance in this respect'.
>
> It can be seen, therefore, that the weight of authority embraces elements of both the traditional view and the more restrained approach. As McHugh and Kirby JJ said in *Suvaal* [73]:
>
> > It is probably true to say that at different times in legal history, the weight given to credibility assessment and the impediment it presents to the exercise of an appellate rehearing have changed, influenced by the quality of the record available for scrutiny; the growing knowledge of psychology and the consciousness of the imperfections of credibility assessment; and a heightened appreciation of the benefits of appellate correction of error, including factual error. But these considerations have not eliminated the appellate obligation to respect the advantages which the primary decision-maker has that are denied to the appellate court. As a matter of logic, experience and legal authority, it cannot be otherwise.
>
> It would, in my view, be wrong to limit 'the advantages which the primary decision-maker has' to demeanour as a guide to credibility assessment and to ignore the "feeling of a case" that usually emerges from running a trial. The primary decision-maker is able to assess testimony against the entirety of the evidence and in a situation in which she or he has an appreciation of the way the trial was run. There may, for example, be subtleties in the way questions were asked (or avoided) that are apparent in the heat of battle but which are not quite as clear in a more clinical examination of a

transcript. Similarly, the effect of evidentiary rulings or rulings about the pleadings made at one stage of a trial may have a greater impact at another point in the proceedings than will be apparent from the record. In carrying out its duty to decide for itself on the proper inference to be drawn from facts an appellate court must be alive to the entire context in which findings were made [64] – [69].

74 As pointed out by the Commissioner in his reasons at [43] the question to be determined by the Commission is whether the respondent has exercised its legal right to dismiss the applicant in such a way that the right has been exercised harshly or oppressively against the employee so as to amount to an abuse of that right: *Undercliffe* at 386. However as Beech CC observed in *Saybolt Australasia Pty Ltd v Mall* (2006) 87 WAIG 87 [52]:

> A proper consideration of whether a particular dismissal is harsh, oppressive or unfair should include a consideration of all of the relevant circumstances. As E M Heenan J observed in *Garbett v Midland Brick Company Pty Ltd* [2003] WASCA 36; (2003) 83 WAIG 893 at [72]:-
>
> > 'Because there is such a wide variety of factors which may affect any individual case, no universal or exhaustive list of the circumstances which may constitute harsh, oppressive or unfair dismissal can be given. Often, however, the issue in a particular case will require a consideration of the length or quality of the employee's service, the culture of the workplace, the prospects for other employment of the individual employee, and the employer's treatment of past incidents and of other employees.'

75 It follows, therefore, that as it is the duty of a decision maker to consider all of the evidence, where important and critical evidence is not referred to, an appellate court may infer that the evidence has been overlooked or that the decision maker at first instance has failed to give consideration to it: *North Sydney Council v Ligon 302 Pty Ltd* (1995) 87 LGERA 435 (442); *Beale v Government Insurance Office of New South Wales* (1997) 48 NSWLR 430 (443); applied by Steytler J in *Skinner v Broadbent* at [37]. Consequently, a decision maker should refer to relevant evidence but there is no need to refer to the relevant evidence in detail, especially in circumstances where it is clear that the evidence has been considered. However, a decision maker at first instance is not obliged to refer in his reasons to all of the evidence or submissions or to make express findings on all disputed items of evidence: *Beale* (443).

76 In this matter the appellant was summarily dismissed after he used objectionable and degrading language in the workplace.

77 The general principles of the valid exercise of the remedy of summary dismissal were considered by Lord Evershed MR in *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285 where he observed at 287 and 289:

> [S]ince a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that, if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service (287).
>
> …
>
> I … think … that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions; and … therefore … the disobedience must at least have the quality that it is 'wilful': it does (in other words) connote a deliberate flouting of the essential contractual conditions (287).

78 All employees are required to comply with a lawful order of their employer. Wilful disobedience of a lawful order may constitute grounds for summary dismissal: *Adami v Maison De Luxe Ltd* (1924) 35 CLR 143. To do so the disobedience must strike at the essence of the contract of employment, that is, it must be inconsistent with the continuing relationship of employer/employee.

The Unfair Dismissal Application – Conclusion

79 The appellant argues in Part A of his grounds of appeal that the Commissioner ignored a number of matters which when considered rendered the termination of his employment unfair.

80 The first matter raised by the appellant is a contention that the employer, Mr Brodie-Hall, was suffering from a detrimental state of mind as he has a disturbance of thought and suffers from volition. Having read the letters written by Mr Brodie-Hall and all other documents in the appeal book, the transcript of evidence and listened to an hour long tape recording conversation between the appellant and Mr Brodie-Hall on 17 July 2009, it is clear that such a contention is groundless. To the contrary, it is clear that Mr Brodie-Hall's actions when dealing with the appellant were that of a patient, rational, considerate and measured employer who made a considerable effort to attempt to explain to the appellant that his conduct at work towards women was inappropriate, lacking in mutual respect and was unacceptable.

81 The second matter raised by the appellant is that Mr Brodie-Hall treated the appellant differently from other employees and that when he (the appellant) was bullied by other employees he (the appellant) had the right to defend himself. In support of this contention the appellant referred to 15 particular matters. We will deal with each of these in the order set out in the grounds of appeal:

1 The appellant contends that other employees all work less than 38 hours a week and get paid for 38 hours a week when he (the appellant) works 38 hours a week and does not make mistakes. Whilst it was recognised by the respondent that the quality of the appellant's production work and effort could not be faulted, no reliable evidence was adduced in the hearing that other employees were paid for unworked hours of work. However, even if such a fact was found, such a fact could not be said to be material to the grounds of dismissal.

2 Whilst it was conceded by Mr Brodie-Hall and Ms Brodie-Hall that other employees do work for their own business during working hours whilst being paid by the respondent, it does not follow that the appellant was discriminated against by the employer because of this fact, or that the Commission erred in not having regard to this fact.

3 The appellant contends that other employees were allowed to bully him. However, the appellant himself gave no evidence about this issue. The only occasion the issue was raised was when the appellant examined Mr Brodie-Hall.

This evidence of Mr Brodie-Hall establishes at its highest that on one occasion the appellant complained to Mr Brodie-Hall that another employee, Chris, had sworn at him. Mr Brodie-Hall properly took action to counsel the employee and there is no evidence that Chris or any other employee swore at the appellant again. Consequently, it cannot be established that there was any evidence of the appellant being bullied or that the Commissioner erred in failing to have regard to this one incident.

4 The fact that the appellant designed his own ugg boots does not support a contention of discrimination and is not a matter that was material to the decision of the respondent to dismiss the appellant.

5 The fact that the appellant always provided the employer with a medical certificate when he saw a doctor and other employees did not, is not evidence of discrimination in the absence of any evidence that the employer required the appellant to provide a medical certificate on each occasion he was absent from work on account of ill health. In any event, the appellant did not give evidence about this matter. He adduced evidence from Mr Brodie-Hall who said that employees are allowed two single day absences without medical certificates and on the third occasion they must provide a medical certificate if they wish to be paid for the absence. Mr Brodie-Hall also said that he does not always insist that employees provide a certificate.

6 The uncontradicted evidence of Ms Brodie-Hall was that she made an online authorisation error which resulted in superannuation not being credited to the appellant's superannuation fund. She corrected the error on 2 June, and then sent an interim statement to the appellant to show that the error had been rectified. She also apologised to the appellant for the error. This error did not only affect the payment of superannuation to the appellant's superannuation fund but affected the payment of superannuation to the superannuation funds of all employees. Consequently, this issue cannot be said to be anything other than an error that was not discriminatory or material in any way to the circumstances that led to the dismissal of the appellant.

7 The appellant contends he was told to wear safety boots, there was a sign in the factory notifying all employees that they were required to wear safety boots, and that he always wore safety boots but other employees did not. However, the evidence given in the hearing before the Commissioner does not support this contention. The appellant gave no evidence about the issue. The evidence that he adduced from Mr Brodie-Hall was that employees in the factory were required to wear closed in shoes but were not required to wear safety boots and the sign in the factory indicates that covered footwear is to be worn. Consequently, no issue of discrimination in relation to this issue could have been said to arise.

8 The appellant led evidence from Mr Brodie-Hall that he (Mr Brodie-Hall) informed the appellant at an interview that he would not like the appellant to use a mobile phone during working hours yet other employees used mobile telephones during working hours. No explanation as to why this was the case, or the frequency of such use was elicited from Mr Brodie-Hall when he gave evidence. However, although this fact can be said to have been established it is difficult to see how the fact that other employees used mobile telephones during working hours is relevant to the issue whether the appellant was unfairly dismissed. In any event, the evidence about this issue is too vague to draw any credible inference of discrimination.

9 The appellant contends that other employees were paid more than him. The appellant gave evidence that when he was employed by the respondent he asked his employer whether any one was being paid more than $17 an hour and was told yes. The employer did not identify who this person was so the appellant asked other employees who was being paid more than $17 an hour. The appellant was paid $17 an hour. It is common ground that Mr Brodie-Hall was aware that the appellant was dissatisfied with the rate of pay of $17 an hour and that is a reason why Mr Brodie-Hall agreed to make a recommendation to any prospective employer the appellant sought employment from. Yet the bare fact that the respondent paid another employee or other employees more than $17 an hour does not of itself raise any issue of discrimination. It is well known that in most workplaces that employees are paid different rates of pay. Reasons vary. In low paid occupations commonly some employees are paid more than others because of the duties they perform and others are paid more merely because of their length of service.

10 The appellant contends that four other employees took longer breaks and longer lunch hours than he did. Whilst there is no evidence to support this alleged fact, even if it were the case it is not in dispute that whilst the appellant was performing his duties on the factory floor his performance could not be faulted. Nor was his punctuality wanting.

11 The appellant says in this particular that everyone in the factory told him what to do and he acknowledged this. This too is a matter which shows that when performing his work in the factory the appellant was a good employee but is not evidence of discriminatory conduct.

12 The appellant says that he was assaulted by Ms Brodie-Hall. It is common ground that Ms Brodie-Hall attempted to remove the handset of the employer's telephone from the appellant whilst he was making a telephone call to a café in Maylands. Whilst we agree that Ms Brodie-Hall's action at law constituted an assault, as an assault is simply defined in the *Criminal Code* (WA) in s 222 to mean 'to strike or touch or otherwise apply force to' a person without their consent, in the circumstances the assault was trivial and not a matter that mitigates the misconduct of the appellant which was far more serious than the act of Ms Brodie-Hall of making contact with the appellant's arm to attempt to remove the telephone from his hand (see [86] - [87] of these reasons). Although Mr Brodie-Hall testified that Ms Brodie-Hall came to him in tears and told him that she had hit the appellant as the Commissioner correctly observed at [42] of his reasons for decision, the contact she made with the appellant's arm was not with such force as to dislodge the telephone from his hand.

13 Sometime prior to the termination of his employment, the appellant sought to purchase a property. Mr Brodie-Hall provided him with a note which stated the appellant had been employed full time since July 2008. The note was dated 29 August 2009 (attachment H to the application) but was provided to the appellant some time prior to 19 August 2009. When Mr Brodie-Hall was asked in examination-in-chief why was the letter post-dated, he could not explain other than to say that he thought it was a typographical error. The appellant complains that this error was discriminatory as the employer would not do this to other employees. However there is no evidence that the error was deliberate, mischievous, caused any difficulty for the appellant or was discriminatory. Such a matter was clearly irrelevant to the question whether the appellant was unfairly dismissed.

14 When Rose an employee became pregnant, employees in the factory collected money to buy a gift for Rose. The appellant contributed $5. Mr Brodie-Hall testified that as the gift was given to Rose after the appellant's employment was terminated, he (Mr Brodie-Hall) returned $5 to the appellant. The appellant says this was discriminatory as he did not return money to any other employee. He also says this action was unlawful as the $5 was the property of Rose. This evidence is plainly immaterial and irrelevant to the issue whether the appellant was unfairly dismissed. Nor does this action constitute discrimination. Further we are not satisfied on the basis of this evidence that the action of the respondent was unlawful.

15 The appellant contends that the employer's allegation that he (the appellant) had a threatening attitude towards him (Mr Brodie-Hall) and work colleagues is not supported by any evidence. The appellant also raises the contention raised in particular 3 of Part A of the grounds of appeal. This submission is misconceived as firstly there was no allegation raised in the proceedings before the Commissioner, or in the documents provided to the Commission that the respondent alleged the appellant had a threatening attitude towards Mr Brodie-Hall. It is, however, the case that Mrs Howley and Ms Andrews gave evidence that the appellant acted towards them in an aggressive, threatening and abusive manner. Secondly, this submission cannot be maintained as the evidence accepted by the Commissioner was that the employer did act on evidence provided to him by Mrs Howley and Ms Andrews. When enquiring about misconduct by an employee, an employer is not required to have the skills of police investigators or lawyers: *Schaale v Hoechst Australia Ltd* (1993) 47 IR 249 (252) (Heerey J); *Amin v Burswood Resort Casino* (1998) 78 WAIG 2441 (2442) (Fielding SC). Thirdly, the appellant does not dispute that he said to Ms Andrews, 'You fucking, fat, ugly bitch.' Such a statement by a male employee to a female employee is by the nature of the words used, a threatening expression and unwarranted. The employer informed the appellant orally and in writing that such conduct was unacceptable and that such objectionable and degrading language should not be used and if repeated his continued employment was at risk.

82 For these reasons we are of the opinion that the appellant has not shown that any critical or material evidence was overlooked by the Commissioner. Consequently, we would dismiss Part A of the appellant's grounds of appeal.

83 In Part B of the appellant's grounds of appeal, the appellant contends that the evidence relied upon for a finding that his behaviour was inappropriate was irrelevant and in any event his actions were in 'defence' as he was bullied. Part B of the grounds of appeal does not identify any error on behalf of the Commissioner. The appellant appears in this ground to simply seek that the Full Bench decide the matter afresh. Such a course is not available under s 49 of the Act as Ritter AP observed in *Michael v Director General, Department of Education and Training* [2009] WAIRC 01180; (2009) 89 WAIG 2266:

> As there stated, an appeal against a discretionary decision cannot be allowed simply because the appellate court would not have made the same decision. The reason why this is so was explained in the joint reasons of Gleeson CJ, Gaudron and Hayne JJ in *Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission* (2000) 203 CLR 194 at [19] - [21]. At [19] their Honours explained by reference to the reasons of Gaudron J in *Jago v District Court (NSW)* (1989) 168 CLR 23 at 76, that a discretionary decision results from a 'decision-making process in which "no one [consideration] and no combination of [considerations] is necessarily determinative of the result" '. Instead 'the decision-maker is allowed some latitude as to the choice of the decision to be made'. At [21] their Honours said that because 'a decision-maker charged with the making of a discretionary decision has some latitude as to the decision to be made, the correctness of the decision can only be challenged by showing error in the decision-making process'. Their Honours then quoted part of the passage of *House v King* which I have quoted above.
>
> Similarly, Kirby J in *Coal and Allied* at [72] said that in considering appeals against discretionary decisions, the appellate body is to proceed with 'caution and restraint'. His Honour said this is 'because of the primary assignment of decision-making to a specific repository of the power and the fact that minds can so readily differ over most discretionary or similar questions. It is rare that there will only be one admissible point of view'. (See also *Norbis v Norbis* (1986) 161 CLR 513 per Mason and Deane JJ at 518 and Wilson and Dawson JJ at 535).

> These principles of appellate restraint have particular significance when it is argued, as here, that a court at first instance placed insufficient weight on a particular consideration or particular evidence. This was considered by Stephen J in *Gronow v Gronow* (1979) 144 CLR 513 at 519. There, his Honour explained that although 'error in the proper weight to be given to particular matters may justify reversal on appeal, … disagreement only on matters of weight by no means necessarily justifies a reversal of the trial judge'. This is because, in considering an appeal against a discretionary decision it is 'well established that it is never enough that an appellate court, left to itself, would have arrived at a different conclusion', and that when 'no error of law or mistake of fact is present, to arrive at a different conclusion which does not of itself justify reversal can be due to little else but a difference of view as to weight'. (See also Aickin J at 534 and 537 and *Monteleone v The Owners of the Old Soap Factory* [2007] WASCA 79 at [36]) [141] – [143].

84 In any event even if it was open for a Full Bench to consider the matter a fresh we are not persuaded the Commissioner erred in making the decision to dismiss the appellant's unfair dismissal claim.

85 Firstly, for the reasons set out above in [81] of these reasons we do not accept there was sufficient evidence before the Commissioner on which a finding could be properly made that the appellant was bullied. Nor do we accept on any occasion that he was acting in 'defence'. Having listened to the tape of the conversation and read the extracts of the tape set out in [30] and [31] of the Commissioner's reasons for decision it is clear that the employer did provide the appellant with an opportunity to explain. In respect of particular point 1 which relates to the incident on 15 July 2009 and the letter of warning there was no credible evidence before the Commissioner at first instance that Mrs Howley bullied the appellant. Further the particulars relied upon by the appellant do not disclose any facts on which a finding could be made that Mrs Howley bullied the appellant.

86 As to particular point 2, the appellant's own evidence and submissions objectively establish that he engaged in correspondence and conversations of a suggestive or sexual nature that can constitute sexual harassment. Sexual harassment is unsolicited, unwanted and unwelcome behaviour of a sexual nature which causes a person to feel offended, humiliated or intimidated: Sappideen C, O'Grady P and Warburton G, *Macken's Law of Employment* (6th ed, 2009) [16.240]. It is plain that the following comments and action could constitute sexual harassment:

(a) informing colleagues of how a girl had said he could have sex with a 16-year-old girl was a prize for winning a sprint race;

(b) handing Ms Brodie-Hall a copy of a letter to the Police in which the appellant says:

> I take my prize. This is what I want. One young curvy, beautiful, red head – 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. Of course she only be for me and me for her and this can only take place if we like each other.
>
> As a proposal it would be beneficial to the system if she was with me, if she liked me and if she did not want to be a prostitute. If it was related to money, which it is, she would make more money with me.
>
> So, in simple words, please go through the system, police, and find a girl that wants to get out and be with me. Police can not have them all. I won the challenge. Only if she likes me. Please get back to me in one months time. Thankyou. I am Snow White, not the witch. As I do not use prostitutes.

(c) saying to a female employee, 'You fucking, fat, ugly bitch';

(d) saying in a telephone conversation on 19 August 2009 with a third party within the hearing of female employees, 'How much is the pizza without the slut?'

87 The Commissioner properly found at [41] of his reasons for decision that the appellant was put on notice in July 2009 not to use such language in the workplace. The appellant knew his employment was at stake, yet on 19 August 2009 he made inappropriate comments of a sexual nature during a telephone call whilst at work, in the hearing of female employees and when using the employer's telephone.

88 Particulars 3, 4 and part of particular 5 raise issues about the running of the employer's business which are immaterial to the reason for termination of the appellant's employment.

89 In relation to the allegation of duress in particular 5, although the appellant contends that he signed the letter of warning under duress, at page 39 of the transcript the appellant gave evidence that: 'he [Mr Brodie-Hall] told me to sign it or I won't have my job … it's duress so I signed it and gave it to him the following day'. However, during the conversation that took place prior to the appellant being handed the letter, the tape of the conversation reveals the appellant said during the conversation that he would conform with the employer's rules during working hours. In any event even if he felt under duress to sign the letter, such a response to the letter would not be in my view material as the directions given in the written letter of warning were not only lawful but reasonable. Further, in the circumstances, it was appropriate and prudent for Mr Brodie-Hall to inform the appellant in writing that his continued employment was in jeopardy if the conduct complained of continued.

90 For the reasons we have set out above, Part B of the appellant's grounds of appeal are not sustained, as no error in the exercise of discretion by the Commissioner can be demonstrated. Accordingly, we are of the opinion that this ground should be dismissed.

The Contractual Benefits Claim – Conclusion

91 To form a contract the elements required before an agreement will be enforceable are, an intention to create contractual or legal relations; acceptance of an offer; and consideration.

92 The test of intention is generally objective and is not concerned with the real intentions of the parties. As Le Miere J observed (with whom Wheeler and Pullin JJA agreed) in *Ireland v Johnson* [2009] WASCA 162; (2009) 89 WAIG 2255 [47]:

> There is no legally enforceable contract unless the parties intended to create contractual relations. In *Ermogenous v Greek Orthodox Community* Gaudron, McHugh, Hayne and Callinan JJ explained:
>
> > Although the word 'intention' is used in this context, it is used in the same sense as it is used in other contractual contexts. It describes what it is that would objectively be conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened. It is not a search for the uncommunicated subjective motives or intentions of the parties [25].
>
> The enquiry whether the parties intended to create contractual relations may take account of the subject matter of the arrangement, the status of the parties to it, their relationship to one another and other surrounding circumstances. The search for the 'intention to create contractual relations' requires an objective assessment of the state of affairs between the parties: *Ermogenous v Greek Orthodox Community*; Gaudron, McHugh, Hayne and Callinan JJ [25].

93 In this matter whilst the appellant may have intended to create a legally enforceable agreement when what was said by the appellant and the respondent in the conversation that was recorded by the appellant is examined objectively, an intention to form contractual legal relations cannot be inferred. The principle of objectively was explained by the High Court in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165 [40]:

> This Court, in *Pacific Carriers Ltd v BNP Paribas* ((2004) 218 CLR 451), has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction (*Pacific Carriers Ltd* at 461 - 462 [22]).

94 Whilst the appellant and the respondent had a relationship of employer and employee what was sought by the appellant was employment with another employer, which is a matter that could not constitute a variation of the existing employment relationship as the appellant was seeking the assistance of the respondent to create a new and separate contract of employment. It is immaterial that if the appellant found other employment following a recommendation by the respondent that his employment with the respondent would have terminated by the resignation of the appellant.

95 All the respondent agreed to do was to act as a referee to a prospective employer and make favourable comments about the appellant's work ethic, his punctuality, efficiency, ability to listen to instructions and to carry out duties. However, it is difficult to contemplate that any agreement to act as a referee in such circumstances or in any circumstances could give rise to a legally enforceable agreement. The very nature of the task of being a referee is that a referee is generally relied upon by persons who seek information about a prospective employee to provide an honest and candid opinion. The public interest demands that referees express frankly any reservations to a prospective employer that they may have about a person. If between agreeing to act as a referee for a party and giving a reference, factual information becomes available or known to the party who agrees to act as a referee that causes that person to doubt whether he or she can speak favourably about the other party, the party who agreed to act as a referee could not as a matter of public policy be legally bound to provide a favourable reference if that party doubts the truth of such a reference.

96 Even if it could be said that the intention of the parties was to create a legally enforceable contract, without consideration the terms of the contract are unenforceable. To satisfy the requirement of consideration, the appellant must have provided something valuable in return. Valuable consideration may consist of either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other in respect of the promise: *Currie v Misa* (1875) LR 10 Ex 153 (162); *Macken's Law of Employment* (6th ed, 2009) [4.65]. In this matter the appellant provided no consideration. He did not promise to do anything in return. Consequently, his claim must at law fail.

97 In any event even if the appellant and the respondent entered into an agreement that was legally binding, the Commissioner correctly found that the appellant had not been denied a benefit by the respondent as no prospective employer had contacted Mr Brodie-Hall for a reference.

98 For these reasons we have concluded that there is no merit in the grounds of appeal and we would dismiss the appeal.

2010 WAIRC 00282

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

BETWEEN:	NICHOLAS READ
	Appellant
	AND
	ROBERT BRODIE-HALL; LEATHER-LIFE
	Respondent
CORAM:	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	COMMISSIONER S J KENNER
	COMMISSIONER J L HARRISON
DATE:	12 MAY 2010 (CORRIGENDUM – TUESDAY, 18 MAY 2010)
FILE NO:	FBA 8 OF 2009
CITATION NO:	2010 WAIRC 00282
PLACE:	**PERTH**

CORRIGENDUM

1. In the third sentence of [3] of the Reasons for Decision of 12 May 2010 delete the words "Robert Brodie-Hall" and insert the words "Nicholas Read" in lieu thereof.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

Dated: Tuesday, 18 May 2010

2010 WAIRC 00263

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NICHOLAS READ
	APPELLANT
	-and-
	ROBERT BRODIE-HALL; LEATHER-LIFE
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	COMMISSIONER S J KENNER
	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 12 MAY 2010
FILE NO/S	FBA 8 OF 2009
CITATION NO.	2010 WAIRC 00263

Result	Appeal dismissed
Appearances	
Appellant	In person
Respondent	Mr D Jones and with him Mr M Haylett (as agents)

Order

This appeal having come on for hearing before the Full Bench on Wednesday, 24 February 2010, and having heard the appellant in person and Messrs Jones and Haylett, as agents on behalf of the respondent, and reasons for decision having been delivered on Wednesday, 12 May 2010, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT the appeal be and is hereby dismissed.

By the Full Bench

(Sgd.) J H SMITH,

[L.S.] Acting President.

FULL BENCH—Proceedings for Enforcement of Act—

2010 WAIRC 00327

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE REGISTRAR OF THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
	APPLICANT
	-and-
	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S J KENNER
DATE	FRIDAY, 4 JUNE 2010
FILE NO	FBM 4 OF 2010
CITATION NO.	2010 WAIRC 00327

Result	Order made
Appearances	
Applicant	Mr J Spurling
Respondent	Ms N MacCarron (of counsel) and with her Mr D Kelly

Order

Having come on for hearing before the Full Bench on 4 June 2010, and having heard Mr J Spurling, on behalf of the applicant, and Ms N MacCarron (of counsel), and with her Mr D Kelly, on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders—

THAT this application be adjourned sine die.

By the Full Bench

(Sgd.) J H SMITH,

[L.S.] Acting President.

FULL BENCH—Procedural Directions and Orders—

2010 WAIRC 00319

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHAN MARITZ WILLERS; AUBREY BIRKELBACH; PETER BRASH; D'ARCY KEVIN SPIVEY; JUDITH WICKHAM; FRANIA SHARP; WENDY MARGARET POWLES; SHANE MELVILLE; SUSAN WARING; DAVE MARTYN WHITFORD-HARVEY
	APPELLANTS
	-and-
	WORKCOVER, WESTERN AUSTRALIAN AUTHORITY; WORKCOVER WA; WORKCOVER WA; WORKCOVER WA; WORKCOVER WA; WORKCOVER W.A.; WORKCOVER WA; WORKCOVER WESTERN AUSTRALIAN AUTHORITY; WORKCOVER WESTERN AUSTRALIA AUTHORITY; WORKCOVER WA
	RESPONDENTS
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT COMMISSIONER S J KENNER COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 2 JUNE 2010
FILE NO/S	FBA 3 OF 2010, FBA 4 OF 2010, FBA 5 OF 2010, FBA 6 OF 2010, FBA 7 OF 2010, FBA 8 OF 2010, FBA 9 OF 2010, FBA 10 OF 2010, FBA 11 OF 2010, FBA 12 OF 2010
CITATION NO.	2010 WAIRC 00319

Result	Order issued to join appeals, one set of appeal books and submissions and an extension of time to 3/6/2010 to file appeal books
Appearances	
Appellants	Mr S Melville (as agent)
Respondent	Mr B Underwood

Order

These appeals having come before the Full Bench, and having heard Mr S Melville, as agent on behalf of the appellants, and Mr B Underwood on behalf of the respondents, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

1. Appeals FBA 3 of 2010 to FBA 12 of 2010 be joined into a single proceeding to be known as joined appeals FBA 3 - 12 of 2010, *Johan Maritz Willers and Others* (appellants) *v WorkCover Western Australia Authority* (respondent).
2. There be a single set of appeal books and submissions; and
3. An extension of time be granted to 3 June 2010 for the lodging of appeal books to enable the hearing and determination of these appeals.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

PRESIDENT—Unions—Matters dealt with under Section 66—

2010 WAIRC 00320

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PRESIDENT

CITATION	**:**	2010 WAIRC 00320
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT
HEARD	**:**	THURSDAY, 29 APRIL 2010
DELIVERED	**:**	WEDNESDAY, 2 JUNE 2010
FILE NO.	**:**	PRES 2 OF 2010
BETWEEN	**:**	MR REVELI KEITH AFFLECK
		Applicant
		AND
		THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH
		Respondent

CatchWords	**:**	Industrial law (WA) - application pursuant to s 66 of the *Industrial Relations Act 1979* (WA) - construction of the rules of an organisation - interpretation of eligibility rule of the Union - whether the applicant is eligible to join the organisation pursuant to r 2(4) of the rules of The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers - Western Australian Branch - - meaning of printing industry and principles of major and substantial employment considered – *Associations Incorporation Act 1987* (WA) s 39C; *Australian Constitution* s 51, s 109; *Constitution Act 1889* (WA) s 2; *Fair Work (Registered Organisations) Act 2009* (Cth) s 166; *Industrial Relations Act 1979* (WA) s 6(e), s 55, s 58(1), s 62, s 66, s 96B; *Industrial Relations Commission Regulations 2005* (WA) reg 78; *Judiciary Act 1903* (Cth) s 78B; *Workplace Relations Act 1996* (Cth) s 4.
Result	**:**	Application dismissed
Representation:		
Applicant	**:**	In person
Respondent	**:**	Mr V J Pelligra (of counsel)

Reasons for Decision

Background

1 This is an application by Mr Reveli Keith Affleck (the applicant) made pursuant to s 66 of the *Industrial Relations Act 1979* (WA) (the Act). The applicant seeks a declaration of the true interpretation of r 2(4) of the rules of The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers – Western Australian Branch (the Union). The applicant argues that when the true interpretation of r 2(4) of the rules of the Union is applied to his circumstances it follows that he is eligible to join and maintain membership of the Union.

2 The applicant joined the Union on 27 January 2010 and obtained membership number 6151926. The Union subsequently cancelled or suspended the applicant's membership. The applicant says that in doing so it acted in an improper and illegal manner. The applicant claims that he is a printer and in that capacity and as Secretary of the Australian Multicultural Union Incorporated (the Association) he has a right to maintain his membership of the Union. The Association is incorporated under the *Associations Incorporation Act 1987* (WA). The applicant seeks orders that his membership of the Union be reinstated and that the Union apologise for any inconvenience caused by the suspension.

3 Rule 2(4) of the rules of the Union provides:

> The Union shall also consist of all persons (excepting journalists) who are employees or whose usual occupation is that of an employee in or in connection with the Printing Industry as hereinafter described, together with such other persons, whether employees in the industry or not, as have been (at the date of registration of this Union) appointed officers of the Printing & Kindred Industries Union, Western Australian Branch, Industrial Union of Workers and admitted as members thereof. The industry in connection with which the Union is registered is and includes any business, trade, manufacture, undertaking, calling, service, employment, handicraft or industrial occupation or avocation on land or water in the industry of printing and/or any kindred industries and/or in any group or branch of such industry or industries, including (without limiting the generality or ordinary meaning of the foregoing description) composing, reading, electrotyping, stereotyping, letterpress machining, lithographic machining, lithographing, machining, printing of all classes, slug-casting or type-casting machine attending and adjusting and/or repairing, type-founding, engraving, process engraving and/or photo engraving, commercial and/or lithographic designing, writing and/or drawing, publishing, despatching,

bookbinding, binding, paper ruling, paper cutting, paper making, paper working, calico and/or paper bag making, envelope making, stationery making, paper products working, embossing, cardboard box making, carton making (including the making of any kind of boxes and/or containers of paper and/or cardboard used alone or in combination with any other material or materials), plastics manufacturing or any of the processes of or incidental to the manufacturing of plastics, or of goods manufactured therefrom, or substitutes therefor.

4 On 6 February 2010, the applicant sent various officers of the Union and others an email in which he made vague allegations of alleged corruption against the Union. On 15 February 2010, the Union's State Secretary, Mr Steven McCartney, sent a letter to the applicant in which he stated among other matters:

(a) it was not clear to him that the Australian Multicultural Union was part of the printing industry;

(b) that the applicant should provide further evidence to demonstrate he was eligible to be a member of the Union;

(c) he would not process the application membership until he received evidence showing that the applicant was eligible to be a member; and

(d) if he did not hear from the applicant within 14 days, he would recommend to the State Council that the application for membership be rejected.

5 The Union says it took this action pursuant to r 16(2) of the rules of the Union which requires the State Secretary to ascertain that an applicant [for membership] 'is engaged in an occupation covered by the union and is also suitable and qualified to be a member'.

6 The Union points out that the issue to be determined in this matter is whether the applicant is engaged in an occupation covered by the eligibility rule, r 2(4) of the rules of the Union, and is suitable and qualified to be a member.

The Evidence

7 The applicant gave sworn evidence in support of his claim. Although he gave his evidence orally, he referred to and read from four documents which are headed 'Submissions' and contained in Parts 1, 2, 3 and 4 which were tendered as exhibits 1, 2, 3 and 4. Part of exhibits 1, 2, 3 and 4 contain submissions which I will deal with later in these reasons.

8 In the applicant's résumé he lists under the heading 'Skills Profile' (exhibit 7):

- Demonstrated ability to work independently and unsupervised.
- Excellent interpersonal skills.
- Ability to negotiate and liaise with others.
- Cultural development.
- Infrastructural Development, Operations and Management.
- Financial planning.
- Computer skills.
- Telecommunication skills.
- Report writing and correspondence skills.
- Demonstrated administrative skills. Including composing, printing.
- Social and Economic Research.
- Excellent planning and organisational skills.
- Excellent communication skills.
- Public Speaking.
- Labour relations (Dispute resolution).
- Analysis and Development.

9 Under the heading 'Work Experience' in his résumé the applicant lists his work experience as follows:

2006	**MOZART'S PATISSERIE INGLEWOOD**	
	Position:	*Delivery Driver*
	Duties:	• Deliver patisseries to retail and whlesale (sic) outlets. Hours 4.30am to 10.00am Mon, Tues, Wed. Receive monies from retail customers.
2006	**PERTH SUBI CITY MILK SUPPLY**	
	Position:	*Delivery Driver*
	Duties:	• Duties • Deliver Milk to City Outlets • Liaise with Customers • Receive Payment from Customers.

2004 **EDUCATION DEPARTMENT**

Position: *Cleaner*

Duties: • Vacuum classrooms and computer rooms • Clean toilets and empty rubbish bins

2001 **DEPARTMENT OF LAND ADMINISTRATION**

Position: *Clerk – Human Resources Special Projects Occupational Health and Safety*

Duties: • Advocacy • Research and report writing

1997 - 2001 **ROYAL PERTH HOSPITAL, INNER CITY MENTAL HEALTH CLINIC**

Position: *Consumer Representative*

Duties: • Represent consumers of Health Services in general and in particular Mental Health Services while taking into account the needs and aspirations of health personnel. • Advocacy

1985 - Present **AUSTRALIAN MULTICULTURAL UNION INC.**

Position: *Secretary*

Duties: • Organising. • Correspondence on behalf of members and associates • Advocacy for members • Legal research (human rights) • Printing

1984 - 1985 **DARLOT GROUP**

Position: *Native Title Worker*

Duties: • Interviewing Aboriginal population re: cultural beliefs and connections with the land • Liaise with Seaman Inquiry • Comprehensive submission to Inquiry addressing all terms of reference. • Composing and Printing submission.

1981 - 1984 **STATE ENERGY COMMISSION**

Position: *Engine Driver*

Duties: • Attend to boiler and turbines • Responsible for condition of all plant, adequate supply of water

1980 **ENSIGN LAUNDRY SERVICES**

Position: *Boiler Attendant / Mechanic*

Duties: • Start up and operation of package boilers • Maintenance of vehicles for laundry • Training for Second Class Engine Drivers Certificate

1979 **JM & CR AFFLECK MECHANICS**

Position: *Mechanic*

Duties: • Customer service • Diagnosis of mechanical faults • Quotes • Ordering parts • Carrying out repairs to a high standard

1979 **PUBLIC WORKS DEPARTMENT (GERALDTON)**

Position: *Waterside Worker*

Duties: • Docking Ships and Stand by Labour

1978 **WUNDOWIE IRON AND STEEL**

Position: *Laboratory Assistant*

Duties: • Analysis of slag from furnace by atomic absorption • Analysis of core pig iron samples • Training trainees in laboratory work

1976 **TELECOM AUSTRALIA**

Position: *Linesman*

Duties: • Installation of telephone conduits • Driving / upkeep of work vehicle for all workers • Regular maintenance of work vehicle/tools

1975	**PUBLIC WORKS DEPARTMENT BROOME**	
	Position:	*Waterside Worker*
	Duties:	• Loading Frozen meats
1974 - 75	**PIONEER BOOKSHOP 75 BULWER ST, PERTH**	
	Position:	*Bookshop Worker Including Offset Printing, Composing, Despatching*
	Duties:	• Printing Literature and Booklets
1973 - 1975	**VARIOUS BUILDING COMPANIES**	
	Position:	*Builders Labourer*
	Duties:	• General labouring duties on work sites • Concrete piers and form work • Digging in footings for housing construction
1973	**MT NEWMAN MINING**	
	Position:	*Trades Assistant*
	Duties:	• Assist tradesman with repairs and routine maintenance of ship loading equipment and conveyor belts • Represent employees in negotiations with management as shop steward with the AWU • Providing transport to day workers at the port site
1972	**ACTU (FEDERATED ENGINE DRIVERS UNION OFFICE) TRADES HALL PERTH**	
	Position:	*ACTU Youth Week Organizer*
	Duties:	• Organizing • Writing • Printing
1971 - 1973	**DEPARTMENT OF ABORIGINAL AFFAIRS PLANNING AUTHORITY**	
	Position:	*Clerk – Economic Development*
	Duties:	• Correspondence with remote communities on matters related to employment projects, apprenticeships etc. • Statistical analysis of social security statistics for remote communities • Overseeing the wellbeing of Aboriginal Art Centre

10 On 29 January 1998, the applicant obtained a certificate from Northsyde Skillshare, a nationally recognised training organisation, that stated he had completed the following computer training programs (exhibit 1, document 1):

(a) C6 Computer Awareness;

(b) C7 Computer Applications (Word Processing 1);

(c) C8 Computer Applications (Word Processing 2); and

(d) C9 Computer Applications (Spreadsheets).

11 The applicant says these qualifications together with his 39 years' experience in various occupations equip him with an ability to utilise a printer which is used by the Association in its 'printing business'. The printer he uses to carry out printing work is a Pixma iP1900 (the printer). In the Association's Statement of Assets and Liabilities as at 27 April 2010, the printer is listed as an asset and valued at $80 (exhibit 1, document 6). The applicant purchased the printer in 2009 and donated it to the Association.

12 The applicant is currently in receipt of a disability pension. He gave evidence that he works as a printer for the Association for one hour a week and is paid $20.05 an hour. The applicant stated that he started work as a casual printer on 27 January 2010. This was the same day he made an application to join the Union. However, when cross-examined he said he started work two days prior to making the application. It appears from the Yearly Time & Pay Book produced by him that he has been paid for one hour of work on each Monday of each week between the hours of 8:00 am and 9:00 am from 25 January 2010 which is two days prior to making the application to join the Union (exhibit 1, document 2). The applicant declares his income to Centrelink. This evidence is supported by a document he received from Centrelink dated 14 April 2010 which lists regular fortnightly earnings of $40.10 (exhibit 1, document 3).

13 The applicant came to be employed by the Association when the Council of the Association agreed that he should be employed as a printer. The Council at the time the decision was made was composed of three people and he was one of those three. When the applicant gave evidence he was reluctant to provide the names of the other members of Council. He said he was prohibited from doing so pursuant to s 39C of the *Associations Incorporation Act*. He also said that members of the Association have asked him to keep their names confidential.

14 The applicant ascertained the proper rate of pay for a casual printer by obtaining information from the Department of Commerce's Wageline 'the other day' (ts 45). The Wageline service provided him with a copy of the summary of the Printing Award (the Award). The applicant explained that after he had regard to the classifications in the Award he determined he should be paid as a level 4 employee which has a casual rate of $19.45 an hour. Level 4 provides the following duties for a level 4 employee (exhibit 1, document 4):

- Keyboard operator
- Proof Reader (sic)
- Artist/Designer
- Small Offset Machinist
- Non Impact Printing Machinist (inc. Electronic & Laser Printing Machine Operator)

15 The applicant contends that the work he does includes work:

(a) operating a keyboard associated with the computer and the printer. The computer he uses is an Arrow computer which is listed in the Association's Statement of Assets and Liabilities and is valued at $250 (exhibit 1, document 6). He also says the computer can be described as an electrotyping machine within the meaning of r 2(4) of the rules of the Union;

(b) as a proofreader for which he says there is no course to gain qualifications but he has gained knowledge and skills in proofreading through his education and training in the form of a degree in economics at Murdoch University and in a graduate diploma of Educational Studies;

(c) as an artist designer in relation to which he has 39 years' experience in printing and leaflet design. He says his experience in this work is principally associated with his involvement in the labour movement and unpaid work as a volunteer when he operated a small offset printer at the Pioneer Bookshop in 1974-1975 and in 1972 when he operated a gestetner for the Federated Engine Drivers' Union;

(d) as a non-impact printing machinist for which he holds relevant computer competencies.

16 The registered address of the Association is the personal home of the applicant. In the preamble of the Constitution the aims of the Association are stated as follows:

> Recognising that at the present juncture there is a dire need for a progressive political force in Australian Politics it is resolved to form The Australian Multicultural Union. Rejecting authoritarianism and antagonistic resolution of disputation the Australian Multicultural Union resolves to work toward the development of a socially cohesive network of people who will through political, social, cultural and economic means endeavour to bring about a positive progressive and harmonious consciousness in society and to contribute in whatever manner possible to the development of harmonious relations in the community. We furthermore undertake to oppose oppression or exploitation of the people in whatever form this may take, to expose those responsible for oppression or exploitation and to work toward the enlightenment of the people as to the true nature of the social and material relations of society and their development.

17 Pursuant to the Objects clause, it is an object of the Association to 'conduct such business on the internet or in the community as may be expeditious in raising funds for the purpose of pursuing the objects of the union'. The applicant says pursuant to this object, the Association commenced a printing business. Also provided in the objects is a statement that:

> The income of the Union shall be applied solely toward the promotion of the organization. No portion of the income or property shall be paid, transferred or distributed indirectly to the members of the Union. Provided that nothing shall prevent payment in good faith of remuneration to any officer or employee of the Union or to any other person other than a member, in return for services rendered.

18 Pursuant to clause 4 of the Constitution, membership is open to all people, however, special attention is to be given to enrolling unemployed people, students, pensioners, self-employed persons, farmers and employees in particular low income earners. Affiliate membership is $1 per annum per member or a price decided by the Management Committee and individual membership is $10 per annum per member or a price decided by the Management Committee. Associate membership is free. The Association has approximately 100 members.

19 The applicant has been the Secretary of the Association since 1985. Originally they were called the Unemployed Workers' Movement. The organisation split from a Fremantle group and became the Australian People's Movement and later became the Australian Multicultural Union Incorporated. All of these bodies have been organisations of low income earners. They also cover pensioners and unemployed people but their primary attention is directed to Centrelink recipients.

20 As the Secretary of the Association the applicant deals with correspondence, maintains the web page of the Association, communicates with members of the Association and members of Parliament. His main activity is to maintain contact with membership and he does that through a chat site on the web. When giving evidence the applicant was unable to estimate how many hours a week that he works as the Secretary. He said that they are a national body and that he chats to people on person.com and the time he spends talking to people varies although he is available to his members 24 hours a day, 7 days a week.

21 On the internet site of the Association there is a page that directs the viewers of the site to another page containing the following information about the printing service (exhibit 8):

> PRINTING:
>
> UNDER OBJECT 9 of Constitution and Rules·of the Australian Multicultural Union Inc: To conduct such business on the Internet or in the Community as may be expeditious in raising funds for the purposes of pursuing the the (sic) objects of the Union. Accordingly we have Registered a Printing Business
>
> DOCEP Registered No. A0821481V ABN : Australian Business Number 34 460 520 396

THE AUSTRALIAN MULTICULTURAL UNION OFFERS FIRST CLASS PRINTING OF BUSINESS CARDS. HOW TO VOTE CARDS. LETERHEADS. AND LEAFLETS. A4 ALL COLOURS

PHONE (08) 93718763.

22 The telephone number referred to on the webpage is the home telephone number of the applicant. When cross-examined about the creation of this page on the website, the applicant denied that he had created the webpage advertising printing services to bolster this application.

23 The Statement of Assets and Liabilities of the Association as at 27 April 2010 provides as follows (exhibit 1, document 6):

Assetts. (sic)	Item	Value
	Cash on Hand	$25.00
	Receivables	$00.00
	Computer Arrow Computer: //	$250.00
	Pixma Printer iP 1900	$80.00
	Web page www.australianmulticulturalunion.org	$140.00
	Paper	$8.00
	Ink	$25.00
	Coreflute Board	$62.00
	Copies of Constitution AMU Incorporated.	$10.00
	Total	$600.00
Liabilities		0

24 The applicant says in Part 2 of his written submissions that he uses the printer to print 'in-house materials'. He also testified that he prints cards, leaflets, information, correspondence, letterheads and election material when one of their members stands for elections as he did in October 2009 when he stood as a Councillor in the Bayswater City Council Elections. He said that when he stood for election he did the printing work and paid the Association $100 for materials. He did not, however, issue a receipt. At that time he was not employed by the Association but was receiving a 'welfare payment' from the Association.

25 When asked in cross-examination what printing work he carries out for the Association, the applicant said he prints the correspondence. He also said that he prints 'stuff' for the business. When asked further by the Commission what he prints he produced a 'poster' and a business card for himself (exhibit 5 and exhibit 6). The 'poster' is a simple image of a dove with a branch in its mouth which can be described as a peace symbol. The image is in colour and heavily pixilated. The applicant explained that he prints the posters on sheets of A4 white paper. This paper appears to be paper used commonly in most businesses and by users of home computers to print letters and other documents and can be described as standard A4 paper. The image is printed in colour. He makes each poster by gluing an image to a piece of plastic with 'Clag' glue. The plastic is composed of material known as 'coreflute' which he purchases in large sheets and cuts to size with a knife. He says each poster sells for $1. The applicant's business card is also very simple in construction and unsophisticated. It appears the applicant uses his computer to create the format and simply prints the information onto standard A4 paper and roughly cuts each sheet to the size of a business card.

26 When asked whether he had designed the dove depicted in the 'poster' the applicant said he sourced the graphic from free material on the internet. He did not design it. When it was put to him it was not a commercial image, he said it was, that people were very impressed by it and to him it was very similar to a work of Picasso (ts 75).

27 Members of the Association can print copies of the Association's Constitution from the website and this is made known to them. However, he often prints the document for them or he arranges for a local member of Parliament to print copies because many members are unemployed or pensioners and are not able to print copies because of financial reasons or because they do not have a printer. The applicant also contends that he is responsible for carrying out electrotyping necessary for proofreading and publication. In making this statement it is my understanding that the applicant is referring to work carried out on the computer. He says that electrotyping is a skill that qualifies him for membership of the Union.

28 In support of the argument that he is employed as a printer within the meaning of r 2(4) of the Union's rules, the applicant produced in his evidence a letter signed by the President of the Association, Mr Jason Clancy, who states in a letter addressed 'To whom it may concern' (exhibit 2, document 10):

This is to verify Mr. Reveli Affleck is a part time paid employee of the Australian Multicultural Union Inc.

> And that his work for the Union includes that of a composer, reader, publishing, despatching, paper ruling, paper cutting, stationary making, paper products working, and of a printer.

29 Mr Clancy is located in Darwin in the Northern Territory. When questioned about exhibit 2, document 10, the applicant said Mr Clancy is an indigenous person who is unemployed, unable to travel and does not have access to a printer so the applicant drafted the letter for Mr Clancy to sign. The applicant concedes that Mr Clancy has not observed him carrying out printing work in 2010.

30 When asked who supervises the printing business, the applicant said that he does and he manages the work. When asked whether he takes orders, he said they had not received any orders but they have had sales. He also said that they had not received any orders from customers but they have sold some things for cash and some of his pay comes from that cash. He also said they have a business plan to produce advertising materials for delicatessens. It appears, however, from the applicant's evidence that that plan is yet to be implemented. When asked from what source of funds is he paid, he said he withdraws the money from the bank or he is paid in cash from dues, donations or subscriptions. He also said that sometimes he pays money into the bank and he pays the bills and his wages from those funds. When he was asked how could he pay his wages next week when the funds of the Association are so low, the applicant said that he would be paid by 'people who will contribute to the payment of his wages'.

31 The applicant stated that the 'in-house printing' they do is to facilitate the efficient operation of the Association and it is an essential component of the Association's work. He also said that it enables the Association to carry out essential administrative work and to maintain democratic operation in their growth and development, yet the applicant also said that he does not do any printing work in his capacity of Secretary of the Association. As the Association grows and develops the applicant hopes that in the future the Association may become a registered organisation under the Act or under the *Fair Work (Registered Organisations) Act 2009* (Cth). He also says that the 'in-house work' has enabled the Association to sign up more members and therefore to increase their influence in Australian society. The applicant made a claim that in the past two years the Association has achieved pay rises of $23,400 million to Centrelink recipients at approximately $100 per fortnight for pensioners, including disability support pensioners, and $25 per fortnight for Newstart and Widows' Allowance recipients The applicant also expressed the opinion that the Association is providing a service to the Australian society by increasing the amount of benefits Centrelink recipients receive and therefore relieving the social and economic stress that the poorer sections of Australian society are suffering.

32 When the applicant made an application to join the Union he filled out a membership application form and was issued with a financial membership card which bears the logo of the AMWU (exhibit 3, document 12). The applicant also completed a direct debit request to have union dues deducted from his bank account. When the applicant completed the application form he spoke to a woman called Bianca at the office of the Union. The applicant says that he tried to register his occupation as 'printer' on the database but was told by Bianca there was no printer classification. She then successfully registered him as a print worker. Whilst she was processing his application he noted that the office staff of the Union operate printing equipment, in particular they operate a machine that prints the plastic and paper Union cards and an electronic photocopier. When he spoke to Bianca about this she told him that the office staff are not permitted to join the Union.

33 On 6 February 2010, the applicant sent a very lengthy email to the Union's State Secretary, Mr McCartney. In the email the applicant referred to the fact that he was a member of the Union and referred to his membership number. He stated that he was concerned that the rules of the Union are abided by and the laws of the Commonwealth and the State Government are abided by. He informed Mr McCartney that on 4 February 2010 he had obtained a copy of the Union's latest annual return that the Union submitted to this Commission. The applicant claimed the return had not been submitted within the time presented by reg 78 of the *Industrial Relations Commission Regulations 2005* (WA) and that the return was not in order. He also raised other issues in relation to state conference delegates and organisers and asked a number of questions about elections of particular officers of the Union including the President, Honorary State Secretaries and some of the delegates to state conference. The applicant made a claim in the email that he had formed the view that 38.09% of state conference delegates had not been elected in accordance with the rules of the Union. In the email the applicant also made some very vague allegations of corruption against the Union and the Australian Labor Party (the ALP).

34 Following receipt of the email, Mr McCartney sent the following letter to the applicant on 15 February 2010 (exhibit B, document 8):

> I write in reference to your recent application to join the Union in which you have stated that you are engaged in an occupation which renders you eligible to be a member of the Printing Division of the AMWU.
>
> I advise that the Union is only able to enrol as members, applicants who are working for an employer - or in an occupation - which clearly falls within its constitutional coverage as defined in the Rules.
>
> It is my understanding that you have claimed that you are eligible for membership of the Union by virtue of activities undertaken by you in your capacity as Secretary of the Australian Multicultural Union Inc.
>
> It appears clear to me that the Australian Multicultural Union Inc is not a part of the printing industry in any way.
>
> It follows therefore that your claim to be eligible for AMWU membership rests upon your occupation and the work undertaken by you for the Australian Multicultural Union Inc. I note such occupation must be undertaken as part of paid employment and not in a voluntary capacity as an honorary office holder of a not-for-profit organisation.
>
> Consistent with the Union's Rules, I therefore request that you produce satisfactory evidence as to how you are eligible to be a member of the Union.

Should such evidence not be provided in writing to me within 14 days, I will recommend to the State Council that your application for membership be rejected.

I further advise that your application for membership will not be further processed until such evidence has been provided. Until such time as your application for membership has been determined, I can advise that the Union will not be deducting funds from your account. Further, I enclose a cheque for the amount already paid by you as part of your application to join.

35 The applicant says he arranged to meet with Mr McCartney to discuss the matters raised in the letter but prior to attending the meeting he received a phone call to inform him that the meeting had been cancelled. On 2 March 2010, the applicant wrote to the State Secretary of the Union. In the letter he stated (exhibit B, document 10):

Dear Sir, I am in receipt of correspondence from you dated 15 February, 2010. You have said in your correspondence.

'It appears to me that the Australian Multicultural Union Inc. Is (sic) not part of the printing industry in any way.'

This is not a true statement and I enclose for your information showing the legal status of The Australian Multicultural Union Inc. in respect of its printing business.

Enclosed are :

1. Photocopy of Department of Consumer and Employment Protection Certificate of Incorporation.
2. Photocopy of Australian Business Number Notification of Registration.
3. Photocopy of Abstract from Constitution of the Australian Multicultural Union Inc. detailing provisions by which The (sic) Australian Multicultural Union Inc. may engage in business Object 9.

'To conduct such business on the internet or in the community as may be expeditious in raising funds for the purpose of pursuing the objects of the union.'

4. Photocopy of Print out from Web site of The Australian Multicultural Union Inc www.australianmulticulturalunion.org showing Print Business advertising.
5. Photocopy of letter from the President of our union confirming the nature of my work

Also please find attached a Notice of Application Form 1 of the Western Australian Industrial Relations Commission.

Hoping this may clarify these issues.

36 On 1 April 2010, the applicant was requested by the solicitor acting for the Union to produce a number of documents including (exhibit B, document 13):

1 the Australian Multicultural Union's financial records;

2 invoices, quotations and receipts for the Australian Multicultural Union's printing business; and

3 documents which Australian Multicultural Union has printed.

37 The Union says that the order made by the Commission on 31 March 2010 required the applicant to discover the records pursuant to the order requiring the applicant to provide evidence of his employer's business activities. The applicant, however, did not provide discovery of any documents answering the description of the categories of documents referred to in the letter dated 1 April 2010 prior to the hearing. The only documents that the applicant provided that answer this description are the Association's Statement of Assets and Liabilities and an invoice from Austin Computers, Osborne Park for an amount of $25 being an invoice for a Canon black ink cartridge (exhibit 1, document 6 and exhibit 10 respectively). The applicant claimed when giving evidence that he regarded the request for discovery to be oppressive and said in any event he had recently moved house and had misplaced all of the Association's financial records so he was unable to produce any other documents including bank statements. The applicant, however, conceded when cross-examined that he has access to internet banking and could, if he chose to do so, download and print copies of relevant bank statements from the internet. He also conceded that he had no evidence to show that the Association receives money for printing work. The only documents the applicant has produced which he says the Association has printed are what he describes to be the posters and his business card.

38 The applicant says that he was refused his right to renew his membership at the ALP in 1994 for reasons not yet given. He says this is relevant because the Union is an affiliate to the ALP and he is now being denied the right to join the trade union. The applicant gave evidence that for most of his working life he has always joined the appropriate union. The first union he joined was the Civil Service Association when he was an employee of the Department of Native Welfare. He has been a shop steward for the AWU, a union delegate to the State Executive of the ALP for the FEDFU and workplace delegate for the ALHMWU.

The Applicant's Submissions

39 The applicant says that because he sent the email to Mr McCartney and a copy to a number of other people he was suspended from the Union.

40 The applicant argues that whilst the context of the Association is to assist members of Centrelink, that pursuant to the Constitution and rules of the Association, the Association can establish a business. The applicant made a lengthy submission that his usual occupation is not that of a printer and concedes he has never been employed as a printer but says he learnt printing as a volunteer. He, however, contends that if you are working in an industry covered by a union you should be a member of that union and he has a right at law to join the appropriate union.

41 The applicant says that he does do work as an electronic printer. He also says that in his work he is involved in the manufacture of plastics because when he makes up posters, he glues A4 images of the peace dove onto pieces of plastic.

42 The applicant concedes he is not a tradesman but says he has qualifications in proofreading, publishing and operating a computer and he is suitable to be a member of the Union.

43 In Part 1 of the applicant's written submissions, the applicant makes a submission about the operation of s 166 of the *Fair Work (Registered Organisations) Act* and s 109 of the *Australian Constitution.* He contends the operation of s 109 of the *Australian Constitution* and the effect of s 166 of the *Fair Work (Registered Organisations) Act* is to override inconsistent rules of an organisation made under the Act. In Part 4 of the applicant's submissions the applicant makes a submission that *Freedom of Association and Protection of the Right to Organize Convention, 1948 (No 87)* supports his claim. In particular the applicant says that the Commonwealth of Australia as a signatory to that Convention means that the right to join a trade union is a constitutional right which should not be denied to anyone. Article 2 of the Convention states that: 'Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.' The applicant also points out the *International Covenant on Civil and Political Rights* also makes mention of the right to join a trade union and the objective of peace. In particular, Article 22 provides: 'Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.' The applicant says that this is a constitutional right by virtue of s 51 of the *Australian Constitution* and s 2 of the *Constitution Act 1889* (WA) which empowers the Parliaments of the Commonwealth and the State of Western Australia to make powers for peace, order and good government.

44 The applicant was informed during the hearing that if he wished to pursue an argument about the effect of any provisions of the *Australian Constitution* he would have to serve the Attorneys-General of each State and the Attorney-General of the Commonwealth with a notice pursuant to s 78B of the *Judiciary Act 1903* (Cth). The applicant was also informed that the terms of the provisions of the *Fair Work (Registered Organisations) Act* did not apply to organisations registered under the law of the State. After that advice was given the applicant did not seek to press these arguments.

45 In determining the meaning of the usual occupation of an employee in or in connection with the printing industry within the meaning of r 2(4) of the Union's rules, the applicant says the printing industry also includes a kindred industry as that word is included in the name of the Union and is used in r 2(4) to define the industry covered by r 2(4). The applicant contends that in construing the meaning of 'kindred' the Commission should have regard to the definition of 'kindred' in *The Australian Oxford Paperback Dictionary* (2nd ed, 1996) which defines 'kindred' as:

> 1. a person's relatives. 2. Blood relationship. 3. Resemblence (sic) in character. 1. related. 2. of similar chemistry and kindred subjects. Kindred spirit a person who's tastes are similar to one's own.

The Union's Submissions

46 The Union led no evidence in this matter. It argues that there are three elements that need to be satisfied by the applicant before an order could be made in the terms sought by him. The first is whether the applicant is an employee. The second is whether the evidence establishes that his usual occupation is a printer. The third element is whether it has been established that the applicant carries out work in an industry that is a genuine printing industry as described in r 2(4) of the rules of the Union. It is contended by the Union that the applicant has not proved any of these elements and that he has attempted to construct evidence to enable him to join the Union by any possible means.

47 The Union is a body corporate and registered as an industrial organisation pursuant to the Act and its rules are registered pursuant to s 58(1) of the Act. Pursuant to r 16(2) of the Union's rules, the State Secretary is required to ascertain 'that the applicant is engaged in an occupation covered by the union and is also suitable and qualified to be a member'. Accordingly, the Union says the onus is on the applicant to establish he is eligible to become a member of the Union. The Union also contends that the rules do not require the Union to engage in an independent investigation to determine the applicant's eligibility for enrolment as a member.

48 The Union says that the applicant was afforded an opportunity by Mr McCartney to satisfy the Union that he was eligible, suitable and qualified for membership. The Union contends that the applicant did not take up that opportunity and lodged this application before providing further documents to the Union

49 Rule 2(4) of the Union's rules provides: 'The Union shall also consist of all persons (excepting journalists) who are employees or whose usual occupation is that of an employee in or in connection with the Printing Industry as hereinafter described'. In construing the term 'usual occupation' it is argued that the Commission should have regard to a decision of Senior Deputy President Williams in the matter of *ACT Visiting Medical Officers Association* (2004) PR 946319 who said in relation to the term 'usual occupation' in s 4 of the *Workplace Relations Act 1996* (Cth) that:

> Section 4 of the Act defines an '*employee'* as including '*any person whose usual occupation is that of employee, but does not include a person who is undertaking a vocational placement'*. The reference in that definition to '*usual occupation'* may suggest that, where a person is engaged in different activities or activities of a different character, it is necessary to examine that person's normal or predominant occupation in order to determine whether or not the person is an '*employee'*. The definition is, however, an inclusive one. I do not accept, therefore, that the '*usual occupation'* of the person in question is to be regarded as the necessary attribute of a person who is to be treated as an employee within the meaning of, or for the purposes of, the Act. Resort must, therefore, be had to the common law [16].

50 The Union contends that the applicant has not disclosed sufficient evidence that he is 'an employee or whose usual occupation is that of an employee in or in connection with the Printing Industry' and the boundaries of his employment relationship are vague. The evidence discloses that the applicant's predominant occupation is Secretary of the Association and he was employed on a casual basis for one hour per week. However, the website and business card refers to him as the Secretary. He is not described or referred to on the website in connection with printing activities. The only examples of printing work that have been produced by the applicant are very unsophisticated. He has provided no catalogues or books of samples of printing work and he has no training or qualifications in printing work. The only positive evidence of printing work is the advertisement on the website. However, it is an unusual and artificial advertisement in that it refers to the Constitution and rules of the Association.

51 The Union also says that it is not clear if one hour's work per week on a casual basis is sufficient to qualify as the applicant's normal or predominant occupation or includes time where the applicant also acts as Secretary of the Association. The Union also points out that the applicant has not disclosed invoices, bank statements or quotes generated in the course of running a printing business, nor has he provided any payslips establishing he is remunerated for printing work or copies of accounts showing income generated by printing work. In particular there is no objective evidence that he is being paid money for his work.

52 As to the letter written by Mr Clancy (exhibit 2, document 10), the Union points out that that letter does not specify what actual printing work is done by the applicant or whether the work is done in his capacity as Secretary or in some other capacity. Further, the evidence established that the letter was drafted by the applicant which makes that evidence unreliable as Mr Clancy has not seen the applicant perform any printing work since he was allegedly engaged as a printer. It also casts doubt on the credibility of the applicant as he has purported to create a document in the name of another person about matters they have not seen.

53 The only other evidence before the Commission that the applicant is engaged in the printing industry is the applicant uses the printer and home computer to generate his business cards and the 'posters'. The Union says without anything more the applicant is unable to substantiate he is engaged in a business or a commercial activity that can be characterised as part of the printing industry as there is no objective evidence of industrial or commercial activity.

54 The Union also says in its written contentions and facts that insofar as r 16(2) of the rules of the Union confers on the State Secretary a discretion to ensure a prospective member is 'also suitable and qualified to be a member', the State Secretary could have regard to the fact that the applicant has on the website of the Association alleged corruption in the Union and, in his email of 6 February 2010, accused the Union of corruption. The Union says these accusations of corruption are baseless, scandalous and embarrassing and are a factor the State Secretary is entitled to consider in determining if the applicant is 'suitable and qualified' to be a member pursuant to r 16(2) of the rules of the Union.

Legal Principles

55 Whether the applicant is an employee of the Association turns solely on whether he has established as a matter of fact that he is genuinely engaged as an employee by the Association. If a finding can be made that at the time he sought to join the Union he was employed by the Association and continues to be so employed, the issue that falls to be determined is whether as an employee of the Association, the applicant's 'work' was covered by the eligibility rule of the Union. This issue turns upon whether or not the applicant is an employee or whose 'usual occupation is that of an employee in or in connection with the printing industry' within the meaning of r 2(4) of the rules of the Union. This phrase was considered by a Full Bench of the Australian Industrial Relations Commission in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Art of Advertising Pty Ltd* (1996) 40 AILR 3-321. In that matter, three employers including Art of Advertising Pty Ltd (AOA) carried out the business of advertising services, including designing and preparing for printing graphics and text for publicity and advertising purposes. AOA performed work for Federal Capital Press of Australia Ltd (FCP) which published 'The Canberra Times'. The issue was whether employees of AOA were covered by the eligibility rules of the Media, Entertainment and Arts Alliance (MEAA) or the Printing and Kindred Industries Union (PKIU). The rules of the MEAA precluded enrolment of persons who were employees in or in connection with the printing industry. The key part of the PKIU's eligibility rule was that it was entitled to enrol 'persons … who are employed or whose usual occupation is that of an employee in or in connection with … the printing industry'. After considering the facts, the Full Bench found that the employees of AOA were employed in connection with the printing industry as they were directly engaged in printing work for FCP. They reached this conclusion in the following analysis:

> The first step is our view that employees of AOA are employed in connection with the industry of FCP. In reaching this view, we have had regard to various decisions which indicate that the words 'in connection with' have a wide connotation and, where used in a union eligibility rule, considerably widen the scope of the rule; see for example, *R v Moore; Ex parte Federated Miscellaneous Workers' Union of Australia* (1978) 140 CLR 470, *R v Coldham; Ex parte The Australian Workers' Union* (1983) 153 CLR 415 and *R v Isaac; Ex parte Transport Workers' Union of Australia* (1985) 159 CLR 323. See also (in a context unrelated to union eligibility rules) the decision of Wilcox J in *Our Town FM Pty Ltd and Australian Broadcasting Tribunal* (1987) 16 FCR 465 at 479 - 480.
>
> The question whether employees of AOA are employed in connection with the industry of FCP 'is one of fact and depends on all the circumstances of the case' (per Gibbs CJ in *Isaac* at p.333). The work performed by employees of AOA has been described earlier in this decision. Almost all this work is, in our view, so closely related to the industry carried on by FCP that the employees of AOA can properly be described as employed in connection with the industry of FCP.

The second step in reaching our conclusion that employees of AOA are employed in connection with the printing industry is that, in our view, FCP is in the printing industry. FCP, as previously stated, publishes 'The Canberra Times', a daily newspaper, and other newspapers. We have considered whether FCP is in the publishing (or newspaper publishing) industry rather than in the printing industry. We have, however, come to the conclusion that, while FCP is in the publishing (or newspaper publishing) industry, it is also in the printing industry.

Material before us which leads us to conclude that FCP is in the printing industry includes:

(1) The definition of 'printing' in The Macquarie Dictionary, Second Revision which gives, as its first definition of the word, 'the art, process, or business of producing books, newspapers, etc., by impression from movable types, plates, etc.; typography'. (The definition in the latest edition of The Macquarie Dictionary is the same.);

(2) The publication called 'Australian and New Zealand Standard Industrial Classification' 1993 Edition (Australian Bureau of Statistics and Department of Statistics, New Zealand). Group 241 in this publication is 'Printing and Services to Printing'. Class 2412 within this group is 'Printing' which 'consists of units mainly engaged in commercial or job printing'. Group 242 is 'Publishing'. Class 2421 is 'Newspaper Printing or Publishing' which 'consists of units mainly engaged in printing or publishing newspapers'. This latter class indicates to us that the printing or publishing of newspapers is within the industry of newspaper printing (as well as newspaper publishing);

(3) The National Printing Industry Training Council publication called 'Technical Change and Skill Formation in the Printing Industry'. This publication, for instance, shows 'printing and publishing' within a schematic description of the printing industry (p 13), refers to the 'newspapers section' (p 13), outlines the development of the newspaper printing process (p 14), and includes publishing as one of the broad processes and technologies in the printing industry;

(4) The National Printing Industry Training Council publication called 'The Challenge of Change'. This publication outlines various industry sectors. One is 'Printing and Publishing', the description of which includes the comment that 'large companies (mainly newspapers) are found in all States'; and

(5) Australian Printing Industry Yearbook 1994. This contains a glossary of printers' terms. The definition of 'Printing Industry' in the glossary commences 'in Australia in its scope includes Publishing, Printing and Publishing...' (This yearbook appears to be put out by the PKIU and its editor is Mr John Cahill, the then federal secretary of the PKIU. On the assumption that it is in the interest of the PKIU to define printing industry as widely as possible, we do not rely, to any substantial degree, on this yearbook).

It appears to us from a consideration of the abovementioned material, that the publishing of newspapers falls within the printing industry as well as within the publishing (or newspaper publishing) industry. We are, accordingly, of the view that FCP is in the printing industry.

The third step in reaching our conclusion that employees of AOA are employed in connection with the printing industry follows from the first two. Having determined that employees of AOA are employed in connection with the industry of FCP, and having determined that FCP is in the printing industry, it follows that employees of AOA are employed in connection with the printing industry.

56 Whether employees are engaged in or in connection with the printing industry was also considered by McLeay C in *National Union of Workers, NSW Branch v Daypak Pty Ltd* (Unreported, NSWIRC, IRC 5910 of 1998, 4 June 1999). In that matter the National Union of Workers (NUW) advised the New South Wales Industrial Relations Commission of a dispute with Daypak Pty Ltd about the payment of wages pursuant to the Storemen and Packers General (State) Award. The employer, Daypak, claimed the employees in question were covered by a printing industry award. The employees were engaged in packing and collation of Bounty bags and similar packs which entailed collating information leaflets and magazines into bags, sealing the bags, packing them into boxes and labelling the boxes. The employer argued the main content of the bags was printed material and that the work was that of a mailing house operation and a finishing operation of the end process of the printing industry. Thus the employer contended the work was carried out in connection with the printing industry and outsourced from the printing industry. McLeay C firstly found that any work outsourced from the printing industry is not sufficient to make a finding that a company that undertakes the work is part of the printing industry: *R v Moore and Others; Ex parte Australian Workers' Union* (1976) 11 ALR 449. McLeay C then applied the principle of 'major and substantial employment' to determine whether the work carried out by the employees of Daypak was part of the printing industry. This test requires an analysis of the substantial character of the industrial enterprise in which an employer or employee is engaged. In particular whether the work 'is in or in connection with the printing industry' turns on an analysis of the major and substantial work of the employees and/or the substantial character of the enterprise (19). When McLeay C reviewed the evidence he came to the view that whilst some of the work may fit descriptions of a mailing house or finishing process, that the work was incidental to the work of the employer. He also found that there was insufficient evidence to conclude that the work of the employees was in or in connection with the printing industry.

57 The principle of major and substantial employment was explained and applied by the Industrial Appeal Court in *The Federal Clerks' Union of Australia Industrial Union of Workers, WA Branch v Cary* (1977) 57 WAIG 585. In the appeal before the Industrial Appeal Court the central question for consideration by the Court was whether a particular employee named in a complaint before the Industrial Magistrate was or was not a 'clerk'. In determining the issue the Court had regard to the substantial nature of the work, the substance of it and the purpose to be achieved by it. The facts found by the Magistrate were that the employee was employed in connection with the renting of real estate and 'her principal duties were to negotiate

tenancy agreements, supervise performance by tenants of those agreements, to advise landlords as to the termination of tenancies, and to act on instructions relating thereto' (587). It was argued by the appellant that her work was essentially that of a clerical nature. This argument was rejected by the Court. Burt CJ with whom Wickham J agreed held that the clerical work the employee performed was to enable her to effectively discharge her duties and the substance of her work was not that of a clerk. Chief Justice Burt explained how he made that finding in the following passage (586):

> The word 'clerk' like so many English words of common and ancient usage lacks definition. Its meaning is very much controlled by context. One dictionary meaning – the Shorter Oxford Dictionary – is 'a subordinate employed to make written entries, keep accounts, etc.' and the appellant in very general terms accepts this to be the meaning of the word for the purposes of this award. The submission made to us by the appellant's counsel was that the dictionary definition which I have set out 'is the proper definition of a clerk' and 'that the common thread which runs through the function of "clerk" is the recording of information'. Having taken that position he freely conceded that 'at some stage in the hierarchy of either business or government administration the function of the worker ceases to be that of clerk and he graduates into the realm of something else'.
>
> If that is right, and I see no reason for supposing that it is wrong, then one judges the question as it may arise in any particular case simply by finding as a fact what it is that the worker was employed to do and then deciding whether upon the facts so found he was employed to 'make written entries, keep accounts' and other work of that character. Of course one has regard to the substantial nature of the employment in terms of the purpose to be achieved by it, the question being, I think, very much controlled by the difference, which is not always accepted by philosophers but which serves the purposes of practical men, between ends and means. If in substance the worker's job is to write and the job is done when the writing has been done he is a clerk, but if in substance the writing done by the worker is but a step taken in the doing by him of something extending beyond it then he is not. The 'substance' of the work identifies the question as being one of degree and it indicates the answer to it will be, or may be, very much the product of a value judgment.

Credibility of the Evidence

58 Having heard and carefully observed the applicant give evidence I generally did not find him to be a reliable and credible witness. He made exaggerated claims about some matters and gave vague and unconvincing evidence about other matters. For example his claim that he is an 'artist/designer' and the very simple graphic image of the dove was very similar to the work of Picasso is plainly exaggerated and unsustainable.

59 The production of a memorandum signed by Mr Clancy is unhelpful, self-serving and cannot be relied upon. It is a document prepared by the applicant and purports to state matters of fact that have not been observed by Mr Clancy.

60 The claim on the Association's webpage that the Association 'offers first class printing of business cards' is also exaggerated. It is plain that such a claim is not maintainable. When the standard of the business card produced by the applicant as exhibit 5 as an example of the 'printing work' produced by him is examined, it is plain that such a claim cannot be maintained as the 'card' is amateurish and could be produced by anyone who has a very basic knowledge of word processing and no training in the skill or occupation of professional printing.

61 The applicant has not produced any documentary material that is not created by him to support his oral evidence that his employment with the Association as a printer is genuine. Further his evidence about the source of funds from which he draws his wages is vague and unsatisfactory. If the Association only has 100 members and if the majority of those members pay $10 a year in membership fees, in the absence of any evidence of other funds or income it is clear that the Association has insufficient funds to employ the applicant. This is evident from the Statement of Assets and Liabilities of the Association (exhibit 1, document 6). In addition to the applicant's evidence that he will be paid by people who will contribute to his wages is not evidence of anything that can be relied upon to support his evidence that he is employed by the Association.

62 Although the applicant is passionate about what he perceives is his right to join the Union as a member it seems that he has attempted to achieve that aim by attempting to 'construct' a printing business through the activities of the Association.

Conclusion

63 Pursuant to r 16(2) of the rules of the Union, on receiving an application to join to the Union, the State Secretary is required to consider whether the person who applies is:

(a) engaged in an occupation covered by the Union; and

(b) also suitable and qualified to be a member.

However, the applicant made this application under s 66 of the Act prior to the State Secretary making a decision under r 16(2) of the rules of the Union. Consequently, there is no decision under this rule that can be reviewed. Therefore it is not necessary to consider the meaning, scope and operation of r 16(2) in this matter.

64 Although I have reservations about the reliability of the applicant's evidence, even if I was to accept his evidence and make a finding that he is employed by the Association, I am not satisfied that the applicant is an 'employee or whose usual occupation is that of an employee in or in connection with the Printing Industry' within the meaning of r 2(4) of the rules of the Union.

65 A person can be employed in or in connection with the printing industry if the business in which they are employed is in or in connection with the printing industry or if the occupation or calling of the person is in connection with the printing industry. Rule 2(4) describes the printing industry to include any 'business, trade, manufacture, undertaking, calling, service, employment, handicraft or industrial occupation or avocation on land or water in the industry of printing and/or any kindred industries'. Rule 2(4) then goes on to describe specific printing occupations and printing work which comprises the printing industry. The applicant contends that he carries out the following printing work: electrotyping, keyboard operator, proofreader, artist/designer and non-impact printing machinist.

66 Although I accept the applicant operates a keyboard of a home computer it appears he primarily does so in the capacity of Secretary, to maintain the Association's website and to 'chat' with members of the Association. When regard is had to this evidence it would be difficult to make a finding that his major and substantial work is that of printing. The principal work (albeit largely unpaid work) that the applicant carries out is as the Secretary of the Association. Any work that he carries out during the one hour each week that he is paid as a 'printer' that is for the members, such as printing copies of correspondence and the Constitution is printing work that is carried out to discharge his duties as the Secretary. In substance that work is not that of a 'printer' in the printing industry within the meaning of r 2(4) of the rules of the Union but is incidental to and part of his work as the Secretary of the Association.

67 In any event I do not agree a computer used for word processing can be described or characterised as an electrotyping machine. The Macquarie Dictionary Online defines 'electrotype' as:

> noun **1.** a facsimile, for use in printing, of a block of type, an engraving, or the like, consisting of a thin shell of metal (copper or nickel), deposited by electrolytic action in a wax, lead, or plastic mould of the original and backed with lead alloy.
>
> –verb (t) (**electrotyped, electrotyping**) **2.** to make an electrotype or electrotypes of.
>
> –**electrotyper**, noun.

68 It is well known that a home computer does not reproduce images by facsimile, a block of type or by engraving. Whilst the applicant may proofread material that he generates for the Association's website, insufficient evidence has been adduced in this matter on which a finding could be made that the applicant is employed by the Association to carry out proofreading. In any event the processes described by him in operating the home computer, maintaining the website and printing documents for the Association and its members are commonly incidents of work of clerical based occupations that are not engaged in the printing industry and is work engaged in by him to discharge his duties as the Secretary.

69 I do not accept that the applicant is employed by the Association as an artist/designer. Such a finding is not open on the evidence as the only evidence given by the applicant about the creation of artistic work is that he accessed a free image from the internet to create the 'posters'.

70 I also do not accept that the applicant's work in creating the posters by gluing paper to cut sheets of plastic coreflute can be described as work in 'plastics manufacturing or any of the processes of or incidental to manufacturing of plastics, or goods manufactured therefrom' within the meaning of r 2(4) of the Union's rules, as the words 'manufacturing of plastics' contemplate the making of plastic. The applicant does not make the sheets of coreflute. Whilst it may be argued that he makes posters from plastic sheets of coreflute, I am of the opinion that the industry referred to in r 2(4) of the Union's rules as the 'manufacture of goods from plastic' only contemplates the manufacture of goods that are part of a commercial endeavour or are goods of a commercial character, that is, goods that are saleable in a competitive market. The posters created by the applicant cannot be said to be of such quality to be such goods of this character. Whilst I accept that it is not material that the applicant carries out what he says is 'printing' work for only one hour a week, I am of the opinion that for a finding to be made that the applicant is genuinely engaged in printing work within the meaning of r 2(4) of the Union's rules there must be an element of commercial endeavour or of a commercial character in the applicant's work. In this matter the applicant has not shown that his work is part of a commercial endeavour. The quality of work of the 'posters' and 'business cards' are such that they could not be seriously marketed as part of a business venture.

71 Leaving aside printing of the 'posters' and 'business cards', during the hour each week the applicant carries out 'printing work' he prints documents and correspondence for the Association. Such work of a clerical nature cannot be characterised as 'printing' work contemplated by r 2(4) of the Union's rules or indeed be characterised as clerical work if the work is engaged in to discharge his duties as Secretary. To find otherwise would have the effect that the Union would have constitutional coverage of all clerical workers, which would constitute an industry under r 2(4) of the rules of the Union as a calling or occupation of printing of all classes. This evidence also casts doubt on whether a finding could be made that the major and substantial work of the applicant is printing. The use of the word 'printing of all classes' in the context of r 2(4) of the rules of the Union must mean more than the printing of documents as part and parcel of the duties of the Secretary of the Association. As set out above it is my opinion that these words mean carrying out printing that has a commercial element.

72 When the hearing of this matter commenced the applicant informed the Commission that he intended to rely upon s 96B of the Act in support of his case. Section 96B provides:

> (1) An award, industrial agreement or order under this Act, or any arrangement between persons relating to employment must not —
>
> (a) require a person —
>
> (i) to become or remain a member of an organisation;
>
> (ii) to cease to be a member of an organisation;
>
> (iii) not to become a member of an organisation; or
>
> (iv) to treat another person less favourably or more favourably according to whether or not that other person is, or will become or cease to be, a member of an organisation;
>
> or
>
> (b) confer on any person by reason of that person's membership or non-membership of an organisation any right to preferential employment or to be given preference in any aspect of employment.

(2) The prohibition in subsection (1) extends to awards, industrial agreements, orders and arrangements that are in force at the commencement of section 28 of the *Industrial Relations Amendment Act 1993*.

(3) A requirement that is contrary to this section is of no effect.

73 The right to freedom of association enshrined by s 96B has no application to persons who are not eligible to be a member of an organisation registered under the Act. Consequently this provision does not assist the applicant's case. The meaning and effect of s 96B cannot be construed in isolation from the legislative scheme of the Act, in particular Division 4 of Part II of the Act which provides for the registration of industrial organisations and associations and among other matters variation of rules. I recently observed in *Liquor, Hospitality and Miscellaneous Union, Western Australian Branch v Director General, Department of Education and Training* (2010) 90 WAIG 127 the modern approach to statutory construction requires courts and tribunals when construing legislation to have regard to the legislative scheme. In particular I said:

> As Ritter AP observed in *Kenji Auto Parts Pty Ltd t/as SSS Auto Parts (WA) v Fisk* (2007) 87 WAIG 328 [38] statutory construction involves a consideration and analysis of the meaning of the words used in a section in the context of the legislation and legislative scheme as a whole, to try to discern the intention of the legislature: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 (381) (McHugh, Gummow, Kirby and Hayne JJ); and *Wilson v Anderson* [2002] HCA 29; (2002) 213 CLR 401 [8] (Gleeson CJ). Courts must seek to ascertain the statutory purpose and legislative intention from the words used in the statute (and can use other aids as are legitimately available). Where the will of Parliament is clear, a court or tribunal must give effect to that clearly expressed will [16].

74 Section 55, s 62 and the objects set out in s 6(e) of the Act provide for a legislative scheme of the registration and alteration of rules of an organisation that provide for eligibility rules for membership. Inherent in that legislative scheme is different organisations and associations registered under the Act will cover different occupations, callings, employment or vocations of employees. The provisions of s 96B must be interpreted in light of this principle. If pursuant to the rules of a registered organisation or association a person is not entitled to be enrolled as a member then no right to freedom of association arises and the prohibitions in s 96B are not invoked.

75 For these reasons I am of the opinion that the applicant has not provided any credible evidence that the work he carries out for the Association is in the printing industry within the meaning of r 2(4) of the rules of the Union and I will make an order dismissing the application.

2010 WAIRC 00321

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PRESIDENT

PARTIES	MR REVELI KEITH AFFLECK
	APPLICANT
	-and-
	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH
	RESPONDENT
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	WEDNESDAY, 2 JUNE 2010
FILE NO.	PRES 2 OF 2010
CITATION NO.	2010 WAIRC 00321

Result	Application dismissed
Appearances	
Applicant	In person
Respondent	Mr V J Pelligra (of counsel)

Order

This matter having come on for hearing before me on Thursday, 29 April 2010, and having heard the applicant in person and Mr Pelligra (of counsel) on behalf of the respondent, and reasons for decision having been delivered on Wednesday, 2 June 2010, pursuant to the powers conferred on the President by the *Industrial Relations Act 1979* hereby orders —

THAT the application be and is hereby dismissed.

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

2010 WAIRC 00255

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR REVELI KEITH AFFLECK
	APPLICANT
	-and-
	AUSTRALIAN MANUFACTURING WORKERS UNION
	RESPONDENT
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	THURSDAY, 6 MAY 2010
FILE NO/S	PRES 2 OF 2010
CITATION NO.	2010 WAIRC 00255

Result	Order issued to amend the name of the respondent
Appearances	
Applicant	In person
Respondent	Mr V J Pelligra (of counsel)

Order

This matter having come on for hearing before me on 29 April 2010, and having heard Mr R K Affleck on his own behalf as applicant and Mr V J Pelligra, of counsel, on behalf of the respondent, the Acting President, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders —

THAT the name of the respondent be deleted and that be substituted therefor the name, The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers - Western Australian Branch.

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

AWARDS/AGREEMENTS—Variation of—

2010 WAIRC 00331

FAST FOOD OUTLETS AWARD 1990

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA
	APPLICANT
	-v-
	AUSTRALIAN FAST FOODS PTY LTD AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	9 JUNE 2010
FILE NO	APPL 3 OF 2010
CITATION NO.	2010 WAIRC 00331

Result	Award varied
Representation	
Applicant	Mr T J Pope
Respondent	No appearance

Order

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

THAT the Fast Food Outlets Award 1990 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 9 June 2010.

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

SCHEDULE

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

13. - MEAL MONEY

Any employee who is required to work overtime for more than two hours on any day, without being notified on the previous day or earlier, that he or she will be required to work such overtime, will either be supplied with a meal by the employer or be paid $11.90 meal money.

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

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

(2) Leading Hands -

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

		$
(a)	If placed in charge of less than 6 employees	8.35
(b)	If placed in charge of 6 to 10 employees	11.40
(c)	If placed in charge of 11 to 20 employees	13.45
(d)	If placed in charge of more than 20 employees	22.25

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

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

Class of Employee	Allowance per Week $
Employees employed on a casual basis	1.60
Employees employed on a part time basis	2.00
Employees employed on a full time basis	2.55

Provided that any employee employed as a full time Cook shall be paid $3.05 per week for laundry and/or dry cleaning. Provided further that the provisions of this clause may be altered by written agreement between the union and the employer.

2010 WAIRC 00271

FOOD INDUSTRY (FOOD MANUFACTURING OR PROCESSING) AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE FOOD PRESERVERS' UNION OF WESTERN AUSTRALIA, UNION OF WORKERS

APPLICANT

-v-

ANCHOR PRODUCTS PTY LTD AND OTHERS

RESPONDENTS

CORAM COMMISSIONER J L HARRISON

DATE FRIDAY, 14 MAY 2010

FILE NO/S APPL 4 OF 2010

CITATION NO. 2010 WAIRC 00271

Result	Award varied
Representation	
Applicant	Mr T Pope
Respondents	No appearances

Order

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

THAT the *Food Industry (Food Manufacturing or Processing) Award* 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 14 May 2010.

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

SCHEDULE

1. Clause 19. - Meal Allowance: Delete this clause and insert the following in lieu thereof:

Where an employee required to work overtime for more than two hours, without being notified on the previous day or earlier that he/she will be so required to work, shall be supplied with a meal by the employer or paid $10.10 for a meal. If owing to the amount of overtime a second or subsequent meal is required the employee shall be supplied with each such meal by the employer or be paid $6.85 for each meal so required.

If an employee in consequence of receiving such notice has provided himself/herself with a meal or meals and is not required to work overtime or is required to work less overtime than notified, he/she shall be paid the amounts prescribed above in respect of the meals not then required.

2. Clause 31. - Wages: Delete subclause (3) of this clause and insert the following in lieu thereof:

(3) Leading Hands

		Per Week Extra $
A Leading Hand In-Charge of:		
(a)	Less than three other employees	14.65
(b)	Not less than three and not more that ten other employees	28.85
(c)	More than ten other employees	42.40

2010 WAIRC 00270

HAIRDRESSERS AWARD 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA
	APPLICANT
	-v-
	THE MASTER LADIES' HAIRDRESSERS INDUSTRIAL UNION OF EMPLOYERS OF WESTERN AUSTRALIA AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 14 MAY 2010
FILE NO/S	APPL 5 OF 2010
CITATION NO.	2010 WAIRC 00270

Result	Award varied
Representation	
Applicant	Mr T Pope
Respondents	Mr O Moon as agent on behalf of the Master Ladies' Hairdressers Industrial Union of Employers of Western Australia

Order

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

THAT the *Hairdressers Award 1989* 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 14 May 2010.

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

SCHEDULE

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

(1) The meal money required to be paid to all employees pursuant to this clause shall be $11.70.

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

(4) Tool Allowance

In addition to the weekly wage a tool allowance of $7.60 per week shall be payable to full time Seniors, part time Seniors, indentured apprentices, and probationary apprentices.

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

An employee holding either a Red Cross or St. John Senior First Aid Certificate of at least 'A' level who is appointed by the employer to perform first aid duties shall be paid $9.20 per week in addition to the employee's ordinary rate.

2010 WAIRC 00274

LICENSED ESTABLISHMENTS (RETAIL AND WHOLESALE) AWARD 1979

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA
	APPLICANT
	-v-
	COMO LIQUOR STORE AND OTHERS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 14 MAY 2010
FILE NO/S	APPL 6 OF 2010
CITATION NO.	2010 WAIRC 00274

Result	Application divided
Representation	
Applicant	Mr T Pope
Respondent	No appearances

Order

WHEREAS on 28 January 2010 the applicant applied to vary the *Licensed Establishments (Retail and Wholesale) Award 1979*; and

WHEREAS the matter was set down for hearing on 14 May 2010; and

WHEREAS at the hearing the Commission formed the view that the application should be divided and the applicant consented to this occurring;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under s 27(1)(s) of the *Industrial Relations Act 1979*, hereby orders -

1. THAT Application 6 of 2010 be divided into two parts to be numbered Application A 6 of 2010 and Application B 6 of 2010 respectively.
2. THAT Application A 6 of 2010 be that part of Application 6 of 2010 that seeks to vary Clause 10. – Meal Times and Meal Allowance and Clause 21. – Wages.
3. THAT Application B 6 of 2010 be that part of Application 6 of 2010 which seeks to vary Clause 22. - Motor Vehicle Allowance.

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

2010 WAIRC 00275

LICENSED ESTABLISHMENTS (RETAIL AND WHOLESALE) AWARD 1979

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA
	APPLICANT
	-v-
	COMO LIQUOR STORE AND OTHERS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 14 MAY 2010
FILE NO/S	APPLA 6 OF 2010
CITATION NO.	2010 WAIRC 00275

Result	Award Varied
Representation	
Applicant	Mr T Pope
Respondent	No Appearances

Order

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

THAT the *Licensed Establishments (Retail and Wholesale) Award 1979* 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 14 May 2010.

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

SCHEDULE

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

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

(2) When an employee is required to continue working after the usual finishing time for more than one hour he/she shall be paid $11.90 for the purchase of any meal required.

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

(3) When an employee is required to continue working after the usual finishing time for more than one hour he/she shall be paid $11.90 for the purchase of any meal required.

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

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

(1) (a) An employee required to operate a ride-on power operated tow motor, a ride-on power operated pallet truck or a walk beside power operated high lift stacker in the performance of his/her duties shall be paid an additional 55 cents per hour whilst so engaged.

(b) An employee required to operate a ride-on operated fork lift, high lift stacker or high lift stock picker or a power operated overhead traversing hoist in the performance of his/her duties shall be paid an additional 76 cents per hour whilst so engaged.

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

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

In a cold chamber in which the temperature is:

(i) Below 0 degrees Celsius to -20 degrees Celsius - 82 cents per hour.

(ii) Below -20 degrees Celsius to -25 degrees Celsius - 95 cents per hour.

(iii) Below -25 degrees Celsius - $1.09 per hour.

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

CANCELLATION OF—Awards/Agreements/Respondents—

2010 WAIRC 00289

VARIOUS AWARDS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER A R BEECH
HEARD	WEDNESDAY, 5 MAY 2010
DELIVERED	TUESDAY, 18 MAY 2010
FILE NO.	APPL 12-14, 16-18, 20-32, 34-47, 49-78, 80-94, 97-107 AND 109-112 OF 2010
CITATION NO.	2010 WAIRC 00289

CatchWords	Award – Awards applying to constitutional corporations – Effect of "Work Choices" and Fair Work Act 2009 on awards - Whether there is an employee to whom the awards apply – Awards cancelled – Industrial Relations Act 1979 (WA) s 47(1); Workplace Relations Act, 1996 Schedule 8 - Part 3 - Division 1 - Subdivision A s 31; Fair Work Act 2009 (Cth); Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth) Schedule 3 - Part 1 s 2(2)
Result	67 Awards cancelled; 26 applications adjourned
Representation	Ms S McGurk, on behalf of the Trades and Labor Council of Western Australia
	Mr D Ellis, on behalf of the Health Services Union of Western Australia (Union of Workers)
	Mr S Banovich, of counsel, for The Australian Workers' Union, West Australian Branch, Industrial Union of Workers
	Mr A Cameron, on behalf of Kalgoorlie Consolidated Gold Mines Pty Ltd
	Ms K Scott, on behalf of IWD Pty Ltd (by written submission)

Reasons for Decision

1 These are applications pursuant to s 47(1) of the *Industrial Relations Act, 1979* ("the Act") on the Commission's own motion to cancel 93 awards on the basis that there is no employee to whom the awards apply given the operation of the *Fair Work Act, 2009* (Cth) ("FW Act"). The Hon. Minister for Commerce ("Minister"), Trades and Labor Council of WA ("TLC"), Chamber of Commerce and Industry of WA ("CCIWA") and the Australian Mines and Metals Association, (Inc) ("AMMA") were notified on 1 February 2010 of the Commission's intention to cancel these awards. Also, the necessary applications were created and served upon the named parties together with a Notice of Hearing listing the applications. Notice of the intention of the Commission to make the order was given in the WA Industrial Gazette on 24 March 2010 ((2010) 90 WAIG 199) and on the Commission's website. Notices pursuant to s 78B of the *Judiciary Act 1903* (Cth) were sent to the Attorneys General by the Registrar on 15 March 2010. No party to an award was obliged to appear at the hearing unless the party objected to the cancellation of the award.

2 The background to these applications can be found in the application to cancel the *Jenny Craig Employees Award, 1995*. The history and conclusion of that application is set out in the decision of the Commission in Court Session of 12 April 2010 ((2010) 90 WAIG 272; [2010] WAIRC 00200). The award was cancelled after it was found that, by the operation of the FW Act, there was no employee to whom the award applied and that the merits of the matter warranted its cancellation. In particular, the Commission in Court Session stated:

> [27] …We are unable to see any detriment arising from its cancellation. Moreover, there is a definite advantage accruing from the removal of an award which is clearly redundant: while it remains, there is likely to be a presumption of validity and to be attempts to vary it to ensure its currency; these are to be avoided and will be avoided by its cancellation.

3 The essential purpose of these applications is to consider whether these 93 awards, out of the 336 awards in the Commission, should now be cancelled in the light of the issues raised and dealt with in that decision. In each case, the award is specific to a company or incorporated body or a number of them, or lists companies as the named parties.

4 The TLC raised no objection to the cancellation of an award which is clearly enterprise-specific. However, it cautioned that where an award is common rule there might be an employer either now or in the future which is not a constitutional corporation, and the cancellation of the award would leave the employees concerned award-free. There was no submission from, nor an appearance on behalf of, the Minister, CCIWA or AMMA. I now consider matters raised with the Commission concerning individual awards.

5 In relation to:

- *The Brewery Laboratory Employees Award 1983*

- *Brewing Industry Award 1993*
- *Malting Industry Award 1993*, and
- *Matilda Bay Brewing Company Limited Enterprise Award 1994*,

the Breweries and Bottleyards Employees' Industrial Union of Workers of Western Australia made a written request for more time to consider its position. Given the sometimes limited financial or legal resources of some unions and the finality of the cancellation of an award, the request will be granted and those applications will be re-listed.

6 In relation to the:

- *Hospital Employees' (Brightwater) Consolidated Award 1981*
- *Hospital Salaried Officers (Australian Red Cross Blood Service, Western Australia) Award, 1978*, and
- *Hospital Salaried Officers (WorkPower) Award of 1996*,

the Health Services Union of Western Australia (Union of Workers) ("HSU") attended and objected to their cancellation on the basis that in the first two awards it is not clear that the employer named as a party is a constitutional corporation. In relation to the second award, the HSU undertook to provide a further submission after its attention was drawn to the decision in *E v. Australian Red Cross Society* (1991) 27 FCR 310; 99 ALR 601. In relation to the third award the HSU undertook to provide to the Commission a copy of a federal enterprise agreement which it says expressly incorporates that award as it is varied from time to time as providing perhaps some of the conditions of employment of employees covered by the federal enterprise agreement. (Subsequent to the hearing the HSU advised that its submission should have referred to a State industrial agreement, not to a federal enterprise agreement.)

7 In respect of the following awards:

- *Cargill Australia Limited - Salt Production and Processing Award 1988*
- *Cockburn Cement Limited Award 1991*
- *Fibre Cement Workers Award*
- *Gold Mining Consolidated Award, 1980*
- *Mineral Earths Employees' Award*
- *Mineral Sands Industry Award 1991*
- *Mineral Sands Mining and Processing Industry Award, 1981*
- *Nickel Mining and Processing Award, 1975*, and
- *Tin and Associated Minerals Mining and Processing Industry Award No. 14 of 1971*,

the Australian Workers' Union, West Australian Branch, Industrial Union of Workers ("AWU") objected to the cancellations because it believes it has members on statutory individual contracts which refer to, or incorporate, one of those awards in the contract. The union is concerned that cancelling those awards would affect those members to their detriment. The AWU undertook to provide further written submissions within 21 days of the hearing.

8 The Construction, Forestry, Mining and Energy Union of Workers objected to the following awards being cancelled on the basis that they are common rule awards:

- *Building and Engineering Trades (Nickel Mining and Processing) Award, 1968*
- *Engine Drivers' (Gold Mining) Consolidated Award, 1979*
- *Engine Drivers' (Nickel Mining) Award 1968*
- *Engine Drivers' Minerals Production (Salt) Industry Award, 1970*
- *Iron and Steel Industry Workers' (Australian Iron and Steel Pty. Ltd.) Production Bonus Scheme Award*
- *The Iron Ore Production & Processing (Locomotive Drivers) Award 2006*
- *Iron Ore Production & Processing (Locomotive Drivers Rio Tinto Railway) Award 2006*
- *Mineral Sands Industry Award 1991*
- *Mineral Sands Mining and Processing (Engineering and Building Trades) Award, 1977*
- *Particle Board Employees' Award, 1964*
- *Particle Board Industry Award No. 10 of 1978*.

9 In each of the above awards where an objection has been made to its cancellation, the applications to cancel the awards will be adjourned to enable me to give further consideration to whether the cancellation should proceed and I anticipate that the Registrar will be asked by me to further investigate some of the objections. I consider the point raised by the TLC to be valid, however in each case an assessment will need to be made whether the award has or is likely to have an employer which is not a constitutional corporation.

10 None of the named parties to the remaining awards object to their cancellation. In the case of the *Storemen IWD Pty Ltd Award 1982* that company provided documentary evidence together with a thorough and helpful submission supporting the cancellation of that award. I consider each of the remaining awards is in the same position as the *Jenny Craig Award*: the area and scope of the awards and the named parties show that the awards apply to companies which are unarguably constitutional corporations, and for the reasons given by the Commission in Court Session in relation to that award, there is no employee for the purposes of the Act to whom the awards apply. I adopt the reasons set out by the Commission in Court Session to conclude that these awards should now be cancelled. I am satisfied too that the requirements of s 47 have been complied with.

11 It appears from some of the responses received, from both employers as well as from unions, that there may be some confusion about the effect of the "Work Choices" amendments upon State awards as they applied to a constitutional corporation, and it may be helpful to set out what I understand is the position. On 27 March 2006 schedule 8 - Part 3 - Division 1 - Subdivision A s 31 of the "Work Choices" amendments to the *Workplace Relations Act, 1996* created an instrument called a Notional Agreement Preserving State Awards (NAPSA) in the terms of the original State award, and with the same name as the State award, as it was on 27 March 2006.

12 The "Work Choices" amendments did not, and constitutionally could not, cancel the State award. The creation of the NAPSA under Commonwealth legislation had no effect upon the State award itself but overrode the State award as it applied to a constitutional corporation. The NAPSA thus created existed in its own right independently of the State award. Any employees of a constitutional corporation who were employed under the State award prior to 27 March 2006 have not been employed since then under the State award but under that separate Commonwealth instrument which has the same name as the original State award. Provision for the NAPSA to be varied or otherwise amended was made in the "Work Choices" amendments; any amendments made by the Commission to the State award after 27 March 2006 did not, and could not, amend or vary the NAPSA.

13 Accordingly, although the creation of the NAPSA could not, and did not, itself cancel or otherwise remove the original State award, it follows that the State award can have no application to a constitutional corporation and its employees. A NAPSA is continued in existence as a "transitional instrument" under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) Schedule 3 - Part 1 s 2(2). The transitional instrument continues to cover the same employees and employers that it covered when it was a NAPSA. It is the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* which provides for the variation and termination of a transitional instrument (in Part 3). The cancellation of a State award can have no effect upon a transitional instrument. There is no practical purpose in maintaining the State award in existence and moreover there may be the perception that while it exists, it does have some practical relevance or application when such is not the case.

14 For all of the above reasons, I will now consolidate the applications to cancel the remaining awards and make an order which cancels them.

2010 WAIRC 00287

VARIOUS AWARDS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	TUESDAY, 18 MAY 2010
FILE NO/S	APPL 12, 14, 16-17, 22-24, 26, 28-32, 37, 39-47, 49-55, 57, 59-67, 69-77, 80-81, 83, 88, 90-91, 94, 100-106 AND 109-112 OF 2010
CITATION NO.	2010 WAIRC 00287
Result	Applications consolidated; Awards cancelled

Order

HAVING HEARD Ms S McGurk, on behalf of the Trades and Labor Council of Western Australia; Mr D Ellis, on behalf of the Health Services Union of Western Australia (Union of Workers); Mr S Banovich, of counsel, for The Australian Workers' Union, West Australian Branch, Industrial Union of Workers; Mr A Cameron, on behalf of Kalgoorlie Consolidated Gold Mines Pty Ltd; and Ms K Scott, on behalf of IWD Pty Ltd (by written submission),

NOW THEREFORE I, pursuant to the powers conferred by s 27(1)(s) and s 47(1) of the *Industrial Relations Act 1979* , do hereby order:

1. THAT applications 12, 14, 16-17, 22-24, 26, 28-32, 37, 39-47, 49-55, 57, 59-67, 69-77, 80-81, 83, 88, 90-91, 94, 100-106 and 109-112 of 2010 be consolidated.

2. THAT the following awards be cancelled:

Plastic Manufacturing Award 1977
CSBP & Farmers Award 1990
Dampier Salt Award 2004
Electrical, Engineering and Building Trades (West Australian Newspapers Limited) Award, 1988
Engineering and Engine Drivers' (Nickel Smelting) Award, 1973
Engineering Trades and Engine Drivers (Nickel Refining) Award, 1971
Porcelain Workers Award, 1970
Foodland Associated Limited (Western Australia) Warehouse Award 1982
Gold Mining Engineering and Maintenance Award
Government Water Supply, Sewerage and Drainage Employees Award 1981
Government Water Supply, Sewerage and Drainage Foremen's Award 1984
Grain Handling Maintenance Workers Award
Grain Handling Salaried Officers' Consolidated Award 1989
Industrial Catering Workers' Award, 1977
Iron Ore Production and Processing (Hamersley Iron Pty Limited) Award 1987
Printing (Community Newspaper Group) Award, No. A 21 of 1989
Aerospace Engineering Services Pty Ltd Enterprise Award 2005
The Printing (Newspaper) Award 1979
Printing (The Sunday Times Guaranteed Employment and Voluntary Retirement) Award, 1983
Printing (West Australian Newspapers Limited, Guaranteed Employment and Voluntary Retirement) Award
RAC Road, Mechanical and Fleet Services Award 1999
Ambulance Service Communication Centre Employees' Award 1991
Salaried Staff Curtin University of Technology Award 1985
Security Officers and Cleaners (West Australian Newspapers) Award, 1992
Shark Bay Salt and Gypsum (Production and Processing) Useless Loop Award 1989
Argyle Diamonds Production Award 1996
State Energy Commission of Western Australia Wages and Conditions Award, 1988
BHP-Utah Minerals International Cadjebut Production Award 1989, No. A 11 of 1989
Storemen IWD Pty Ltd Award 1982
Iron Ore Production & Processing (BHP Billiton Iron Ore Pty Ltd) Award 2002
Storemen's Rapid Metal Developments (Aust.) Pty. Ltd. Award 1982
The John Lysaght (Australia) Limited Award
Journalists' (Suburban and Free Newspapers) Award, 1984
Kalgoorlie Consolidated Gold Mines Award 2002
Laboratory and Technical Employees (Peters (W.A.) Limited) Award of 1981
Bibra Lake Fabrication Workshop Award
Supermarkets and Chain Stores (Western Australia) Warehouse Award
BP Fremantle Ltd Oil Bunkering Award 1992, No. A 20 of 1981
Telfer Gold Mine Fly In/Fly Out Award
BP Refinery (Kwinana) (Security Officers') Award, 1978
BRADKEN Bassendean (WA) Way Forward Enterprise Award 2003
Titanium Oxide Manufacturing Award 1975
Transport Workers (Burswood Island Resort) Award 1987
Transport Workers' (Eastern Goldfields Transport Board) Award 1976
Water Corporation (Staff) Award 2003
Western Australian Mint Security Officers' Award, 1988
Western Australian Mint Award 2005

Wire Manufacturing (Australian Wire Industries Pty. Ltd.) Award No. 24 of 1970
Wundowie Foundry Award 1986
Masters and Deckhands Total Harbour Services Pty Ltd Award
Masters Dairy Award 1994
Metals and Engineering Rapid Metal Developments (Aust) Pty Ltd Award 1993
Minerals Production (Salt) Industry Award 1969
Nickel Refining Award, 1971
Nickel Smelting (WMC Resources Ltd) Award 2003
Permanent Building Societies (Administrative and Clerical Officers) Award, 1975
Building Materials Manufacture (CSR Limited - Welshpool Works) Award, 1982
Burswood Catering and Entertainment Pty Ltd Employees Award 2001
Burswood Hotel (Maintenance Employees') Award, 1990
Burswood International Resort Casino Employees' Award 2002
Burswood Island Resort (Maintenance Employees') Award No. A 22 of 1986
Burswood Resort Casino (Theatrical Employees) Award No. A 10 of 1991
Can Manufacturing (Production and Maintenance - Amalgamated Industries Pty. Ltd.) Award 1985
Cement Workers' Award, 1975
Clerks (Commercial Radio and Television Broadcasters) Award of 1970
Clerks' (R.A.C. Control Room Officers) Award of 1988
Clerks' (Swan Brewery Co. Ltd.) Award 1986

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2010 WAIRC 00306

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CAROL ALLEN
	APPLICANT
	-v-
	SHIRE OF ASHBURTON
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 31 MAY 2010
FILE NO/S	U 217 OF 2009
CITATION NO.	2010 WAIRC 00306

Result	Discontinued
Representation	
Applicant	Ms J Walker (as agent)
Respondent	Ms F McDonald and later Mr A Quahe (of Counsel)

Order

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

WHEREAS on 22 December 2009 the Commission convened a teleconference for the purpose of dealing with scheduling issues with respect to the application being lodged out of time; and

WHEREAS the application was set down for hearing on 4 and 5 March 2010; and

WHEREAS on 3 March 2010 the parties advised the Commission that an agreement had been reached to settle the matter; and

WHEREAS on 3 March 2010 the hearing was vacated; and

WHEREAS on 3 March 2010 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 8 March 2010 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.

2010 WAIRC 00329

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR DAVID WILLIAM BEDNALL
	APPLICANT
	-v-
	THE DEPARTMENT OF EDUCATION AND TRAINING
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 8 JUNE 2010
FILE NO/S	U 153 OF 2009
CITATION NO.	2010 WAIRC 00329

Result	Discontinued
Representation	
Applicant	Mr S Millman (of counsel)
Respondent	Mr J Misso (of counsel)

Order

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

WHEREAS on 12 October 2009 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties were given time to discuss a settlement offer; and

WHEREAS on 24 November 2009 the Commission convened a further conference; and

WHEREAS at the conclusion of that conference the parties finalised the terms of settlement; and

WHEREAS on 22 February 2010 the Commission contacted the applicant about the status of the matter and the applicant's representative responded on 26 February 2010 advising that he was awaiting a copy of the Deed of Settlement; and

WHEREAS on 1 April 2010 the applicant filed a Notice of Withdrawal or Discontinuance form in respect of the application; and

WHEREAS on 8 April 2010 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.

2010 WAIRC 00328

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ADRIAN BYRNE
	APPLICANT
	-v-
	THE SHIRE OF MOUNT MAGNET
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 8 JUNE 2010
FILE NO/S	U 271 OF 2009
CITATION NO.	2010 WAIRC 00328

Result	Discontinued
Representation	
Applicant	Mr P King (as agent)
Respondent	Mr S Kemp (of Counsel)

Order

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

WHEREAS on 18 February 2010 the Commission convened a conference for the purpose of conciliating between the parties however, no agreement was reached; and

WHEREAS at the conclusion of the conference the parties were to write to the Commission about the location of the hearing; and

WHEREAS on 3 March 2010 the respondent's representative wrote to the Commission to advise that the respondent's view was that the hearing should be in Mount Magnet; and

WHEREAS on 4 March 2010 applicant's representative wrote to the Commission to advise that it was the applicant's view that the hearing should be in Perth; and

FURTHER that the applicant had been declared unfit to travel; and

WHEREAS on 5 March 2010 the Commission advised the parties that the matter would be set down for hearing in Mount Magnet once the applicant has a medical certificate clearing him to travel; and

FURTHER the matter would be adjourned to 29 March 2010 at which time the applicant's representative was to inform the Commission of the status of the applicant's health; and

WHEREAS on 17 March 2010 the applicant advised the Commission that the parties had reached an in principle agreement to settle the matter; and

WHEREAS on 20 April 2010 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 21 April 2010 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,
Commissioner.

[L.S.]

2010 WAIRC 00277

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GORAN DIMOVSKI
	APPLICANT
	-v-
	ADP - BELMONT
	ANTONY AND LENS CRRADOCK
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 17 MAY 2010
FILE NO	B 18 OF 2010
CITATION NO.	2010 WAIRC 00277

Result	Application discontinued
Representation	
Applicant	Mr G Dimovski
Respondent	Mr L Craddock

Order

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

AND WHEREAS on 16 April 2010 the Commission convened a conference for the purpose of conciliating between the parties;

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

AND WHEREAS on 22 April 2010 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.

2010 WAIRC 00083

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KEVIN HIGGINS
	APPLICANT
	-v-
	GATEWAY PRINTING
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
WRITTEN SUBMISSIONS	THURSDAY, 10 DECEMBER 2009, WEDNESDAY, 24 DECEMBER 2009, THURSDAY, 7 JANUARY 2010
DELIVERED	TUESDAY, 23 FEBRUARY 2010
FILE NO.	U 184 OF 2009, B 184 OF 2009
CITATION NO.	2010 WAIRC 00083

Catchwords	Industrial Law (WA) - Termination of employment - Harsh, oppressive and unfair dismissal - Contractual benefits claim - Claim for payment of Notice - Claim for payment of Holiday pay and Wages at correct rate and Superannuation - Whether Commission has jurisdiction - Reasons for Decision issued - Further information and evidence required - *Industrial Relations Act 1979* (WA) s 29(1)(b)(i), s 29(1)(b)(ii); *Fair Work Act 2009* s 12, s 13, s 14, s 26; *Commonwealth of Australia Constitution Act* s 51(xx), s 109
Result	Reasons for Decision issued
Representation	
Applicant	Mr K Higgins on his own behalf, by way of written submissions
Respondent	Ms J Kruger (as agent), by way of written submissions

Reasons for Decision

1 On 29 September 2009 Kevin Higgins ("the applicant") lodged applications pursuant to s 29(1)(b)(i) and (ii) of the *Industrial Relations Act 1979* ("the Act") claiming he was unfairly dismissed on 1 September 2009 and that he was owed benefits under his contract of employment by Gateway Printing ("the respondent"). The respondent denies the applicant's claims that he was unfairly terminated and is owed benefits under his contract of employment and maintains that as the respondent (Gateway Printing) is a trustee company and is a national system employer it is covered by the *Fair Work Act 2009* ("the FW Act") and these applications are therefore outside of the Commission's jurisdiction.

Submissions

2 The parties were required to file written submissions with respect to the issue of the Commission's jurisdiction to deal with these applications and any evidence in support of their contentions was to be provided by way of Statutory Declaration. The respondent did not provide any evidence by way of Statutory Declaration and advised the Commission that it did not wish to cross-examine the evidence given by the applicant.

Respondent

3 The respondent submits that Gateway Printing Pty Ltd (ABN 78 097 192 464), which is located at 37 Forsyth Street, O'Connor, Western Australia, is in the business of printing books, business stationery and promotional materials and it employs 11 employees in production, sales and other administrative related areas.

4 The respondent submits that Gateway Printing Pty Ltd is the applicant's employer and therefore the respondent with respect to these proceedings. The respondent claims that Gateway Printing Pty Ltd is the sole trustee for the R & M Wood Family Trust (ABN 91 510 375 957) trading as Gateway Printing and as a result of this corporate structure, Gateway Printing Pty Ltd is the applicant's employer and the legal entity, by way of the R & M Wood Family Trust, which employs its employees. This arrangement is reflected by the Australian Business Number ("ABN") contained on the applicant's Group Certificate (see Annexure A attached to the respondent's written submissions dated 10 December 2009).

5 The respondent submits that pursuant to s 14 of the FW Act, Gateway Printing Pty Ltd is a national system employer and therefore falls within the jurisdiction of Fair Work Australia and the FW Act to the exclusion of the Commission and the applicant is therefore a national system employee pursuant to s 13 of the FW Act. As a result the applicant's employment is subject to the terms of the FW Act and Fair Work Australia's jurisdiction in relation to any claim for unfair dismissal. Furthermore, s 26 of the FW Act excludes the rights of a party to access any State industrial laws and any related jurisdiction created by those laws, including the Act.

6 The respondent therefore argues that the Commission has no jurisdiction to deal with these applications and they should be dismissed.

Applicant

7 The applicant disputes that he was employed by Gateway Printing Pty Ltd. The applicant made the following submissions by way of statutory declaration in support of his claim that he was employed by Gateway Printing (ABN 91 510 375 957) which is not an employer for the purposes of the FW Act.

8 The applicant argues that the original offer of employment made to him dated 17 December 2008, indicates that Gateway Printing (ABN 91 510 375 957) is his employer and all payslips given to the applicant state that Gateway Printing was the applicant's employer (see Annexures A and B attached to the applicant's Statutory Declaration dated 24 December 2009). The applicant's Group Certificate points to Gateway Printing as being the applicant's employer and the final payment made to the applicant by cheque issued by RL & M Wood atft R & M Wood Family Trust trading as Gateway Printing also indicates that Gateway Printing was the applicant's employer (see Annexures C and D attached to the applicant's Statutory Declaration dated 24 December 2009).

9 The applicant submits that all correspondence received by the applicant from Gateway Printing refers to the applicant being employed by Gateway Printing and is on Gateway Printing letterhead and includes the ABN 91 510 375 957 (see Annexures E, F and G attached to the applicant's Statutory Declaration dated 24 December 2009). The applicant submits that there is no mention in any of this correspondence of a trustee company, Pty Ltd company or an entity with an alternative ABN.

10 The applicant maintains that an extract from the Australian Securities & Investment Commission National Names Index states that Gateway Printing falls under the jurisdiction of the Department of Commerce of Western Australia and Wageline confirmed to him that Gateway Printing falls under the jurisdiction of the Commission (see Annexure H attached to the applicant's Statutory Declaration dated 24 December 2009).

11 The applicant maintains that as Gateway Printing was his employer the Commission has jurisdiction to deal with these applications.

Findings and conclusions

12 Section 14(1)(a) of the FW Act defines a "national system employer" as "a constitutional corporation, so far as it employs, or usually employs, an individual" and s 13 of the FW Act defines a "national system employee" as an individual employed by a national system employer. Section 12 of the FW Act defines a "constitutional corporation" as a corporation to which s 51(xx) of the Commonwealth Constitution applies and s 51(xx) of the Commonwealth Constitution provides that a corporation among others is "trading or financial corporations formed within the limits of the Commonwealth".

13 Section 26 of the FW Act reads as follows:

"**26 Act excludes State or Territory industrial laws**

(1) This Act is intended to apply to the exclusion of all State or Territory industrial laws so far as they would otherwise apply in relation to a national system employee or a national system employer.

(2) A ***State or Territory industrial law*** is:

(a) a general State industrial law; or

(b) an Act of a State or Territory that applies to employment generally and has one or more of the following as its main purpose or one or more of its main purposes:

(i) regulating workplace relations (including industrial matters, industrial activity, collective bargaining, industrial disputes and industrial action);

(ii) providing for the establishment or enforcement of terms and conditions of employment;

(iii) providing for the making and enforcement of agreements (including individual agreements and collective agreements), and other industrial instruments or orders, determining terms and conditions of employment;

(iv) prohibiting conduct relating to a person's membership or non-membership of an industrial association;

(v) providing for rights and remedies connected with the termination of employment;

(vi) providing for rights and remedies connected with conduct that adversely affects an employee in his or her employment; or

(c) a law of a State or Territory that applies to employment generally and deals with leave (other than long service leave or leave for victims of crime); or

(d) a law of a State or Territory providing for a court or tribunal constituted by a law of the State or Territory to make an order in relation to equal remuneration for work of equal or comparable value; or

(e) a law of a State or Territory providing for the variation or setting aside of rights and obligations arising under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair; or

(f) a law of a State or Territory that entitles a representative of a trade union to enter premises; or

(g) an instrument made under a law described in paragraph (a), (b), (c), (d), (e) or (f), so far as the instrument is of a legislative character; or

(h) either of the following:

(i) a law that is a law of a State or Territory;

(ii) an instrument of a legislative character made under such a law;

that is prescribed by the regulations.

(3) Each of the following is a ***general State industrial law***:

(a) the *Industrial Relations Act 1996* of New South Wales;

(b) the *Industrial Relations Act 1999* of Queensland;

(c) the *Industrial Relations Act 1979* of Western Australia;

(d) the *Fair Work Act 1994* of South Australia;

(e) the *Industrial Relations Act 1984* of Tasmania.

(4) A law or an Act of a State or Territory ***applies to employment generally*** if it applies (subject to constitutional limitations) to:

(a) all employers and employees in the State or Territory; or

(b) all employers and employees in the State or Territory except those identified (by reference to a class or otherwise) by a law of the State or Territory.

For this purpose, it does not matter whether or not the law also applies to other persons, or whether or not an exercise of a power under the law affects all the persons to whom the law applies."

14 If the respondent is a trading corporation, by virtue of ss 12, 13 and 14 of the FW Act, the jurisdiction of the Commission to deal with the applicant's claim for unfair dismissal is excluded by s 26 of the FW Act and s 109 of the Commonwealth Constitution.

15 Whether a corporation is a trading corporation is ultimately a question of fact and degree (see *R v Judges of the Federal Court of Australia and Another*; *ex parte The Western Australian National Football League (Inc) and Another* (1979) 143 CLR 190 per Mason J at 234. The relevant principles were also summarised by Steytler P in *Aboriginal Legal Service of Western Australia (Inc) v Lawrence* (No 2) (2008) 252 ALR 136 at paragraph 68 as follows:

"The more relevant (for present purposes) principles that might be drawn from these and other cases are as follows:

(1) A corporation may be a trading corporation even though trading is not its predominant activity: *Adamson* at CLR 239; ALR 473; *State Superannuation Board* at CLR 303–4; ALR 14–15; *Tasmanian Dam case* (at CLR 156, 240, 293; ALR 625, 789, 833); *Quickenden* at [49]–[51], [101]; *Hardeman* at [18].

(2) However, trading must be a substantial and not merely a peripheral activity: *Adamson* at CLR 208, 234, 239; ALR 473, 478, 542–3; *State Superannuation Board* at CLR 303–4; ALR 14–15; *Hughes v Western Australian Cricket Assn Inc* (1986) 19 FCR 10 at 20; 69 ALR 660 at 671 (*Hughes*); *Fencott* at CLR 622; ALR 49; *Tasmanian Dam case* at CLR 156, 240, 293; ALR 625, 789, 833; *Mid Density* at FCR 584; *Hardeman* at [22].

(3) In this context, "trading" is not given a narrow construction. It extends beyond buying and selling to business activities carried on with a view to earning revenue and includes trade in services: *Ku-ring-gai* at ALR 624, 644; FLR 139, 159–60; *Adamson* at CLR 235; ALR 474; *Actors and Announcers Equity Assn of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 184–5 and 203; 40 ALR 609 at 618 and 635; *Bevanere Pty Ltd v Lubidineuse* (1985) 7 FCR 325 at 330; 59 ALR 334 at 339; 4 IPR 467 at 472; *Quickenden* at [101].

(4) The making of a profit is not an essential prerequisite to trade, but it is a usual concomitant: *St George County Council* at CLR 539, 563, 569; ALR 372, 375, 379; *Ku-ring-gai* at ALR 625, 645; FLR 140, 167; *Adamson* at CLR 219; ALR 461; *E* at FCR 343, 345; ALR 633, 635; *Pellow* at [28].

(5) The ends which a corporation seeks to serve by trading are irrelevant to its description: *St George County Council* at CLR 543; ALR 377; *Ku-ring-gai* at ALR 643; FLR 160; *State Superannuation Board* at CLR 304–6; ALR 15; *E* at FCR 343; ALR 633. Consequently, the fact that the trading activities are conducted is the public interest or for a public purpose will not necessarily exclude the categorisation of those activities as "trade": *St George County Council* at CLR 543; ALR 377 per Barwick CJ; *Tasmanian Dam case* at CLR 156; ALR 625 per Mason J.

(6) Whether the trading activities of an incorporated body are sufficient to justify its categorisations as a "trading corporation" is a question of fact and degree: *Adamson* at CLR 234; ALR 473 per Mason J; *State Superannuation Board* at CLR 304; ALR 15; *Fencott* at CLR 589; ALR 52; *Quickenden* at [52], [101]; *Mid Density* at FCR 584.

(7) The current activities of the corporation, while an important criterion for determining its characterisation, are not the only criterion. Regard must also be had to the intended purpose of the corporation, although a corporation that carries on trading activities can be found to be a trading corporation even if it was not originally established to trade: *State Superannuation Board* at CLR 294–5, 304; ALR 7, 15; *Fencott* at CLR 588–9, 602, 611, 622–4; ALR 52, 70, 74, 80; *Hughes* at FCR 20; ALR 671; *Quickenden* at [101]; *E* at FCR 344; ALR 636; *Hardeman* at [18].

(8) The commercial nature of an activity is an element in deciding whether the activity is in trade or trading: *Adamson* at CLR 209, 211; ALR 453, 455; *Ku-ring-gai* at ALR 624, 627–8, 643, 648; FLR 139, 142, 160, 67; *Bevanere* at FCR 330; ALR 339; IPR 472; *Hughes* at FCR 19–20; ALR 671; *E* at FCR 343; ALR 633; *Fowler*; *Hardeman* at [26]."

16 The relevant authorities confirm that the issue to be determined when deciding if the respondent is a trading corporation is the character of the activities carried out by the respondent at the relevant time and whether or not the respondent engaged in significant and substantial trading activities of a commercial nature at this time such that it can be described as a trading corporation.

17 The applicant has two applications before the Commission. U 184 of 2009 is a claim that the applicant has been unfairly dismissed and B 184 of 2009 is a claim that the applicant is owed one week's pay in lieu of notice, the balance of 70 hours of accrued annual leave entitlements which was paid to the applicant at termination at the incorrect rate, the balance of 15.20 hours of wages which was paid to the applicant at termination at the incorrect rate and superannuation entitlements on these amounts and these claims arise as at 1 September 2009 which is the date upon which the applicant was terminated.

18 It is clear that s 26 of the FW Act, which came into operation on 1 July 2009, excludes the jurisdiction of the Commission with respect to claims of unfair termination involving employees employed by a national system employer which is a trading or financial corporation. However, s 27 of the FW Act may exclude claims for the enforcement of the terms of an employee's contract of employment for a range of employees who may be employed by a national system employee. Additionally, it is also relevant to note that ten National Employment Standards apply to employees employed by a national system employer to which the FW Act applies and these standards are minimum standards of employment and include, amongst other things, an annual entitlement to four weeks paid annual leave per year and minimum notice periods.

Correct name of the employer

19 Apart from assertions in its submissions no evidence was tendered by the respondent confirming that Gateway Printing Pty Ltd (ABN 78 097 192 464) is the sole trustee for the R & M Wood Family Trust (ABN 91 510 375 957) trading as Gateway Printing. In contrast, all of the annexures supplied by the applicant confirm that the applicant was employed by Gateway Printing (ABN 91 510 375 957) which is an unincorporated entity. In the circumstances, I am unable to conclude that the applicant's employer was Gateway Printing Pty Ltd.

20 Even if Gateway Printing Pty Ltd was the applicant's employer I am also unable to conclude that it is a trading corporation for the purposes of s 12 of the FW Act given the limited information before me with respect to the respondent's activities.

21 In the circumstances I will give the respondent a further opportunity to provide certified documentation to the Commission confirming that Gateway Printing Pty Ltd is the sole trustee for the R & M Wood Family Trust trading as Gateway Printing and any further information by way of statutory declaration about the respondent's activities by Tuesday 9 March 2010. The respondent is also required to make submissions about the Commission's jurisdiction to deal with the denied contractual benefits being claimed by the applicant in application B 184 of 2009 given s 27 of the FW Act and the existence of the National Employment Standards. After the respondent provides further information and any evidence it wishes to do so the applicant will then be given 14 days within which to respond. I will then decide the issue of the true name of the applicant's employer and the Commission's jurisdiction to deal with each application.

2010 WAIRC 00296

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KEVIN HIGGINS
	APPLICANT
	-v-
	GATEWAY PRINTING
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
WRITTEN SUBMISSIONS	TUESDAY, 9 MARCH 2010, TUESDAY, 23 MARCH 2010
DELIVERED	FRIDAY, 21 MAY 2010
FILE NO.	U 184 OF 2009, B 184 OF 2009
CITATION NO.	2010 WAIRC 00296

Catchwords	Industrial Law (WA) - Supplementary Reasons for Decision - Further information and evidence provided - Termination of employment - Harsh, oppressive or unfair dismissal - Commission satisfied respondent is a trading corporation - Claim alleging unfair dismissal beyond Commission's jurisdiction - Application alleging unfair dismissal dismissed - Contractual benefits claim - Whether jurisdiction to deal with claim for a national system employee - Impact of National Employment Standards - Claims arise before application date of National Employment Standards - Commission has jurisdiction to deal with a claim for denied contractual benefits against a national system employer - Declaration issued - *Industrial Relations Act 1979* s 7, s 27(1)(m) and s 29(1)(b)(ii); *Fair Work Act 2009* s 12, s 13, s 14(1)(a), s 26, s 26(1), s 26(2), s 26(2)(e), s 26(3), s 27, s 27(1A), s 27(1)(c), s 27(2) and s 27(2)(o); *Commonwealth of Australia Constitution Act* s 109
Result	Application alleging unfair dismissal dismissed; Contractual benefits claim jurisdiction found
Representation	
Applicant	Mr K Higgins on his own behalf by way of written submissions
Respondent	Ms J Kruger (as agent) by way of written submissions

Supplementary Reasons for Decision

1 On 23 February 2010 the Commission issued Reasons for Decision in relation to this matter. The Commission was unable to conclude at the time whether the respondent was a trading corporation for the purposes of the *Fair Work Act 2009* ("FW Act") on the information and evidence submitted by the parties and a further opportunity was given to the respondent to provide certified documentation confirming its contention that Gateway Printing Pty Ltd is the trustee for the R & M Wood Family Trust trading as Gateway Printing and information about the respondent's trading activities by way of Statutory Declaration. The Commission also requested that the respondent make submissions about the Commission's jurisdiction to deal with the denied contractual benefits being claimed by the applicant in application B 184 of 2009 given the terms of s 27 of the FW Act as well as the potential impact of the existence of the National Employment Standards ("the Standards") on the applicant's denied contractual benefit claims if the applicant was employed by a national system employer as defined in the FW Act. After the respondent provided its further submissions and evidence the applicant made a further brief submission in response.

Respondent's further submissions

2 In its further submissions the respondent reiterated its claim that Gateway Printing Pty Ltd is the trustee of the R & M Wood Family Trust trading as Gateway Printing and this entity was the applicant's employer. The respondent provided evidence by way of a Statutory Declaration declared by Rodney Leonard Wood on 5 March 2010 that the R & M Wood Family Trust (ABN 91 510 375 957) ("the Trust") was created pursuant to a Deed of Settlement ("the Deed") dated 1 July 1994 and a copy of the Deed was annexed to this Statutory Declaration. Documentation tendered by the respondent confirms that the initial trustees of the Trust were Rodney Leonard Wood and Mandy Wood (see Clause 1.4 of the Deed) and the Deed was varied on 22 June 2001 whereby Rodney Leonard Wood and Mandy Wood were removed as the trustees of the Trust and replaced by Gateway Printing Pty Ltd as the sole trustee of the Trust pursuant to the terms of a Deed of Variation (see Annexure D to the Statutory Declaration of Rodney Leonard Wood). Mr Wood also declared that Gateway Printing is registered with the Western Australian Department of Consumer and Employment Protection and Attachment E to his Statutory Declaration is an extract for the trading name "Gateway Printing" recording that the Trust trades as Gateway Printing. Mr Wood also declared that the Australian Business Number ("ABN") on the applicant's group certificate, 91 510 375 957, is the ABN for the trading name Gateway Printing which is owned and operated by Gateway Printing Pty Ltd as trustee for the R & M Wood Family Trust. The respondent submits that on this basis, the applicant's employer is Gateway Printing Pty Ltd as trustee for the R & M Wood Family Trust which trades as Gateway Printing.

3 The respondent also submits that Gateway Printing Pty Ltd as trustee for the Trust, which trades as Gateway Printing is a trading corporation as its sole purpose is engaging in the production of printed related material to generate profit. On this basis the respondent is a constitutional corporation and as a result, a national system employer and its employees, including the applicant, are regulated by the provisions of the FW Act. The Commission therefore does not have jurisdiction to determine the applicant's claim of unfair dismissal.

4 The respondent submits that the applicant's denied contractual benefits claims fall outside the Commission's jurisdiction as s 26(2) of the FW Act identifies the *Industrial Relations Act 1979* ("the IR Act") as a general State industrial law which is excluded by virtue of s 26(1) of the FW Act and the applicant's claims do not fall within the definition of a non-excluded matter as provided in s 27(2)(o) of the FW Act because they do not arise under one of the named Acts specified in s 27(1A) of the FW Act.

Applicant's further submissions

5 The applicant maintains that the respondent's further submissions fail to provide any evidence that Gateway Printing Pty Ltd as trustee for the Trust, which trades as Gateway Printing was his employer and he stated that he had nothing further to add to his previous submissions.

Findings and conclusions

6 I am satisfied and I find on the basis of the documentation submitted by the respondent by way of the Statutory Declaration made by Mr Wood on 5 March 2010 and the annexures contained therein that Gateway Printing Pty Ltd is the trustee of the R & M Wood Family Trust which trades as Gateway Printing and that Gateway Printing Pty Ltd as trustee for the R & M Wood Family Trust trading as Gateway Printing is therefore the correct name of the applicant's employer.

7 Pursuant to the Commission's powers under s 27(1)(m) of the IR Act, which allows the Commission to correct, amend or waive any error, defect or irregularity whether in substance or in form, I will amend the name of the respondent in the Notices of Application with respect to both applications to reflect the correct name of the respondent and I will issue orders that Gateway Printing be deleted as the named respondent in both applications and be substituted with Gateway Printing Pty Ltd as trustee for the R & M Wood Family Trust trading as Gateway Printing (see *Rai v Dogrin Pty Ltd* [2000] 80 WAIG 1375 and *Bridge Shipping Pty Ltd v Grand Shipping SA and Anor* [1991] 173 CLR 231).

8 Even though the respondent has not provided detailed evidence about the respondent's trading activities, on the undisputed information before me I find that the respondent's main purpose is to trade. I accept that the respondent engages in the production of printed related material to generate a profit arising out of the activity of commercial printing whereby the respondent employs approximately 11 employees in production, sales and other administrative related areas.

9 When taking into account the terms of s 12, s 13 and s 14(1)(a) of the FW Act I find that the respondent is a trading corporation and the applicant is therefore an employee of a national system employer pursuant to the FW Act and the Commission's jurisdiction to deal with the applicant's claim for unfair dismissal is excluded by the terms of s 26 of the FW Act and s 109 of the Commonwealth Constitution. An order will therefore issue dismissing the applicant's unfair dismissal application for want of jurisdiction.

Denied contractual benefits

10 The applicant is seeking the following benefits under his contract of employment with the respondent as at 1 September 2009, which was the date the applicant was terminated: one week's pay in lieu of notice, the balance of 70 hours of accrued annual leave entitlements which was paid to the applicant at termination at the incorrect rate, the balance of 15.20 hours of wages which was paid to the applicant at termination at the incorrect rate and superannuation entitlements with respect to the amounts he is claiming.

11 Section 27 of the FW Act reads as follows:

"**27 State and Territory laws that are not excluded by section 26**

(1A) Section 26 does not apply to any of the following laws:

(a) the *Anti-Discrimination Act 1977* of New South Wales;

(b) the *Equal Opportunity Act 1995* of Victoria;

(c) the *Anti-Discrimination Act 1991* of Queensland;

(d) the *Equal Opportunity Act 1984* of Western Australia;

(e) the *Equal Opportunity Act 1984* of South Australia;

(f) the *Anti-Discrimination Act 1998* of Tasmania;

(g) the *Discrimination Act 1991* of the Australian Capital Territory;

(h) the *Anti-Discrimination Act* of the Northern Territory.

(1) Section 26 does not apply to a law of a State or Territory so far as:

(b) the law is prescribed by the regulations as a law to which section 26 does not apply; or

(c) the law deals with any non-excluded matters; or

(d) the law deals with rights or remedies incidental to:

(i) any law referred to in subsection (1A); or

(ii) any matter dealt with by a law to which paragraph (b) applies; or

(iii) any non-excluded matters.

Note: Examples of incidental matters covered by paragraph (d) are entry to premises for a purpose connected with workers compensation, occupational health and safety or outworkers.

(2) The ***non-excluded matters*** are as follows:

(a) superannuation;

(b) workers compensation;

(c) occupational health and safety;

(d) matters relating to outworkers (within the ordinary meaning of the term);

(e) child labour;

(f) training arrangements, except in relation to terms and conditions of employment to the extent that those terms and conditions are provided for by the National Employment Standards or may be included in a modern award;

(g) long service leave, except in relation to an employee who is entitled under Division 9 of Part 2-2 to long service leave;

(h) leave for victims of crime;

(i) attendance for service on a jury, or for emergency service duties;

Note: See also section 112 for employee entitlements in relation to engaging in eligible community service activities.

(j) declaration, prescription or substitution of public holidays, except in relation to the rights and obligations of an employee or employer in relation to public holidays;

(k) the following matters relating to provision of essential services or to situations of emergency:

(i) directions to perform work (including to perform work at a particular time or place, or in a particular way);

(ii) directions not to perform work (including not to perform work at a particular time or place, or in a particular way);

(l) regulation of any of the following:

(i) employee associations;

(ii) employer associations;

(iii) members of employee associations or of employer associations;

(m) workplace surveillance;

(n) business trading hours;

(o) claims for enforcement of contracts of employment, except so far as the law in question provides for a matter to which paragraph 26(2)(e) applies;

(p) any other matters prescribed by the regulations."

12 I reject the respondent's submission that the applicant's claims for denied contractual benefits do not fall within the definition of a non-excluded matter as provided in s 27(2)(o) of the FW Act on the basis that the claims do not fall within one of the Acts contained in s 27(1A) of the FW Act. It is my view that on a proper reading of s 27 of the FW Act, non-excluded matters set out in s 27(2) are not restricted to the enforcement of a claim under the Acts contained in s 27(1A) as claimed by the respondent.

13 Section 26 of the FW Act sets out a number of State or Territory industrial laws which are excluded by the operation of the FW Act, including at s 26(3) the IR Act which at s 29(1)(b)(ii) allows an employee to lodge an application in the Commission with respect to a claim for denied contractual benefits.

14 Section 27 of the FW Act, which is headed State and Territory laws that are not excluded by s 26, sets out a number of laws and matters that are not excluded by the terms of s 26 of the FW Act. Section 27(1A) includes eight pieces of legislation relating to equal opportunity and anti discrimination laws in each State and Territory within Australia. Section 27(1) refers to s 26 of the FW Act not applying to a law of a State or Territory so far as the law deals with any non-excluded matters and s 27(2) describes non-excluded matters, including at s 27(2)(o) claims for enforcement of contracts of employment except for a matter to which s 26(2)(e) of the FW Act applies, which relates to varying or setting aside rights and obligations arising out of a contract of employment that a court or tribunal finds unfair.

15 In my opinion on a proper reading of s 27 of the FW Act as a whole it does not require non-excluded matters to only relate to entitlements relevant to the eight Acts contained in s 27(1A). Section 26 of the FW Act sets out State laws which do not apply to a national system employer and employee and s 27(1)(c) of the FW Act provides that s 26 does not apply to a law of a State or Territory so far as the law deals with any non-excluded matters and these matters are set out in s 27(2). I find that given the terms of s 27(1)(c) of the FW Act, combined with s 27(2)(o), and as the Commission is empowered to deal with an employees claim of a denied contractual benefit pursuant to s 29(1)(b)(ii) of the IR Act, that the Commission has jurisdiction to deal with a national system employee's claim for denied contractual benefits against a national system employer if what is being sought is a claim for enforcement of a contract of employment which does not relate to varying or setting aside rights and obligations arising out of a contract of employment that a court or tribunal finds unfair.

16 For an applicant to be successful in a denied contractual benefit claim in the Commission a number of elements must be established. The claim must relate to an industrial matter pursuant to s 7 of the IR Act and the claimant must be an employee; the claimed benefit must be a contractual benefit that being a benefit to which there is an entitlement under the applicant's contract of service; the relevant contract must be a contract of service; the benefit claimed must not arise under an award or order of this Commission; and the benefit must have been denied by the employer: *Hotcopper Australia Ltd v David Saab* (2001) 81 WAIG 2704; *Ahern v Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (WA Branch Inc)* (1999) 79 WAIG 1867. The meaning of "benefit" has been interpreted widely in this jurisdiction: *Balfour v Travel Strength Ltd* (1980) 60 WAIG 1015; *Perth Finishing College Pty Ltd v Watts* (1989) 69 WAIG 2307.

17 I find that the Commission is not precluded from dealing with all of the entitlements being claimed by the applicant. There is no issue in this matter and I find that at all material times the applicant was an employee of the respondent and was employed under a contract of service. I find that these claims are also industrial matters for the purposes of s 7 of the IR Act as they relate to payments the applicant claims are due to him arising out of his employment with the respondent. On the information currently before me I am unable to conclude that the benefits the applicant is claiming arise under an award or order of this Commission.

18 As the Standards were operative from 1 January 2010 and the applicant's denied contractual benefits arose as at 1 September 2009 their existence does not preclude the Commission from dealing with the applicant's claims.

19 I will therefore issue a declaration that the Commission has jurisdiction to deal with the applicant's claims for denied contractual benefits.

2010 WAIRC 00295

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KEVIN HIGGINS
	APPLICANT
	-v-
	GATEWAY PRINTING PTY LTD AS TRUSTEE FOR THE R & M WOOD FAMILY TRUST TRADING AS GATEWAY PRINTING
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 21 MAY 2010
FILE NO/S	U 184 OF 2009
CITATION NO.	2010 WAIRC 00295

Result	Dismissed
Representation	
Applicant	Mr K Higgins on his own behalf by way of written submissions
Respondent	Ms J Kruger (as agent) by way of written submissions

Order

Having heard Mr K Higgins on his own behalf and Ms J Kruger as agent on behalf of the respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

1. THAT the name of the respondent be deleted and that Gateway Printing Pty Ltd as trustee for the R & M Wood Family Trust trading as Gateway Printing be substituted in lieu thereof.
2. THAT the application be and is hereby otherwise dismissed.

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

2010 WAIRC 00294

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KEVIN HIGGINS
	APPLICANT
	-v-
	GATEWAY PRINTING PTY LTD AS TRUSTEE FOR THE R & M WOOD FAMILY TRUST TRADING AS GATEWAY PRINTING
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 21 MAY 2010
FILE NO/S	B 184 OF 2009
CITATION NO.	2010 WAIRC 00294

Result	Jurisdiction found
Representation	
Applicant	Mr K Higgins on his own behalf by way of written submissions
Respondent	Ms J Kruger (as agent) by way of written submissions

Order

Having heard Mr K Higgins on his own behalf and Ms J Kruger as agent on behalf of the respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby:

1. ORDERS that the name of the respondent be deleted and that Gateway Printing Pty Ltd as trustee for the R & M Wood Family Trust trading as Gateway Printing be substituted in lieu thereof.

2. DECLARES that the Commission has jurisdiction to deal with the applicant's claim for denied contractual benefits.

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

2010 WAIRC 00276

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARGARET MEARNS
	APPLICANT
	-v-
	SHIRE OF LAVERTON
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 17 MAY 2010
FILE NO/S	U 263 OF 2009
CITATION NO.	2010 WAIRC 00276

Result	Application dismissed
Representation	
Applicant	No appearance
Respondent	No appearance

Order

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

AND WHEREAS this matter was listed for hearing on 26 March 2010 for the applicant to show cause why her application should not be dismissed;

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

AND WHEREAS having no appearance by the applicant the Commission formed the view the application should be dismissed;

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

2010 WAIRC 00307

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR CHRISTOPHER JOHN EVANS
	APPLICANT
	-v-
	SWAN TAFE
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 31 MAY 2010
FILE NO/S	U 135 OF 2009
CITATION NO.	2010 WAIRC 00307

Result	Discontinued
Representation	
Applicant	Mr S Millman (of Counsel)
Respondent	Mr M Taylor

Order

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

WHEREAS on 29 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 were given time for further discussions; and

WHEREAS on 13 October 2009 the applicant's representative advised the Commission that the parties had reached an agreement to settle the matter; and

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

WHEREAS on 5 March 2010 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 18 March 2010 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,
Commissioner.

[L.S.]

2010 WAIRC 00316

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RICHARD PAUL OSWICK
	APPLICANT
	-v-
	CITY OF COCKBURN
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 2 JUNE 2010
FILE NO/S	U 88 OF 2009
CITATION NO.	2010 WAIRC 00316

Result	Discontinued
Representation	
Applicant	Mr K Trainer (as agent)
Respondent	Mr S White (as agent)

Order

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

WHEREAS on 25 May 2009 the Commission, constituted by Smith SC (as she was then), convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties were given time for further discussions however, no agreement was reached; and

WHEREAS the application was set down for hearing and determination on 30 September 2009 with respect to two preliminary issues; and

WHEREAS on 16 September 2009 the respondent's representative requested an adjournment of the hearing pending the outcome of an appeal to the Full Bench in another matter; and

WHEREAS the applicant did not object to the hearing being adjourned; and

WHEREAS on 18 September 2009 the Commission adjourned the hearing sine die; and

WHEREAS on 10 November 2009 the applicant requested that the matter be relisted for hearing; and

WHEREAS on 25 November 2009, and before the matter had been listed for hearing, the applicant advised the Commission that an agreement had been reached to settle the matter; and

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

WHEREAS on 22 March 2010 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 24 March 2010 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.

2010 WAIRC 00292

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GLENN JAMES ROSS
	APPLICANT
	-v-
	CORRUPTION AND CRIME COMMISSION
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 20 MAY 2010
FILE NO/S	B 6 OF 2007
CITATION NO.	2010 WAIRC 00292

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 19th day of March 2007, the 18th day of April 2007, the 30th day of April 2007, the 22nd day of May 2007 and the 2nd day of June 2009 the Commission convened conferences for the purpose of conciliating between the parties; and

WHEREAS following the last such conference the parties awaited the determination of a related application and engaged in further discussions; and

WHEREAS on the 27th day of April 2010 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.

2010 WAIRC 00293

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GLENN ROSS
	APPLICANT
	-v-
	CORRUPTION AND CRIME COMMISSION
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 20 MAY 2010
FILE NO/S	B 28 OF 2007
CITATION NO.	2010 WAIRC 00293

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 19th day of March 2007, the 18th day of April 2007, the 30th day of April 2007, the 22nd day of May 2007 and the 2nd day of June 2009 the Commission convened conferences for the purpose of conciliating between the parties; and

WHEREAS following the last such conference the parties awaited the determination of a related application and engaged in further discussions; and

WHEREAS on the 27th day of April 2010 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.

2010 WAIRC 00315

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LORIN SOLE
	APPLICANT
	-v-
	AUSTRALIAN RENEWABLE FUELS LIMITED
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 2 JUNE 2010
FILE NO/S	B 224 OF 2009
CITATION NO.	2010 WAIRC 00315

Result Discontinued

Order

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

WHEREAS the Commission set down a scheduling conference on 2 February 2010 in relation to an issue of jurisdiction raised by the respondent; and

WHEREAS on 28 January 2010 the conference was vacated at the request of the applicant's representative; and

WHEREAS on 22 February 2010 and 15 March 2010 the Commission wrote to the applicant's representative about setting a further scheduling conference; and

WHEREAS on 17 March 2010 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 19 March 2010 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.

2010 WAIRC 00304

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KLARA MARGARETTE STYLIANOU
	APPLICANT
	-v-
	ANN MARTIN
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 26 MAY 2010
FILE NO/S	B 158 OF 2009
CITATION NO.	2010 WAIRC 00304
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 27th day of November 2009 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties could not reach agreement; and

WHEREAS the application was set down for hearing and determination on the 28th day of April 2010; and

WHEREAS during an adjournment in that hearing the parties reached an agreement in principle in relation to the application; and

WHEREAS on the 21st day of May 2010 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.

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Cindy Michelle Woolcott	Mandurah Offshore Fishing and Sailing Club Inc	U 16/2010	Commissioner J L Harrison	Order issued
Gregory James Pearce	City of Armadale	U 29/2010	Commissioner J L Harrison	Consent order issued
Julie Francis Grigo	Just Pizza Company	U 27/2010	Commissioner J L Harrison	Consent order issued
Juliet Simonis	Gabrielle Cronan (Dance & Music Central)	U 33/2010	Commissioner J L Harrison	Consent order issued
Krissie Dawson; Krissie Dawson	Hills Community Support Group; Hills Community Support Group	U 169/2009	Commissioner J L Harrison	Consent order issued
Meigan Waayers	Kimberley Land Council Aboriginal Corporation	U 272/2009	Commissioner J L Harrison	Order issued
Peter James Willesee	The Salvation Army Australia Southern Territory	U 23/2010	Commissioner J L Harrison	Consent order issued
Stephen Robert Lawrence; Stephen Robert Lawrence	Stanley International College Pty Ltd; stanley international college pty ltd	U 270/2009	Commissioner J L Harrison	Consent order issued

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
The Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth	The Chief Executive Officer of the City of Melville	Harrison C	C 5/2010	24/03/2010 26/03/2010	Dispute in relation to refusal of approved purchased annual leave of union member	Concluded

CORRECTIONS—

2010 WAIRC 00333

APPEAL AGAINST A DECISION OF THE COMMISSIONER OF POLICE TO TAKE REMOVAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES AM

APPELLANT

-v-

COMMISSIONER OF POLICE

RESPONDENT

CORAM CHIEF COMMISSIONER A R BEECH
COMMISSIONER J L HARRISON
COMMISSIONER S M MAYMAN

DATE 10 JUNE 2010 (CORRIGENDUM THURSDAY, 11 FEBRUARY 2010)

FILE NO/S APPL 8 OF 2008

CITATION NO. 2010 WAIRC 00333

CORRIGENDUM

1. In the Representation section of the Further Reasons for Decision of 11 February 2010 ((2010) 90 WAIG 283; [2010] WAIRC 00061),

   (a) after the word "Appellant", delete the words "Ms D Scaddan (of counsel) by written submission" and insert the words "Ms KA Vernon (of counsel) by written submission"; and

   (b) after the word "Respondent", delete the words "Ms KA Vernon (of counsel) by written submission" and insert the words "Ms D Scaddan (of counsel) by written submission"

(Sgd.) A R BEECH,
Chief Commissioner,
[L.S.] On Behalf of the Western Australian Industrial Relations Commission.
Dated: Thursday, 10 June 2010

PROCEDURAL DIRECTIONS AND ORDERS—

2010 WAIRC 00291

APPEAL AGAINST THE DECISION MADE ON 12 AUGUST 2009 RELATING TO A CHARGE OF AN ALLEGED BREACH OF DISCIPLINE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GUISEPPE DI PIETRO
	APPELLANT
	-v-
	UNDER TREASURER, DEPARTMENT OF TREASURY AND FINANCE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
	MS L McKAY - BOARD MEMBER
	MS K WATSON - BOARD MEMBER
DATE	THURSDAY, 20 MAY 2010
FILE NO	PSAB 10 OF 2009
CITATION NO.	2010 WAIRC 00291

Result Extension of time in which to appeal granted

Order

WHEREAS this is an appeal pursuant to the *Industrial Relations Act 1979* filed beyond the 21 days allowed by the Act; and

WHEREAS on the 11th day of May 2010 the respondent advised that it did not object to the granting of the application for an extension of time in which to appeal;

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

THAT the application for an extension of time in which to appeal be granted.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2010 WAIRC 00285

APPEAL AGAINST THE DECISION MADE ON 1 SEPTEMBER 2009 RELATING TO TERMINATION OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CATHERINE SMIT
	APPELLANT
	-v-
	SAFETY BAY SENIOR HIGH SCHOOL
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
	MR K TRENT - BOARD MEMBER
	MR J ROSSI - BOARD MEMBER
DATE	TUESDAY, 18 MAY 2010
FILE NO	PSAB 26 OF 2009
CITATION NO.	2010 WAIRC 00285

Result Name of respondent amended

Order

WHEREAS this is an appeal pursuant to Section 80I of the *Industrial Relations Act 1979*; and

WHEREAS on the 12th day of May 2010 the Public Service Appeal Board convened a hearing for the purpose of the issue of jurisdiction; and

WHEREAS at the hearing the parties agreed that the name of the respondent be amended to "Department of Education";

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

THAT the name of the respondent in the appeal be amended to "Department of Education".

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

PUBLIC SERVICE APPEAL BOARD—

2010 WAIRC 00280

APPEAL AGAINST DECISION MADE BY RESPONDENT RE STATUS OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	FRANIA SHARP
	SUSAN WARING
	WENDY POWLES
	JUDITH MARGARET WICKHAM
	SHANE MELVILLE
	JOHAN WILLERS
	APPELLANTS
	-v-
	WORKCOVER WA
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
	MS B CONWAY - BOARD MEMBER
	MR A PITTOCK - BOARD MEMBER
DATE	TUESDAY, 18 MAY 2010
FILE NO	PSAB 30 OF 2009, PSAB 31 OF 2009, PSAB 32 OF 2009, PSAB 33 OF 2009, PSAB 34 OF 2009, PSAB 35 OF 2009
CITATION NO.	2010 WAIRC 00280

Result	Directions issued
Representation	
Appellants	Mr J Willers and Mr S Melville
Respondent	Mr R Andretich of counsel

Directions

HAVING heard Mr J Willers on his own behalf and on behalf of appellants Ms F Sharp, Ms S Waring, Ms W Powles and Ms J Wickham, and Mr S Melville on his own behalf and Mr R Andretich (of counsel) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby directs:

1. THAT in respect of proposed Direction 1 the decision of the Public Service Appeal Board is reserved and the parties will be advised in due course.

2. THAT the respondent within fourteen (14) days file and serve a list of discoverable documents relevant to the issues between the parties including, but not limited to the following classes of documents:

   (a) All advertisements placed by or on behalf of the respondent for the position of Arbitrator filled by the appellants;

   (b) The contracts by which the appellants were employed by the respondent;

   (c) The contracts by which four Arbitrators were employed on a permanent basis by the respondent at the same time that the respondent employed the appellants;

   (d) All job description forms applying for the position of Arbitrator;

   (e) All government approved procedures and all government/WorkCover WA approved policies applicable to the appellants' appointment and/or the conversation of same to permanent officers;

   (f) All documents relevant to the decision to appoint the appellants as fixed term officers having regard to the criteria set out in Clause 8(5) of the Public Service Award 1992 and in Approved Procedure 4; including all file notes, memoranda, correspondence and email bearing on whether the appellants were engaged for the purpose of:

      (i) covering one-off periods of relief;

      (ii) working on a project with a finite life;

      (iii) work that is seasonal in nature;

      (iv) acquiring an officer with specific skills not readily available in the public sector for a finite period;

      (v) working in any other situation as agreed by the respondent and The Community & Public Sector Union/The Civil Service Association of WA.

3. THAT the time for compliance by the parties with Direction 2 made on 25 March 2010 be extended to fourteen (14) days after point 1 hereof.

4. THAT the listing for the hearing of these appeals on 27 May 2010 be vacated and that these appeals be listed for simultaneous hearing at a time to be fixed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2010 WAIRC 00299

APPEAL AGAINST DECISION MADE BY RESPONDENT RE STATUS OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	FRANIA SHARP
	SUSAN WARING
	WENDY POWLES
	JUDITH MARGARET WICKHAM
	SHANE MELVILLE
	JOHAN WILLERS
	APPELLANTS
	-v-
	WORKCOVER WA
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
	MS B CONWAY - BOARD MEMBER
	MR A PITTOCK - BOARD MEMBER
HEARD	TUESDAY, 11 MAY 2010
DELIVERED	TUESDAY, 25 MAY 2010
FILE NO.	PSAB 30 OF 2009, PSAB 31 OF 2009, PSAB 32 OF 2009, PSAB 33 OF 2009, PSAB 34 OF 2009, PSAB 35 OF 2009
CITATION NO.	2010 WAIRC 00299

CatchWords	Public Service Appeal Board – *Public Sector Management Act 1994* s 64(1)(b) – Permanent officer – Full and Complete Particulars of Answer – *Public Service Award 1992* – Approved Procedure 4 – Fixed term employee – Validity of appointment
Result	Direction issued
Representation	
Applicants	Mr J Willers and Mr S Melville
Respondent	Mr R Andretich of counsel

Reasons for Decision

Application for Full and Complete Particulars of Answer

1 These are the unanimous Reasons of the Public Service Appeal Board (the Board).

2 These appeals are to be heard and determined together. By Notices of Appeal to the Board filed on 21 December 2009, the appellants appeal against the respondent's decision in relation to an interpretation of the *Public Sector Management Act 1994* (*PSM Act*), in not recognising them as permanent officers in accordance with s 64(1)(a) of the *PSM Act*. The respondent filed a Notice of Answer on 31 March 2010.

3 The appellants have filed an application for Full and Complete Particulars of the Respondent's Answer in respect of two issues being:

> "1. With regards to paragraphs 8 and 9 of the Answer, precisely what condition or conditions referred to in Approved Procedure 4 or in the Public Sector Award is it alleged applied in relation to the Appellants' appointments and, in relation to each such condition, why is it alleged such condition applied.
>
> 2. With regards to paragraph 12 of the Answer, if the Appellants' appointments did not meet the conditions required by section 64 for appointments made under subsection (1)(b), is it or is it not alleged the appointments are invalid at law."

We will deal with these questions separately.

Question 1

4 Paragraphs 8 and 9 of the respondent's Answer referred to in question 1 of the appellants' application for Full and Complete Particulars are as follows:

"8. Paragraphs 5 and 6 of the Applications are admitted only insofar as they refer to the instruments as relating to employment in the Public Service and their content.

9. The Respondent does not admit that none of the circumstances referred to in the Approved Procedure 4 or the Public Service Award applied in relation to the Applicants' appointments."

5 Paragraph 8 of the respondent's Answer refers to paragraphs 5 and 6 of the schedule to the Notice of Appeal. Those paragraphs are as follows:

"5. The PSMA is expressed to be subject to approved procedures and any binding award, order or industrial agreement under the Industrial Relations Act 1979.

6. The Public Service Award 1992 (the Award), which award is made under the Industrial Relations Act 1979, governs my terms and conditions of employment. Per clause 8(5) of the Award, an employer may only employ a person as a fixed term contract officer in the circumstances provided in that clause. None of the circumstances provided in the clause apply in relation to my appointment as an Arbitrator, hence my appointment as a purported 'fixed term employee' is in breach of that Award. Further, the government approved procedures and policies for the employment of public service officers on fixed term contracts reflect the Award provisions."

6 By question 1 the appellants seek to know what condition or conditions in Approved Procedure 4 or in the Public Service Award the respondent alleges applied in relation to their appointments and why each such condition applied. This is said to rely upon paragraphs 8 and 9 of the Answer. Paragraph 8 of the Answer does not allege that any particular conditions of either Approved Procedure 4 or the Public Service Award applied to the appellants. It does no more than admit that the *Public Service Award 1992* and other instruments, 'relate to (e)mployment in the Public Service and their content'.

7 Paragraph 9, containing a double negative, in effect, neither admits nor denies and puts the appellants to proof, that any of the circumstances referred to in Approved Procedure 4 or the Public Service Award apply to the appellants' employment. The request for particulars at paragraph 1 assumes more than paragraphs 8 and 9 of the respondent's Answer provide, and in doing so, asks a question which does not follow as a consequence of those paragraphs and requires further admissions and answers.

8 Whilst it is appropriate for public policy purposes and for fairness in the process of a hearing that the appellants should not be ambushed and that they should know what the respondent says, it is not for the Board to rephrase the questions asked within the Request for Full and Complete Particulars so as to enable questions the appellants want to ask to be asked, and for answers to be obtained when the questions asked rely upon an erroneous assumption or conclusion as to the terms of the respondent's answer.

9 Accordingly the application in respect of question 1 will be dismissed. There is no impediment to the appellants filing a further application properly relying upon the respondent's Answer.

Question 2

10 Paragraph 12 of the respondent's Answer referred to in question 2 of the appellants' application is as follows:

"12. If, which is not admitted, the appointments did not meet the conditions required by section 64 for appointments made under subsection (1)(b) they may be invalid as purported appointments made under that subsection, not valid appointments by default made under subsection (1)(a) as permanent officers."

11 During the course of the conference convened on Tuesday 11 May 2010, the respondent's answer to this was classified as meaning that the respondent says two things:

1. If the appointments were not properly made under s 64(1)(b) then they may be invalid; and

2. The fact of the appointments having been invalidly made (if that is the case) does not have the consequence of the appointments being permanent appointments.

12 If that is so, there is no reason why the respondent ought not respond to this question, and is directed to do so within seven days.

2010 WAIRC 00298

APPEAL AGAINST DECISION MADE BY RESPONDENT RE STATUS OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	FRANIA SHARP
	SUSAN WARING
	WENDY POWLES
	JUDITH MARGARET WICKHAM
	SHANE MELVILLE
	JOHAN WILLERS
	APPELLANTS
	-v-
	WORKCOVER WA
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
	MR A PITTOCK – BOARD MEMBER
	MS B CONWAY – BOARD MEMBER
DATE	TUESDAY, 25 MAY 2010
FILE NO.	PSAB 30 OF 2009, PSAB 31 OF 2009, PSAB 32 OF 2009, PSAB 33 OF 2009, PSAB 34 OF 2009, PSAB 35 OF 2009
CITATION NO.	2010 WAIRC 00298

Result	Direction Issued
Representation	
Applicants	Mr J Willers and Mr S Melville
Respondent	Mr R Andretich of counsel

Direction

HAVING heard from Mr J Willers on his own behalf and as agent on behalf of the appellants in Appeals No. 30 – 33 of 2009, Mr S Melville on his own behalf, and Mr R Andretich of counsel on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby directs:

THAT in respect of the Request for Full and Complete Particulars of Respondent's Answer of 20 April 2010:

1. In respect of question 1, the application is dismissed.
2. In respect of question 2, the respondent is hereby directed to respond within seven days of the date of this Direction.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2010 WAIRC 00324

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	ADRIAN YOUNG
	APPLICANT
	-v-
	SAFE & SOUND LABOUR HIRE
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 3 JUNE 2010
FILE NO	OSHT 108 OF 2010
CITATION NO.	2010 WAIRC 00324

Result	Application discontinued
Representation	
Applicant	Mr S Millman
Respondent	Mr J Blackburn and Ms L Gibbs (both of counsel)

Order

WHEREAS this is an application pursuant to s 28(2) of the *Occupational Safety and Health Act 1984*;

AND WHEREAS on 18 March 2010 the applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984*, hereby order –

THAT this application be, and is hereby discontinued.

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

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2010 WAIRC 00301

REFERRAL OF DISPUTE RE PAYMENT OF CLAIM

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	KINGS TRANSPORT SERVICES PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 26 MAY 2010
FILE NO/S	RFT 27 OF 2009
CITATION NO.	2010 WAIRC 00301

Result	Discontinued
Representation	
Applicant	Mr D Cain and Mr T Dawson
Respondent	Mr D Spink

Order

WHEREAS the applicant filed a referral to the Road Freight Transport Industry Tribunal ("the Tribunal") under s 40 of the *Owner-Drivers (Contracts and Disputes) Act 2007* on 11 December 2009; and

WHEREAS on 14 January 2010 the Tribunal convened a conciliation conference in respect of the matter; and

WHEREAS at the conclusion of the conference the parties were given time for further discussions; and

WHEREAS on 21 January 2010 the applicant advised the Tribunal that it wished to progress the matter to arbitration; and

WHEREAS the matter was set down for hearing and determination on 15 March 2010; and

WHEREAS on 15 March 2010, and prior to the hearing commencing, the applicant advised the Tribunal that it was not proceeding with the matter and lodged a Notice of Withdrawal or Discontinuance in respect of the application and the hearing was vacated; and

WHEREAS on 15 March 2010 the respondent advised that it had no objection to the matter being discontinued;

NOW THEREFORE, the Commission, sitting as the Road Freight Transport Industry Tribunal, pursuant to the powers conferred on it under the *Owner-Drivers (Contracts and Disputes) Act 2007* hereby orders –

THAT the application be and is hereby discontinued.

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

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Notation of—

The following were matters before the Commission sitting as the Road Freight Transport Industry Tribunal pursuant to s 38 of the *Owner-Drivers (Contracts and Disputes) Act 2007* that settled prior to an order issuing.

Parties		Commissioner	Application Number	Dates	Matter	Result
Ken Mills	Peter Oldenhuis trading as Westline Contracting	Harrison C	RFT 28/2009	27/01/2010 16/02/2010 4/05/2010	Referral of Dispute re payment of claim	Consent order issued