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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Appeals against decision of Commission—

2011 WAIRC 00996

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARY ABBOTT-ETHERINGTON
	APPELLANT
	-and-
	AUTO GROUP AUCTIONS (WA) PTY LTD
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER J L HARRISON
DATE	FRIDAY, 4 NOVEMBER 2011
FILE NO	FBA 5 OF 2005
CITATION NO.	2011 WAIRC 00996

Result	Appeal dismissed
Appearances	
Appellant	No appearance
Respondent	No appearance

Order

WHEREAS an appeal was lodged in the Commission on 23 May 2005;

AND WHEREAS the appeal was listed for hearing on 19 July 2005 for 10 October 2005, the hearing did not proceed as the Full Bench was not available to sit;

AND WHERAS on 22 September 2005 by order of the Full Bench the date listed as the hearing date of the appeal was vacated and adjourned to a date to be fixed: [2005] WAIRC 02705;

AND WHEREAS on 18 October 2005, the appeal was relisted for hearing on 16 December 2005;

AND WHEREAS on 15 December 2005 the appellant applied for an adjournment of the appeal as her counsel was ill;

AND WHEREAS on 16 December 2005 by order of the Full Bench the hearing and determination of the appeal was adjourned to a date to be fixed: [2005] WAIRC 03337;

AND WHEREAS on 16 January 2006, the appeal was relisted for hearing on 21 March 2006;

AND WHEREAS on 8 March 2006, the respondent's solicitors advised the Full Bench and the appellant's counsel in a letter dated 8 March 2006 that the respondent was in administration, having appointed voluntary administrators on 10 February 2006;

AND WHEREAS on 20 March 2006 the administrators of the respondent informed the Full Bench in a letter dated 20 March 2006 that they were not in a position to give consent under s 440D of the *Corporations Act 2001* (Cth) for the appeal to be heard;

AND WHEREAS on 20 March 2006, the Full Bench ordered the appeal be adjourned sine die: [2006] WAIRC 03992;

AND WHEREAS on 6 June 2006 liquidators of the respondent were appointed which had the effect that pursuant to s 471B of the *Corporations Act 2001* the appeal was stayed and could not proceed without the leave of the Supreme Court;

AND WHEREAS on 28 March 2008 the appellant's counsel informed the Commission that he no longer represented the appellant and that the appellant intended to take steps to seek leave from the Supreme Court to proceed with the appeal;

AND WHEREAS on 30 May 2008 the appellant informed an officer of the Commission that she wished to proceed with the appeal and that she intended in the following week to make an application to the Supreme Court for leave;

AND WHEREAS on 9 September 2008 and 7 October 2008, the appellant informed an officer of the Commission that she was discussing the matter with a new solicitor;

AND WHEREAS during 2009 the Commission was unable to contact the appellant;

AND WHEREAS on 16 November 2010 an officer of the Commission sent a letter to the appellant in which the appellant was asked whether she had made an application for leave to the Supreme Court and whether the Supreme Court had granted leave to proceed with the appeal;

AND WHEREAS on 7 December 2010 the appellant sent a letter to the Commission in which she stated she had been ill for a long period and was not able to focus on dealing with this matter but that she wished to move forward with the appeal;

AND WHEREAS on 13 July 2011 an officer of the Commission sent a letter to the appellant again asking whether she had made an application to the Supreme Court;

AND WHEREAS on 10 August 2011 the appellant sent an email to the Chambers of the Acting President in which she stated again that she wished to proceed with the appeal and that she would obtain assistance as to how to make an application to the Supreme Court;

AND WHEREAS on 10 August 2011 an officer of the Commission sent an email and a letter to the appellant which stated that the Full Bench intended to list the appeal for mention for the appellant to show cause why the appeal should not be dismissed. The letter and email also stated that to enable the appellant to obtain any legal advice, the appeal would be listed at a time that was no less than six weeks from the date of the letter;

AND WHEREAS on 26 September 2011 the appellant was sent a Notice of Hearing that the Full Bench would sit on 3 November 2011 for the appellant to show cause why the appeal should not be dismissed. The notice also stated that if the appellant did not attend the hearing an order would issue dismissing the appeal for want of prosecution;

AND WHEREAS on 3 November 2011 when the appeal was called on for hearing by the Full Bench the appellant did not appear;

AND WHEREAS the Full Bench having determined that the appeal should be dismissed;

NOW THEREFORE pursuant to the powers vested in it by the *Industrial Relations Act 1979*, it is ordered that the appeal be, and is hereby dismissed for want of prosecution.

By the Full Bench

(Sgd.) J H SMITH,

[L.S.] Acting President.

PRESIDENT—Matters dealt with—

2011 WAIRC 00994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER SECTION 7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICES BOARD
	APPLICANT
	-and-
	DENISE DRAKE-BROCKMAN
	RESPONDENT
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	THURSDAY, 3 NOVEMBER 2011
FILE NO.	PRES 2 OF 2011
CITATION NO.	2011 WAIRC 00994

Result	Order issued
Appearances	
Applicant	Mr D J Matthews (of counsel)
Respondent	Mr M B Clancy (as agent)

Order

WHEREAS on 26 October 2011, the applicant filed an application for an order that the part of the decision of the Commission comprised in order 4. of the decision made by the Commission on 17 October 2011 in application U 82 of 2011 [2011] WAIRC 00963 (the decision) be stayed pending the hearing and determination of the appeal to the Full Bench in FBA 7 of 2011;

AND WHEREAS on 2 November 2011, the applicant and the respondent reached an agreement that an order could be made to stay order 4. of the decision on the undertaking of the applicant that if the appeal is unsuccessful the applicant will pay the respondent the sum of $46,096.97 plus interest calculated at 6% from 17 October 2011 (the adjusted sum) and a sum payable as superannuation will be paid to the respondent's superannuation fund calculated at 9% of the adjusted sum;

NOW THEREFORE having heard Mr D J Matthews of counsel on behalf of the applicant and Mr M B Clancy as agent on behalf of the respondent, the Acting President, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders that —

Order 4. of the decision made by the Commission on 17 October 2011 in application U 82 of 2011 [2011] WAIRC 00963 is stayed pending the hearing and determination of appeal FBA 7 of 2011 or until further order.

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

PRESIDENT—Unions—Matters dealt with under Section 66—

2011 WAIRC 01004

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE REGISTRAR
	APPLICANT
	-and-
	MR PHIL WOODCOCK, THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	RESPONDENT
FILE NO.	PRES 7 OF 2009
PARTIES	PAUL ROBINSON
	APPLICANT
	-and-
	MR PHIL WOODCOCK, ACTING SECRETARY INTERIM COMMITTEE, AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES WA BRANCH
	RESPONDENT
FILE NO.	PRES 6 OF 2010
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	TUESDAY, 8 NOVEMBER 2011
CITATION NO.	2011 WAIRC 01004

Result	Order issued
Appearances	
Applicants	Mr R J Andretich (of counsel) on behalf of the Registrar
	Mr P G Laskaris (of counsel) on behalf of Paul Robinson
Respondents	Mr J Nolan (of counsel)

Order

These matters having come on for hearing before me on 7 November 2011, and having heard Mr R J Andretich (of counsel) on behalf of the Registrar, Mr P G Laskaris (of counsel) on behalf of Paul Robinson, and Mr J Nolan (of Counsel) on behalf of the

respondents, the Acting President, pursuant to the powers conferred under the *Industrial Relations Act 1979*, by consent, hereby orders that —

1. The Interim Branch Executive is to provide to the Registrar on or before 31 December 2011 a list of all members of The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch as at 23 December 2011;
2. There be liberty given to all of the parties to apply on 24 hours' notice.

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

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

2011 WAIRC 01009

ENROLLED NURSES AND NURSING ASSISTANTS (GOVERNMENT) AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

THE BOARD OF MANAGEMENT ALBANY REGIONAL HOSPITAL AND OTHERS

RESPONDENT

CORAM COMMISSIONER J L HARRISON
DATE THURSDAY, 10 NOVEMBER 2011
FILE NO/S APPL 115 OF 2008
CITATION NO. 2011 WAIRC 01009

Result Discontinued

Order

WHEREAS this is an application to vary the *Enrolled Nurses and Nursing Assistants (Government) Award*; and

WHEREAS on 12 November 2010 the Commission wrote to the applicant requesting advice as to its intentions in relation to the matter; and

WHEREAS on 23 February 2011 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS 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.

2011 WAIRC 01008

HEALTH WORKERS - COMMUNITY AND CHILD HEALTH SERVICES AWARD, 1980

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

HONOURABLE MINISTER FOR HEALTH

RESPONDENT

CORAM COMMISSIONER J L HARRISON
DATE THURSDAY, 10 NOVEMBER 2011
FILE NO/S APPL 108 OF 2008
CITATION NO. 2011 WAIRC 01008

Result Discontinued

Order

WHEREAS this is an application to vary the *Health Workers – Community and Child Health Services Award, 1980*; and

WHEREAS on 12 November 2010 the Commission wrote to the applicant requesting advice as to its intentions in relation to the matter; and

WHEREAS on 23 February 2011 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS 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.

2011 WAIRC 01011

HOSPITAL WORKERS (GOVERNMENT) AWARD NO. 21 OF 1966

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION

APPLICANT

-v-

THE BOARD OF MANAGEMENT SIR CHARLES GAIRDNER HOSPITAL AND OTHERS

RESPONDENT

CORAM COMMISSIONER J L HARRISON

DATE THURSDAY, 10 NOVEMBER 2011

FILE NO/S APPL 122 OF 2008

CITATION NO. 2011 WAIRC 01011

Result Discontinued

Order

WHEREAS this is an application to vary the *Hospital Workers (Government) Award No. 21 of 1966*; and

WHEREAS on 12 November 2010 the Commission wrote to the applicant requesting advice as to its intentions in relation to the matter; and

WHEREAS on 23 February 2011 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS 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.

2011 WAIRC 01010

WARD ASSISTANTS (MENTAL HEALTH SERVICES) AWARD 1966

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION
	APPLICANT
	-v-
	HONOURABLE MINISTER FOR HEALTH
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 10 NOVEMBER 2011
FILE NO/S	APPL 119 OF 2008
CITATION NO.	2011 WAIRC 01010

Result Discontinued

Order

WHEREAS this is an application to vary the *Ward Assistants (Mental Health Services) Award 1966*; and

WHEREAS on 12 November 2010 the Commission wrote to the applicant requesting advice as to its intentions in relation to the matter; and

WHEREAS on 23 February 2011 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS 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.

NOTICES—Award/Agreement matters—

2011 WAIRC 01005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 31 of 2011

APPLICATION FOR A NEW AGREEMENT TITLED

"SHIRE OF HARVEY ENTERPRISE AGREEMENT 2011"

NOTICE is given that an application has been made to the Commission by the *Western Australian Municipal, Administrative, Clerical and Services Union of Employees* and the *Shire of Harvey* under the Industrial Relations Act 1979 for the registration of the above Agreement.

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

4. PARTIES BOUND

4.1 The Parties to this Agreement shall be;

4.1.1 the Shire of Harvey ('the Shire' or 'the Employer'); and

4.1.2 the Western Australian Municipal, Administrative, Clerical and Services Union of Employees ('the Union' or 'WASU').

4.2 This Agreement covers all Shire of Harvey employees who;

4.2.1 Are employed at the Shire of Harvey Depots and the Shire of Harvey Administration Offices; and

4.2.2 Would otherwise have their employment governed by the terms of the *Municipal Employees (Western Australia) Interim Award 2011* or the *Local Government Officers' (Western Australia) Interim Award 2011*; and

4.2.3 Are eligible to be members of the WASU.

4.3 This Agreement shall not apply to designated senior officers and those employees whose employment is subject to a negotiated salary.

4.4 This Agreement covers approximately 85 employees.

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

J A SPURLING,
Registrar.

9 November 2011

2011 WAIRC 00998

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 29 of 2011

APPLICATION FOR A NEW AGREEMENT TITLED

"SHIRE OF NAREMBEEN WORKS STAFF ENTERPRISE BARGAINING AGREEMENT 2011"

NOTICE is given that an application has been made to the Commission by the *Western Australian Municipal, Administrative, Clerical and Services Union of Employees* under the Industrial Relations Act 1979 for the registration of the above Agreement.

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

4. INCIDENCE AND PARTIES BOUND

4.1 This Agreement shall come into force and effect from the date of registration by the Western Australian Industrial Relations Commission and the nominal expiry date of this Agreement shall be 30 June 2014.

4.2 This Agreement shall be read and interpreted wholly in conjunction with the Award and where there is any inconsistency between the terms and conditions of this Agreement and the terms and conditions of the Award, the terms and conditions prescribed by this Agreement shall prevail to the extent of the inconsistency.

4.3 The parties to this Workplace Agreement shall be:

4.3.1 The Western Australian Municipal, Administrative, Clerical and Services Union of Employees, 102 East Parade, East Perth, WA, 6004; and

4.3.2 The Shire of Narembeen 1 Longhurst Street, Narembeen, WA 6369; and

4.4 This Agreement shall be binding upon and govern the terms and conditions of employment of all employees of the Shire whose employment is otherwise covered and/or governed by the Municipal Employees (Western Australia) Interim Award 2011.

4.5 The parties to this Workplace Agreement agree that:

4.5.1 it is their intention to achieve the principle object in Section 3 of the Workplace Relations Act 1996, which is to respect and value the diversity of the work force by helping to prevent and eliminate discrimination at their enterprise on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; and

4.5.2 any dispute concerning these provisions and their operation will be progressed under Clause 9 – Dispute Settlement Procedures of the Award; and

4.5.3 nothing in these provisions allows any treatment that would otherwise be prohibited by antidiscrimination provisions in applicable Commonwealth or Territory legislation.

4.6 If any provision of this agreement is declared or determined to be illegal or invalid by final determination of any court or tribunal of competent jurisdiction, the validity of the remaining parts, terms or provisions of this agreement shall not be affected, and the illegal or invalid part, term or provision shall be deemed not to be part of this agreement.

4.7 This Agreement shall apply in the state of Western Australia to approximately 15 employees.

APPENDIX A – AWARD & CLASSIFICATION LEVELS

15. – CLASSIFICATION DEFINITIONS

15.1 Municipal employee – level 1

15.2 Municipal employee – level 2

15.3 Municipal employee – level 3

15.4 Municipal employee – level 4

15.5 Municipal employee – level 4A

15.6 Municipal employee – level 5

15.7 Municipal employee – level 6

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

J A SPURLING,
Registrar.

25 October 2011

POWER OF ENTRY—Matters pertaining to—

2011 WAIRC 00989

APPLICATION FOR AUTHORITY TO BE ISSUED TO MR JOSEPH MCDONALD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2011 WAIRC 00989
CORAM	**:**	CHIEF COMMISSIONER A R BEECH ACTING SENIOR COMMISSIONER P E SCOTT COMMISSIONER S J KENNER
HEARD	**:**	TUESDAY, 9 AUGUST 2011, THURSDAY, 1 SEPTEMBER 2011, MONDAY, 17 OCTOBER 2011, TUESDAY, 18 OCTOBER 2011, WEDNESDAY, 19 OCTOBER 2011, TUESDAY, 1 NOVEMBER 2011
DELIVERED	**:**	WEDNESDAY, 2 NOVEMBER 2011
FILE NO.	**:**	APPL 31 OF 2011
BETWEEN	**:**	MR KEVIN REYNOLDS Applicant AND (NOT APPLICABLE) Respondent

CatchWords	**:**	*Industrial Law (WA) – Application for order that Registrar issue right of entry authority - Hearing concluded and decision reserved - Application for leave to intervene*
Legislation	**:**	*Industrial Relations Act 1979* s 27(1)(k)
Result	**:**	*Application by Mr Mcjannett for leave to intervene dismissed*
Representation:		
Applicant	**:**	Mr J Nicholas, of counsel
Respondent	**:**	Mr R Mcjannett, seeking leave to intervene

Case(s) referred to in reasons: Nil

Case(s) also cited: Nil

Reasons for Decision - Application by Mr Mcjannett for leave to intervene

COMMISSION IN COURT SESSION:

1 The hearing in this matter concluded on 19 October 2011 and the decision was reserved. On that same day, Robert Mcjannett filed an application to intervene in order to object to the application. His application to intervene was heard on 1 November 2011.

2 Mr Mcjannett established that he is a member of the CFMEU (Construction and General Division). He gave evidence that if he was permitted to intervene he would bring evidence of his knowledge of Mr McDonald and that he finds Mr McDonald's conduct offensive and embarrassing and threatening. He would, if permitted to intervene, seek to bring evidence in support of these matters and other issues. He stated that he had been aware of the application in this matter when it had been filed. However, he had not sought to intervene earlier because of illness, and because his assumption was that the application had no chance of success. He noted media reports of the application and followed the progress of the hearing. It was only when he thought the risk of the application being granted was too great that he decided to seek leave to intervene.

3 The applicant opposed the application by Mr Mcjannett, pointing out that there had been initial considerations of who would be allowed to intervene but now events had moved on and the case had concluded. The applicant recognised that members of the CFMEU have an interest in the application, but in this case it is not established that Mr Mcjannett has a right that will be directly affected by the application.

4 We have reached the following decision. In order to be given leave to intervene Mr Mcjannett will need to show under s 27(1)(k) of the *Industrial Relations Act 1979* that he has sufficient interest in whether or not another right of entry authority should be issued to Mr McDonald, and that leave should be granted to re-open the hearing. Mr Mcjannett appears for himself as a member of the CFMEU (Construction and General Division). We are satisfied that Mr Mcjannett is a member of the CFMEU (Construction and General Division) and that he has an interest in the affairs of the union of which he is a member. However, that may not of itself demonstrate that his interest is a sufficient interest for the purposes of this matter, and each case will depend on its own circumstances.

5 However, that consideration is, in our view, overshadowed by the fact that Mr Mcjannett has known of this application since it was filed and did not at that time seek leave to intervene. There is no evidence that the illness he referred to precluded him from making an application to intervene at an earlier date. Further, he was aware of the progress of this application sufficiently enough to form a judgment of the likelihood of it succeeding or failing before deciding to seek leave to intervene.

6 The application was filed on 15 June 2011 and on 10 August 2011 the Commission issued directions that the Registrar publish notification of the application on the Commission's internet website and requiring that a person with sufficient interest wishing to be heard in relation to this application should file in the Commission by 25 August 2011 an application to be heard. An order issued on 5 September 2011 ((2011) 91 WAIG 1943; [2011 WAIRC 00866]) setting the matter down for hearing and requiring the filing and serving of outlines of submissions. There have been hearings, of which notice was given in the court lists, on 9 August and 1 September 2011 to hear from persons seeking to be heard. The hearing in the substantive matter commenced on 17 October 2011. We note the application was reported in the local newspaper on 26 August 2011 and on 14 and 18 and 19 October 2011. The fact that Mr Mcjannett elected to do nothing until the last day of the hearing is a matter for him, however his change of mind does not provide a basis for the granting to him of leave to intervene and for the hearing to be re-opened. It is simply too late. The applicant in the substantive matter has a right to expect the orderly disposition of his application. This has occurred and it would be an abuse of process in these circumstances to grant this late application to intervene. Accordingly, it will be dismissed.

2011 WAIRC 00990

APPLICATION FOR AUTHORITY TO BE ISSUED TO MR JOSEPH MCDONALD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR KEVIN REYNOLDS
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 2 NOVEMBER 2011
FILE NO/S	APPL 31 OF 2011
CITATION NO.	2011 WAIRC 00990

Result	Application by Mr Mcjannett for leave to intervene dismissed
Representation	
Applicant	Mr J Nicholas, of counsel
Respondent	Mr R Mcjannett, seeking leave to intervene

Order

HAVING HEARD Mr J Nicholas on behalf of the Applicant and Mr R Mcjannett, seeking leave to intervene;

NOW THEREFORE the Commission in Court Session hereby orders –

THAT the application by Mr Mcjannett for leave to intervene be dismissed.

(Sgd.) A R BEECH,
[L.S.] Commission In Court Session.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2011 WAIRC 00974

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LISA ANNE BOND
	APPLICANT
	-v-
	WE PRINT IT BUNBURY
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 31 OCTOBER 2011
FILE NO/S	B 115 OF 2011
CITATION NO.	2011 WAIRC 00974

Result	Application discontinued
Representation	
Applicant	Ms L A Bond
Respondent	Mr J Austin and Mrs D Austin

Order

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

AND WHEREAS on 30 August 2011 the Commission convened a conference for the purpose of conciliating between the parties;

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

AND WHEREAS on 20 October 2011 the applicant advised the Commission to file the Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

2011 WAIRC 00975

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LISA ANNE BOND
	APPLICANT
	-v-
	WE PRINT IT BUNBURY
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 31 OCTOBER 2011
FILE NO/S	U 115 OF 2011
CITATION NO.	2011 WAIRC 00975

Result	Application discontinued
Representation	
Applicant	Ms L A Bond
Respondent	Mr J Austin and Mrs D Austin

Order

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

AND WHEREAS on 30 August 2011 the Commission convened a conference for the purpose of conciliating between the parties;

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

AND WHEREAS on 20 October 2011 the applicant advised the Commission to file the Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

2011 WAIRC 00986

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CATHY JORGENSON AND OTHERS
	APPLICANTS
	-v-
	BANSLEY PTY LTD T/AS CARINYA OF BICTON
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 31 OCTOBER 2011
FILE NO/S	B 50 OF 2011, B 51 OF 2011, B 52 OF 2011, B 53 OF 2011, B 54 OF 2011, B 55 OF 2011, B 56 OF 2011, B 57 OF 2011, B 58 OF 2011, B 59 OF 2011, B 60 OF 2011, B 61 OF 2011, B 62 OF 2011, B 63 OF 2011
CITATION NO.	2011 WAIRC 00986

Result	Consent Order issued
Representation	
Applicant	Ms E Palmer (as agent)
Respondent	Mr G McCorry (as agent)

Consent Order

HAVING HEARD Ms E Palmer (as agent) on behalf of the applicants and cross-respondents and Mr G McCorry (as agent) on behalf of the respondent and cross-applicant, and by consent, the Commission makes the following orders –

1. THAT applications B 50 of 2011, B 51 of 2011, B 52 of 2011, B 53 of 2011, B 54 of 2011, B 55 of 2011, B 56 of 2011, B 57 of 2011, B 58 of 2011, B 59 of 2011, B 60 of 2011, B 61 of 2011, B 62 of 2011, B 63 of 2011 be dismissed with no order as to costs.

2. THAT the cross-applications in matters B 50 of 2011, B 51 of 2011, B 52 of 2011, B 53 of 2011, B 54 of 2011, B 55 of 2011, B 56 of 2011, B 57 of 2011, B 58 of 2011, B 59 of 2011, B 60 of 2011, B 61 of 2011, B 62 of 2011, B 63 of 2011 be dismissed with no order as to costs.

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

2011 WAIRC 00937

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2011 WAIRC 00937
CORAM	**:**	COMMISSIONER J L HARRISON
HEARD	**:**	WEDNESDAY, 27 JULY 2011
DELIVERED	**:**	FRIDAY, 7 OCTOBER 2011
FILE NO.	**:**	U 4 OF 2011, B 4 OF 2011
BETWEEN	**:**	EMMA CRINITI Applicant AND SCOTT TURNER - VIP PUBLISHERS & ADCONNECT LOCAL MARKETING Respondent

Catchwords	**:**	Industrial Law (WA) - Termination of employment - Claim of harsh, oppressive and unfair dismissal - Principles applied - Application upheld - Applicant unfairly dismissed - Compensation ordered - Contractual benefits claim - Entitlements under contract of employment - Claim for payment of commission on sales - Application upheld - Order issued
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 7, s 27(1), s 29(1)(b)(i) and s 29(1)(b)(ii)
Result	**:**	Upheld and orders issued
Representation:		
Applicant	**:**	Mr P Mullally (as agent)
Respondent	**:**	Mr S Turner

Case(s) referred to in reasons:

Ahern v Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (WA Branch Inc) (1999) 79 WAIG 1867

Balfour v Travel Strength Ltd (1980) 60 WAIG 1015

Belo Fisheries v Froggett (1983) 63 WAIG 2394

Bogunovich v Bayside Western Australia Pty Ltd (1998) 78 WAIG 3635

Bridge Shipping Pty Ltd v Grand Shipping SA and Anor (1991) 173 CLR 231

Byrne v Australian Airlines (1995) 61 IR 32)

Hotcopper Australia Ltd v David Saab (2001) 81 WAIG 2704

John Palermo v Charles Rosenthal (2011) 91 WAIG 129

Noel Edward Knight v Alinta Gas Ltd (2002) 82 WAIG 2392

Perth Finishing College Pty Ltd v Watts (1989) 69 WAIG 2307)

Rai v Dogrin Pty Ltd (2000) 80 WAIG 1375

Shire of Esperance v Mouritz (1991) 71 WAIG 891

Tranchita v Wavemaster International Pty Ltd (1999) 79 WAIG 1886

Undercliffe Nursing Home v Federated Miscellaneous Workers Union of Australia, Hospital Service and Miscellaneous WA Branch (1985) 65 WAIG 385

Waroona Contracting v Usher (1984) 64 WAIG 1500

Reasons for Decision

1 On 5 January 2011 Emma Criniti (the applicant) lodged applications in the Commission pursuant to s 29(1)(b)(i) and (ii) of the *Industrial Relations Act 1979* (the Act) claiming that she had been unfairly dismissed on 21 December 2010 by Scott Turner – VIP Publishers & Adconnect Local Marketing (the respondent) and that she is owed benefits under her contract of employment with the respondent. The respondent denies both claims.

2 It became clear during the hearing that the respondent had been incorrectly named. Having formed the view that it is appropriate to amend the respondent's name and given the Commission's powers under s 27(1) of the Act, I propose to issue an order that Scott Turner – Vip Publishers & Adconnect Local Marketing be deleted as the named respondent in these applications and be substituted with Scott Turner Family Trust trading as VIP Publishers and Adconnect Local Marketing (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).

Background

3 The applicant commenced employment with the respondent on 23 February 2009 working approximately 30 - 32 hours per week as a sales consultant and she sold advertising for a range of the respondent's products. The applicant's contract of employment was confirmed in writing (see Exhibit A3 document 3). The applicant was terminated by the respondent on 21 December 2010 in an email sent to her by Mr Scott Turner on behalf of the respondent. The applicant's salary at the time she was terminated was $60,000 per annum paid as a fortnightly retainer plus 15% commission on advertising sold by the applicant.

4 The events leading up to the applicant's termination are not in dispute. No face-to-face or telephone discussions took place between the applicant and Mr Turner in the period immediately preceding the applicant's termination on 21 December 2010 and the parties liaised by email. The following verbatim email exchange between the applicant and Mr Turner details the events leading up to the applicant's termination on 21 December 2010:

> On 20/12/2010, at 11:58 AM, Emma Criniti wrote:
>
> > Hey Scott,
> >
> > I was hoping you would of called me this morning as I do need to go through some things with you as I am a little confused about what is happening and upset that you have not returned my calls since last Wednesday, there were a number of things I needed to talk to you about.
> >
> > Firstly - Did you put up the Arena Poster as I didn't get a pic to send to client?
> >
> > Secondly - Murray did tell me that the Bra Bar posters were all printed so not sure why that Fandance one is not there
> >
> > Thirdly - I have 2 sales this week for WA Custom Homes, which are probably Artique and Brikmakers, both are getting back to me with confirmations to book them in, I am very confused as to what I should do with these now as don't want to turn away a sale and I should not have to feel bad about making a sale as that is what my job is.
> >
> > Fourthly - I had an appt with M & B Sales on Thursday and they want to be a supplier on the builder directory I quoted them $750 plus gst for the year with only a landing page and she emailed me back to say they want to go ahead, so shall I sign up and when would they be up and running, in January?

Fifthly - Some clarification is needed before I continue working as I can't make out from what you have been emailing me if I still am employed and still being paid base wage only and you will pay me the commissions due when you have some more money or if you are totally broke and expecting me to work for free until you have some money to pay back what I am owed. You haven't given me any clue apart from alarming me that it sounds like I will be living on 2 minute noodles for xmas and probably all of January, should I be looking for another job, I hope not?

Anyway I hope to hear from you shortly so we get everything sorted out and can make a plan for the future and hopefully get things back on track to get money back in for both of us, cheers.

From: Scott Turner [email address]

Sent: Monday, 20 December 2010 12:58 PM

To: Emma Criniti

Subject: Re: Updates

Importance: High

Hi Emma

Dont sell anything as I am broke and I cant pay you so just cancel them. I dont want to run up a tab.

Will see what I can do after New Year.

Thanks, Scott

From: Scott Turner [email address]

Sent: Monday, 20 December 2010 1:09 PM

To: Emma Criniti

Subject: Re: Updates

Importance: High

It should be right but I will have to do Custom Homes as I wont have $30,000 to pay your commissions. The bank is close to taking my house as I can never meet my mortgage payments, so I cant run up any commission bills.

I need to get the signs back up so its profitable as its been neglected - we havent sold anything really and I lose a lot more than I gain, and my leases havent changed, they are still $25,000 a month.

I also need a holiday - so I wont get back to you till after New Year. I havent had a break all year and have done 60 hour weeks to end up broke, so I need a week off - Im wasting my time here unfortunatley, I need to get paid I got 3 kids.

Scott

On 20/12/2010, at 2:03 PM, Emma Criniti wrote:

I wish you would just call me much easier than emailing back and forth, not nice for you at all, so sorry, but I also have commitments too and you still haven't answered my question properly about pay, is it just commissions you are not paying me now or any pay that I am owed.

I am owed a fortnightly pay this week for the last two weeks work plus I am owed holiday pay up until the 11th January, you surely can't expect me to wait another 2 weeks to even speak to you and not know if I have a job or any pay coming or what?

I am happy to stay on if you can pay me weekly base and will wait for commissions but let me know what the go is at least here, not sure if I have job or not?

I have done nothing but the best for your company and always worked hard, so to be ignored and not even given a straight answer and left in the lurch moneywise a week before xmas is not a nice feeling and to put me in this turmoil with no warning I feel very hurt, I thought we had a better relationship and I would help you all I can.

From: Scott Turner [email address]

Sent: Monday, 20 December 2010 4:20 PM

To: Emma Criniti

Subject: Re: Updates

Im not not paying, I got no frickin money to pay. I cant even buy my kids christmas presents

Its not by choice - maybe that asshole Murray could have worked more than 25 hours a week, so I didnt have to use a web designer or a second graphic designer. Im screwed, sorry but I have no money.

Im getting sued everywhere now I wont have a dime till mid January and most of that is gone on bills due last month.

I might be able to get you a couple of weeks pay in maybe 2 weeks, it really depends on if people pay me, I only have $1, 000 in the account.

The system doesnt work, I havent even got last years income in from Custom Homes and Im paying out on next years commissions now that I dont see money from for another 12 months. I dont have any money at all, Im trying to jkeep my bloody house.

Scott

From: Emma Criniti [email address]

Sent: Monday, 20 December 2010 5:39 PM

To: 'Scott Turner'

Subject: RE: Updates

Ok so you think it is fine to just go away, not call me and leave me with no pay at xmas and not even tell me this after 2 years of hard work when I am the one making you all the money and it gets wasted on starting up millions of new things and paying stupid staff who don't do their jobs, that is not my fault.

I asked you the other week about money and you said all is fine you have lots coming at the end of the year. You are the one who said clients don't have to pay until the directory and Perth VIP are launched, why did you do that. I have offered many times to follow up outstanding debts for you and you say no. Right now I could be calling trying to collect money in for you. You also have all the new bookings I have just done that you can invoice for deposits right now that will pay, if you are that much in debt as you say you are why are you away, you should be chasing up what is owed!!! You could have plenty of cash coming in at the moment and even the new sales I did apart from 2 are all paying deposits pretty much straight away, then another payment in June then September, so you have money staggered through out the year from Custom Homes not just in 12 months time, only a few that pay on publication, rest make payments during the year before print. It is also not my fault that the outstanding $25,000 has not been collected, that is not my role but I do offer.

I am very angry now that you could treat me like this and not even say Merry Xmas to me, thanks for all your work this year and just go away for two weeks and know that I would have no money, that is really awful of you to do, I do not deserve to be treated like this, you haven't even sent me an apology. If you had of told me earlier we could of worked something out but to just throw me aside and not tell me I won't be paid this week or even for a few weeks is really bad after all I have done for you and the sales I make. Why send me out to keep selling if you knew you couldn't pay me, we also have an employment agreement and if I don't get any money in the new year for the 2 weeks work I have done, the holiday pay I am owed and the commissions I am owed to date then I will contact the Fair Work Ombudsman reluctantly to resolve this.

I also have a mortgage and car payments to make and also can't buy anyone any friggin xmas presents now, how dare you lead me on and not have the guts to end my employment and pay up what you owe and just keep using me, that is grossly unfair and I had no choice in the matter. I was even considering to talk to you about buying Custom Homes off you after your email the other day, I have all the clients details and am sure they wont mind getting a call from me to tell them I got screwed over by you at xmas and you ran off and didn't pay me my pay, my holiday pay, my commissions, I am sure they will be impressed to hear that.

My job is not to do the accounts, my job was to make sales which I did, I can't help if you don't follow up on the invoices, you have money there now to collect, go get it, you say you are getting sued everywhere and won't have any money till mid Jan and most is gone on bills due last month, well guess what I am also an important bill that is due. I can't believe you expect an employee to wait over 6 weeks for outstanding monies, such poor form. Almost all the Custom homes sales I did will pay you a deposit now which will more than cover my pay/commissions due and also there was other sales in that last batch that were for Adconnect and Directorys that can be invoiced straight away. The last thing I want is for this to turn nasty or be bickering with you but I am sure when I get calls from clients in the new year you won't want me telling them about this and why I am no longer working there, you have not done the right thing by me at all.

I have so loved working for you and am so sad it has come to you doing this to me, I know it is not by choice but you have not handled yourself well in regards to me and the running of the business, it is only cos I am emailing you that you have now admitted you can't pay me otherwise I would still not know and really I am so so flabbergasted that a few days before xmas you would run off and not pay me a dime, very very hurtful. You say you got hurt by what people did to you this year, well you just did the same back to me.

Have a great xmas, may 2011 be all you wish for and more, I hope your problems get resolved and that your family is ok and it won't come to losing your house. I have enjoyed every minute of working for you and am gutted with this situation and my treatment, I hope you will contact me in the new year to resolve what is owed and that you will give me a written testimonial as I will need that for job interviews. By the way you haven't even asked about my doctors results, like you probably care anyway, but I do probably have to go have an operation in the new year, so I will need my pay to help towards hospital costs.

I am sorry to talk so bluntly but hope you can understand how mad, hurt, frustrated and upset I am at the moment, feeling very used and abused, thanks for everything and wow what a great xmas.

Hope we can work this out amicably and soon, I am not up for a fight with you, I want us to remain on good terms with each other and just be paid for what I am rightfully owed and get on with my life. This is all just so very sad ☹

On 20/12/2010, at 7:05 PM, Emma Criniti wrote:

> I have just gone through all the bookings I am due the commissions on and you have about $20,000 in deposits that are payable to you right now, that you can or may have invoiced for, so that is more than what you owe me in pay and commissions and you do not have to wait 12 months for these payments. Most will also make other payments to you during the year before WA Custom Homes even goes to print if you look at the payment terms that are written on their bookings.
>
> This is not my fault if they have not been invoiced or followed up for their payments and I would have been more than happy to do that for you if you had of asked.
>
> I still can't believe this is happening, you have such great businesses in Custom Homes and Adconnect, how did it get to this, you have a lot of money due to you and owing, most of these people will happily pay now if you ask them. You can invoice Zorzi, Di Bucci, Lighting City, Ceramic City, Instyle, just to name a few, some are even paying half to you now!!

From: Scott Turner [email address]

Sent: Monday, 20 December 2010 9:06 PM

To: Emma Criniti

Subject: Re: WA Custom Homes

yes I understand that - I have been ripped off for 12 months by various people, no one has ever worked a 40 hour week for me, and I have had to pick up the slack and have done 60 hour weeks. All the prima donna contributors want thousands for crap writing also

I cant pay any commissions and I cant afford 15% on rebookings which just take an email - $1000 a shot for a builder or supplier is too expensive

None of those people have paid the deposit - they have all been billed immediately - they always take weeks to pay

These are small businesses, Custom Homes makes only $200, 000 and adconnect less than that

Remember I have also paid $1.3 million dollars for all of this - the Ooh media posters take me 3 days every 2 weeks, and the Ooh media sub lease I had to spend $500, 000 on signs to get that job

So far I have not been returned $1 on Ooh media or Custom Homes, when you take the purchase costs into account - which is $1.6 million all up

I can probably keep you if youre willing to work for 3 months on wages only, but otherwise I cant afford it, I cant rack up $30, 000 in commissions, I owe the tax man $30, 000 and he is suing me, the printers $20, 000 and contributors $20, 000, and the shops $25, 000 on January 1, plus the $10, 000 I owe from December 1 gone.

Its just not working I probably have to sell it all to get paid myself

I really have to close for 3 months and do it all myself, cant see any other way out - that or sell everything

Im tired of being abused every week by a different asshole somewhere too, I have flogged myself and have had enough

Scott

From: Scott Turner [email address]

Sent: Monday, 20 December 2010 9:10 PM

To: Emma Criniti

Subject: Re: WA Custom Homes

Im off till after next week - come into the office after that if you want and we can go through it – its salvageable but I have to be honest I cant afford the same rates next year of $105, 000 - I have to get paid its not an option I dont anymore.

Its also possible everything will be sold, whatever gets me paid basically - I dont really care where the cheques come from

---

From: Scott Turner [email address]

Sent: Monday, 20 December 2010 9:11 PM

To: Emma Criniti

Subject: Re: WA Custom Homes

Adconnect is not a good business - the dog swamp signs for example and Harbour Town - Im losing $15, 000 a year at those 2 locations as we cant sell any signs - the leases dont go away if the signs arent sold

Plus the signs cost me $30, 000 - so its a hard business it needs to be sold all the time

---

From: Scott Turner [email address]

Sent: Monday, 20 December 2010 9:23 PM

To: Emma Criniti

Subject: Re: WA Custom Homes

and whos going to call them - some asswipe that wants $60, 000 a year to sit in here and complain about how they are getting ripped off - Murrays wife was going to start and she whined about no microwave before she even got here - Its 9.30 at night and I just finished some posters - I could do it now I guess and work 65 hours a week!!!

On 20/12/2010, at 10:46 PM, Emma Criniti wrote:

Scott,

As a small business, most owners would follow up the outstanding accounts themselves, or get their wives to do it or you could of asked me to do it and priortise over doing other things, especially if you are having troubles like you say you are and that there is money there to go get, I would be doing my all to get it in if I was in your shoes.

You also can't change your employment agreements without consulting your employee first, you asked me to resell Custom Homes, you knew I was selling it, you knew how much I had sold and you never once attempted to renegotiate my agreement prior to me starting to resell it or put anything in writing at anytime to say I won't be getting 15%, so you can't change the goalposts whenever it suits you or without advising me of the new terms you want to bring in, I have had no choice in the matter. My agreement also says I will be paid fortnightly my commissions!!!

It is so wrong to just not pay someone the wages/commissions they are owed and to not tell them this until they had to keep emailing you for any answers, let alone to do it to them just before xmas and their annual leave, horrifying. It is also not my problem what you paid for the business, what they owe you, what they make, how you manage them, how you manage other staff, that has nothing to do with me. You employed me under our agreement, if you now can't afford me then tell me to see what we can figure out or finish me up properly with the money you owe me or a payment plan. Don't think you can just not pay me and I will hang around and keep working and not even discuss it with me properly.

If you had of discussed these things with me prior I am sure we could of come to some happy arrangement, however I feel you have totally worked me over and not had a thought about how this has affected me, with no apology forthcoming at all.

I am sorry to say this but I now feel I have no choice but to take this through the proper channels to be paid what I am rightfully owed.

From: Scott Turner [email address]

Sent: Tuesday, 21 December 2010 8:27 AM

To: Emma Criniti

Subject: Re: WA Custom Homes

ok thanks we will call it quits as of today

Scott

(Exhibit A3 documents 7 - 15)

Applicant's evidence

5 The applicant gave evidence that when she sold advertising for the respondent she advised Mr Turner about each sale and then forwarded him a copy of the contract she drew up for each client. The contract identified the customer, the advertising bought by this customer, the length of time it was booked for, the cost of the advertising and the payment terms. This document was also signed by the applicant and the client. The applicant stated that she asked clients to make a payment when the contract was signed but monies due to be paid by a client were not always paid immediately and some clients had payment schedules and others wanted an invoice to effect payments. The applicant stated that Mr Turner was responsible for generating invoices for client payment and the applicant gave evidence that she sometimes followed up outstanding payments due to the respondent even though this was not part of her role.

6 The applicant gave evidence that her retainer and the commission due to her were paid by the respondent each fortnight and she tendered bank account details confirming the payments regularly made by the respondent each fortnight for the period 4 October 2010 to 17 January 2011 (Exhibit A3 document 49). The applicant stated that throughout her employment with the respondent she was regularly paid the commission due to her each fortnight based on the value of contracts she negotiated on behalf of the respondent. The applicant stated that Mr Turner never told her that payment had to be received from each client before the respondent paid her commission for the client and she gave evidence that the fortnightly commission was paid to her for the contracts she wrote whether or not the client had paid a deposit for the advertising they had booked and she was not told by the respondent at any stage that this arrangement would change.

7 The applicant gave evidence that up to 14 December 2010 her relationship with Mr Turner was normal. The applicant gave evidence that the fortnightly commission she was due to be paid on 10 December 2010 was not paid in the usual manner and Mr Turner sent her a text message telling her that she would receive this commission payment on 16 December 2010. On 14 December 2010 the applicant attempted to contact Mr Turner by telephone however his mobile telephone was off and he did not return her call. On 16 December 2010 the applicant emailed Mr Turner with respect to the commission owing to her as he said she would be paid this commission on that date and Mr Turner replied to her email saying that he was unable to pay the commission to her. A series of emails were then exchanged between the applicant and Mr Turner which resulted in Mr Turner terminating the applicant by email on 21 December 2010.

8 The applicant stated the commission due to her was contained in the email she sent to Mr Turner on 16 December 2010. This email, verbatim, is as follows (formal parts omitted):

> Hi Scott,
>
> Here are my commissions due up to date, hope I don't wipe your account out!!! My account will look good though once you pay me, mind you most of it is going on my credit card, being going a bit mad lately, what with holidays to Melbourne, botox, horse stuff and now Christmas, the spending never ends, hehehe!!!
>
> I have posted the remainder of the signed off bookings to you today, only Austral left to come back signed, all the rest I have already sent to you prior or are now on their way to you.
>
> Orica Mining Service - $900
>
> Sovereign Building - $1,500
>
> The Bra Bar - $3,000
>
> Absolute Balustrades - $6,200
>
> Ceramic City - $3,600
>
> Lighting City - $5,727.27
>
> Eco Stone - $4,000
>
> Obelli Design - $3,000
>
> Weststyle - $5,600
>
> Venueswest - $5,400
>
> Austral Bricks - $3,025
>
> Grandwood - $5,000
>
> Zorzi - $5,000
>
> Di Bucci - $5,400
>
> Instyle Pools - $3,102.27
>
> Trilogy Pools - $3,000
>
> **Total - $63,454.54**

(Exhibit A3 document 4)

9 After Mr Turner received this email, further emails were exchanged between the applicant and Mr Turner about two clients which had not continued operating and who had not paid the respondent for the advertising sold by the applicant. As the applicant had already been paid commission for these clients she agreed to offset these commission payments which she had already been paid against her existing claim which resulted in the claim for commission being 15% of $56,854.54 and not $63,454.45 which equated to the amount of $8,528.18 which is the amount she was seeking in her application for a denied contractual benefit. The applicant gave evidence that when the issue of the two clients not continuing to operate was raised with her by Mr Turner she had no hesitation in agreeing to reduce the commission due to her by the amount she had been paid for these clients. The applicant stated that Mr Turner agreed to pay the applicant $8,528.18 in commission by 24 or 25 December 2010 and when the applicant did not receive this commission payment she sent an email to Mr Turner on 29 December 2010. Following is the verbatim email exchange between the applicant and Mr Turner:

> On 29/12/2010, at 8:18 AM, Emma Criniti wrote:
>
> Could you kindly advise if you made my payment on Fri or Sat as discussed, I have car and mortgage payments due tomorrow and will need to organize other funds today if you have not transferred it, cheers.
>
> **Kind regards,**
>
> **Emma Criniti**
>
> ---
>
> **From:** Scott Turner [email address]
>
> **Sent:** Wednesday, 29 December 2010 8:23 AM
>
> **To:** Emma Criniti
>
> **Subject:** Re: Emma Employment Entitlements

yes $3475 - but not the commissions - I cant pay those till Jan 16 when Ooh pays me my salary as I am still owed $25, 000 from last years magazine (Sambrook and Visionary havent paid anything still for las t year plus a few others) and no deposits have been paid for next years at all at this stage

Scott

From: Emma Criniti [email address]

Sent: Wednesday, 29 December 2010 2:56 PM

To: 'Scott Turner'

Subject: RE: Emma Employment Entitlements

Importance: High

Can you please forward a payslip to advise what the $3475 is made up of as I am entitled to my wages up until the 21st Dec, two weeks termination pay in lieu of 2 weeks formal notice in writing and 9 days holiday pay and this amount does not reflect that. If you read my contract Termination Clause - Either party may terminate employment by providing the other with two weeks notice in writing, failing which, payment in lieu of notice must be made by the party giving notice.

My commissions are also overdue and I can not be held responsible if you have not collected the deposits due or followed up outstanding accounts. The individual payment terms vary for each client whether it be for WA Custom Homes, Online Directory or Adconnect and these sales/payment terms have all been approved by you prior and also when you accepted their signed orders and invoiced them. I have happily forfeited the money on a sale if it falls over or they close their doors. However if you have not collected the money when it is due or their payment is not until later then that can't be used against me for non payment, you know they will all pay if you contact them. I will quite happily ring all the clients to explain what is happening between us and to see if they can pay their deposits so you can pay me out if you would prefer it that way.

I am disappointed that based upon the letter I sent you last week and your responses below that you would pay me out in full this Fri or Sat, with the new sales value as agreed minus the Fabrics By Robin and Stained Glass Overlay sales that our situation has still not been resolved in full as you said it would be.

If I do not have my full entitlements and commissions outstanding paid in full by you at the revised rate we agreed on as outlined below by Friday this week, I have now contacted the WA Industrial Relations Commission and will be lodging forms for an unfair dismissal complaint and for nonpayment/underpayment of employee entitlements upon termination on Monday 4th January.

Kind regards,

Emma Criniti

From: Scott Turner [email address]

Sent: Wednesday, 29 December 2010 7:08 PM

To: Emma Criniti

Subject: Re: Emma Employment Entitlements

Piss off Emma

I dont have the money to pay you at the moment so I would prefer to feed my family than pay you. I only have $1000 in the bank.

You will get paid when I get some money to pay you. You are just a greedy self absorbed person. You were employed for adconnect local marketing. You did nothing on that business and it went down hill for 2 years. You just want the easy renewals and I dont have to give them to you.

You abused me in July, which is one of many times. You are nasty, and I dont have to put up with it.

Contact any one of my customers and I will sue you.

Scott

From: Scott Turner [email address]

Sent: Wednesday, 29 December 2010 7:18 PM

To: Emma Criniti

Subject: Re: Emma Employment Entitlements

actually you better go to the Commission as I wont have the money by January 4

Go in there and take me to Court – by the way you are taking Sam too – she is a trustee so put her name down on your complaint and we will come into mediation mid February and see you

Alternatively you can get off your high horse and accept that the greedy one sided contract didnt work for Custom Homes and wait for your money mid month

If you want it to get nasty, sure you will still get your money, but it will take a lot longer and you will be earmarked as a vindicgtive litigious greedy bully around town.

Gee the thanks you get for paying someone $200, 000 in 2 years in astounding.

Greedy greedy bully

From: Scott Turner [email address]

Sent: Wednesday, 29 December 2010 7:35 PM

To: Emma Criniti

Subject: Re: Emma Employment Entitlements

Clearly you are a vindictive and ligtigioous person.

Knowing that, I advise you are to never, ever, contact anyone I deal with privately or in business, about any of my business dealings in any capacity, ever.

If that is not clear to you, let me know and I will get a lawyer to spell it out.

See you at mediation with Sam.

Regards

Scott

From: Scott Turner [email address]

Sent: Wednesday, 29 December 2010 7:49 PM

To: Emma Criniti

Subject: Re: Emma Employment Entitlements

By the way – litigate against me and I will have the tax Office around auditing your horse riding business

Two can play bully, bully.

From: Scott Turner [email address]

Sent: Wednesday, 29 December 2010 9:11 PM

To: Emma Criniti

Cc: [email address – Samantha]

Subject: Contracts

Sales contracts are not valid until the deposit due on signing is paid by the client.

Any half decent sales rep gets the deposit on signature. Until I am paid the deposit, as far as i am concerned the Contract is not a valid sale for commission purposes.

As such you will be paid when the contract deposit from which your commission is derived, is obliged by the client, and not before.

Furthermore, many of your adconnect sales have failed to make the contracted amount you were paid for.

I will adjust these sales between now and January 15.

Scott

From: Scott Turner [email address]

Sent: Thursday, 30 December 2010 12:11 PM

To: Emma Criniti

Subject: Re: Emma Employment Entitlements

Hi Emma

I have now referred this termination for legal advice.

I am tired of the bullying and threats about some work fair place like I have “done something wrong”.

I can change commission structure whenever I want, it is my perogative as the business owner. If the sales person doesnt like it, they can leave. At no time have you not been paid in 2 years. Ever. You have been paid all your wages to date as always.

Additionally, I have been advised I only need to pay commission on money received by the business. If this is the case, you will owe the business a significant sum of money.

We will be in touch in due course.

I cant understand why you were so aggressive and threatening, really, it was not necessary.

Regards

Scott

From: Scott Turner [email address]

Sent: Thursday, 30 December 2010 7:22 PM

To: Emma Criniti

Cc: [email address – Samantha]

Subject: commissions

Hi Emma

After a review of the employment agreement and legal advice it is evidence that Adconnect does not owe you any further commissions. Commissions are only payable when a desposit is secured by yourself. Once you no longer work for the business, that agreement ceases.

I posted today an invoice for Custom Homes commissions you must repay by January 4.

It was disappointing that you considered deposits " not your problem" and its 'too bad" if the business did not get paid them, and that you were to be paid regardless of any deposits, in advance in contradiction of the express commission clause in your employment agreement.

This conduct and attitude has undeniably damaged my business, and left it cash flow poor by incorrectly paying you for commissions not due to you well in advance.

It is also "disappointing", and "horrific" to quote you, to have had only parts of your employment contract quoted and used to try coerce me into paying you additional undue commissions under the threat of a fair work place investigation by January 4, and for you to have deliberatley omitted the issue of deposits on sales contracts being the catalyst for a commisionable sales contract. Clearly you had read the agreement, and did not mention the commision requirements, and as such you lied to your employer to endseavour to steal money.

Unfortunatley this attitude for commissions at any expense has caused my business some short term cash flow issues. Thankfully you made your feelings clear about not caring about the business or the cash receipts to it, which were actually your responsibility. As such we can now all move on.

Please refund the over paid commissions as requested by January 4. At this stage I have not done a full sales review and am happy to be refunded as detailed in the invoice posted today December 30. At this stage I do not have time for a full sales commission review, though should one be required, one will be done for which the business will need to be refunded for overpayments to you.

Regards

Scott Turner

(Exhibit A3 documents 25 - 32)

10 The applicant gave evidence that the respondent paid the retainer due to her as well as her outstanding leave entitlements by the end of December 2010 but she has not been paid the commission of $8,528.18 which she maintains is owed to her.

11 The applicant gave evidence that she was terminated by the respondent on 21 December 2010 when she received an email from Mr Turner saying 'ok thanks we will call it quits as of today' and she understood she was no longer employed by the respondent when a further email from Mr Turner was received on that date stating 'Emma – thats (sic) it – we are done' (see Exhibit A3 documents 15 and 18). The applicant gave evidence that she did not receive any letter from the respondent confirming her termination nor was she given reasons for her termination. The applicant gave evidence that after her termination she received numerous harassing and abusive emails from Mr Turner accusing her of theft and threatening her with legal action and the applicant said that this had been a stressful period for her.

12 The applicant stated that on 22 December 2010 she sought out alternative employment and she attended three job interviews and received two offers of employment. The applicant commenced employment in a similar role on 24 January 2011 as a sales executive for BPA and her current employment conditions were confirmed in a letter from BPA dated 28 March 2011 (Exhibit A3 document 50). The applicant stated that she is earning the same base rate of pay as she was paid by the respondent however commission payments are structured differently and the applicant submitted taxation documentation for the period up to 30 June 2010 and 30 June 2011 confirming her reduced income (Exhibits A1 and A2).

13 Under cross-examination the applicant confirmed that she was previously terminated by the respondent in May 2010. The applicant agreed that she claimed a commission for Austral Bricks in the email she sent to Mr Turner on 16 December 2010 and it had not yet signed a contract and she also agreed that if one of the respondent's clients ceased trading and did not pay the respondent for advertising then she would not be entitled to be paid commission for this client.

14 Under re-examination the applicant stated that her termination in May 2010 arose due to a dispute with Mr Turner about an advertising billboard not being put up on time and the applicant stated that this issue was dealt with swiftly and she was reinstated the same day Mr Turner terminated her. The applicant maintained that even though she stated in an email she sent to Mr Turner on 16 December 2010 that Austral Brick had not signed the contract at the time she understood that Austral Brick had since sent back a signed contract to Mr Turner.

Respondent's evidence

15 Mr Turner operates the respondent's business along with his partner Ms Samantha Turner. Mr Turner stated that the applicant sold advertising in four areas of the respondent's business. This included advertising in shopping centres whereby the client paid by monthly instalments, advertising for an annual magazine titled WA Custom Homes whereby the client pays a deposit and the balance was paid on publication, advertising for the Perth Vip magazine which is published annually in January and the applicant sold advertising for a website called Perth Building Directory whereby advertisers paid an annual fee.

16 Mr Turner stated that the applicant was a good salesperson but she was aggressive and a bully.

17 Mr Turner said that at the time the applicant was terminated the respondent had cash flow problems and he stated that between approximately $20,000 and $30,000 by way of commission was paid in advance to the applicant and the respondent had not received payments from clients for these sales. Mr Turner stated that the respondent had not received money from clients the applicant was seeking commission payments for in her email sent on 16 December 2010 and he stated that deposits would not be paid to the respondent with respect to these sales until March or April 2011.

18 Mr Turner said the respondent always paid its bills and in the case of the applicant her retainer was not due to be paid until 26 December 2010 and Mr Turner stated that the retainer and annual leave entitlements owing to the applicant were paid on the first day available in late December 2010 due to public holidays occurring during this period. Mr Turner stated that he became concerned when the applicant told him that she would sue the respondent if the retainer and commission owing to her were not paid and the applicant also threatened to damage the respondent's business. Mr Turner stated that he was concerned about her threat given monies were not due to be paid to her until 26 December 2010. Mr Turner said he was also disgusted by the applicant's threat to the respondent's business and her threat to contact the respondent's customers but despite repeatedly asking the applicant to explain these threats she did not respond. Mr Turner stated that the respondent's business operates on goodwill and he was upset by the applicant's threats.

19 Mr Turner maintained that the terms of Clause 1. – Salary Package, Commissions and Reimbursements of the applicant's contract of employment provides that commission is not to be paid if clients had not paid the respondent any money and Mr Turner stated that the applicant's contract is clear about when sales commissions are due and payable. As the applicant is no longer working for the respondent the applicant is also not owed the commission she is claiming. Mr Turner stated that the respondent has received signed advertising orders and deposits from all of the clients the applicant was claiming commission payments for in the email she sent on 16 December 2010 however the art work had not been completed for all of these clients. Mr Turner stated that a number of commission payments were made to the applicant which the respondent did not receive any payments from clients and this included nine clients who had not paid the respondent for services totalling approximately $30,000 and the applicant has therefore been overpaid $4,548 in commission. Mr Turner gave evidence that these commissions should never have been paid to the applicant given the terms of her contract and he stated that he paid the commission to the applicant at the time as he assumed clients would pay these accounts but they did not. Mr Turner confirmed that he did not check to see if these clients had signed bookings prior to paying the applicant her commission however he stated that some clients had signed bookings but had not paid the respondent.

20 Mr Turner confirmed that three of the commissions being sought by the applicant would be due and payable to the applicant under her contract as at the date of the hearing and he maintained that the remainder would not be due to be paid to the applicant until artwork had been completed in August 2011. Mr Turner said that in any event the respondent has no money and he could not afford to pay the applicant any monies owing to her.

21 Mr Turner stated that the applicant was terminated because in her email dated 20 December 2010 she threatened the respondent's business and in doing so Mr Turner maintains the applicant breached Clauses 10, 11 and 12 of her contract of employment. Mr Turner stated that this was not the first time the applicant had been terminated for being abusive towards him and she exhibited a pattern of aggressive behaviour towards him.

22 Under cross-examination Mr Turner stated that the payment of the retainer and commission to the applicant were separate payments and Mr Turner confirmed that the applicant's base salary increased to $60,000 during her employment with the respondent. Mr Turner reiterated that the applicant's contract provides that commission was payable to her when deposit monies and all sales paperwork was received from clients. Mr Turner confirmed that for each client that the applicant was seeking to be paid commission the respondent had received relevant sales paperwork and all deposits had been paid by these clients but this was not the case at the time the applicant sent details of the commission to be paid to her in her email dated 16 December 2010. Mr Turner said that Grandwood Homes and Zorzi Homes had paid deposits but they were no longer going ahead with their advertising and their deposits would be refunded to them. Mr Turner then said that he was unable to confirm if the respondent had received deposits for all clients which the applicant claimed commission for and Ms Turner is the person who does the respondent's bookwork and he assumed that this was the case.

23 When it was put to Mr Turner that throughout the applicant's employment with the respondent she was paid commission each fortnight when she provided the sales paperwork completed for each client, Mr Turner stated that he assumed that everything was correct in relation to these sales and he relied on the information contained in the applicant's emails. Mr Turner was unaware if contracts had been received by the respondent at the time commission payments were made to the applicant and he stated that Ms Turner undertook the administrative role for the respondent and he did not look at the respondent's bookwork. He was therefore unable to say with certainty whether sales paperwork had been received or whether deposits had been paid in relation to commissions paid to the applicant.

24 Mr Turner stated that the artwork for the Custom Homes magazine will not be completed before the end of August 2011 and he maintained that the payment of commission for advertising sold for this magazine would not be paid until the end of August 2011 when the art work was completed.

25 Mr Turner maintained that notwithstanding the terms of Clause 6 of the applicant's contract, the applicant's contract did not cease after three months. Furthermore, the applicant relied upon the terms of this contract given the wording contained in her email she sent to him on 20 December 2010.

26 Mr Turner stated that he did not dispute that the applicant was owed commission payments on 17 December 2010 because he was on holidays at the time and he agreed that he did not say in his email of this date to the applicant about this issue that the applicant was improperly claiming commissions. He then stated that the applicant's contract states that commission payments have to be approved by him. Mr Turner gave evidence that the statement in his note provided with the applicant's pay advice for the wages paid to her on 29 December 2010 that 'commissions will be paid Jan 16' related to commissions that were approved by him (see Exhibit A3 document 33).

27 Mr Turner stated that he could not recall if the letter he sent to the applicant dated 30 December 2010 was the first time he had claimed overpaid commissions from the applicant (Exhibit A3 document 36).

28 Mr Turner confirmed that he terminated the applicant by email on 21 December 2010 and he claimed he did so after the applicant threatened his business in an email she sent to him the day before whereby the applicant threatened to contact the respondent's clients and damage his business. Mr Turner was not prepared to disclose if he was aware if the applicant had contacted any of the respondent's clients in this regard prior to and post her termination.

29 Mr Turner maintained that he sent the applicant a letter of termination containing the reasons for her termination but he does not have a copy of this letter nor did he discover it to the applicant.

30 Mr Turner agreed that he negotiated with the applicant on 21 December 2010 to reduce the commission being claimed by her but he maintained that he did this prior to reviewing the applicant's employment contract and all of the respondent's bad debts and the applicant's sales. Mr Turner stated that notwithstanding committing to pay the applicant commission as at this date he later determined that no commission was owing to the applicant.

31 Mr Turner confirmed that in response to an email the applicant sent to him requesting a payslip he told the applicant to 'piss off' and he stated that his response was not just to her request but to her threats to his business. Mr Turner confirmed that he sent an email to the applicant calling her a greedy bully and he stood by these comments and he confirmed that he told the applicant that he would contact the Australian Taxation Office about the applicant taking cash money for her horse riding business.

32 Mr Turner stated that he was entitled to run his business as he saw fit and he did not have to have an agreed process as to how the applicant was paid commission. Mr Turner stated that he only asked the applicant on a couple of occasions to collect monies owed to the respondent by clients but he maintained that it was the applicant's responsibility not to sell bad debts.

33 Under re-examination Mr Turner stated that the applicant was a good employee but bossy and she would not accept that the respondent could not pay her retainer and commission during a period when the respondent had cash flow problems. The applicant also threatened legal action against the respondent and threatened to damage the respondent's business which was unacceptable and this resulted in her dismissal. Mr Turner stated that commissions paid to the applicant were generous and it was only after she threatened his business that he scrutinised commission already paid to the applicant more closely and he realised that her employment agreement was not being adhered to. Mr Turner maintained that the respondent was not paid until magazines were published and this meant he was paying the applicant in advance which made it difficult for the respondent's cash flow.

34 Mr Turner stated that the applicant lost a good job because she 'abused the boss' and threatened to ruin his business and he stated that the applicant did not work as part of a team. Mr Turner maintained he was a good employer and that the respondent did not have a bad name.

Applicant's submissions

35 The applicant maintains that she was unfairly terminated. The applicant endeavoured to liaise with the respondent about the retainer and commission due to her from 16 December 2010 onwards however the applicant was not given any indication as to whether she would be paid these monies which were due to her and when, and Mr Turner indicated that he was going away. The applicant maintains that the email she sent to the respondent on 20 December 2010 does not contain a threat to damage the respondent's business and had to be read in context and the applicant relies on the fact that at the time the respondent had not committed to pay the retainer and commission due to her. In any event this is not language giving rise to gross misconduct and it was an innocent comment in the context of what was going on at the time. There was also no evidence that she contacted the respondent's clients and she was not cross-examined in any significant way about this issue.

36 The applicant argues that as she was putting pressure on the respondent to make commitments to pay her retainer and commission and as she was contemplating taking legal action in order for her to be paid her retainer and commission this led to her termination. The applicant was under pressure at the time as the respondent had foreshadowed that it was unable to pay her the retainer and commission due to her and in the circumstances there was no reason to terminate the applicant and her termination was therefore unfair. The applicant also maintains that the respondent concedes that if the applicant had not pressured Mr Turner for the wages and commission due to her then she would still be employed by the respondent. The applicant has mitigated her loss, which is not in dispute, and her loss is the period she was unemployed and her ongoing loss in the form of reduced income as detailed in Exhibits A1 and A2 minus two weeks paid to the applicant in lieu of notice.

37 The applicant submits she is owed $8,528.18 in commission. The applicant argues that her written contract of employment expired after three months and what then transpired between the parties was an informal arrangement with respect to the payment of commission to the applicant and it was now not possible for the respondent to renege on its previous arrangement with the applicant whereby commission due to her was paid every fortnight. The applicant also did not have to wait to be paid commission owing to her until a deposit or monies were paid by the client or the advertising was published. In any event the terms of Clause 1 of the applicant's contract of employment are contradictory and there was no evidence in support of the

respondent's claim that the applicant had to wait up to 12 months before she was paid for commission due on sales from the WA Custom Homes magazine and her evidence was that she was paid her commission on a regular basis once she had submitted her claims. The applicant submits that the respondent has only recently checked its clients' sales and its position that commission payments are now not due is a recent invention and has only been raised by the respondent since the relationship between the applicant and the respondent broke down.

38 Even though the respondent had cash flow problems in December 2010 the respondent as her employer had obligations to the applicant to pay the retainer and commission due to her. The applicant endeavoured to negotiate with the respondent about monies owed to her however the respondent avoided any direct contact. Promises and commitments were made by the respondent to pay the commission owing to the applicant and an agreed sum was negotiated and there was no mention at the time that the applicant had to wait for payment until August 2011. The applicant is therefore due the commission she is claiming for work completed during her employment with the respondent even if monies relating to these sales was paid to the respondent after the applicant was terminated.

Respondent's submissions

39 The respondent submits that the applicant was not unfairly terminated. One email sent by the applicant on 20 December 2010 contains a comment by the applicant that she was threatening to harm the respondent's business and this threat was made in contravention of the terms of her contract of employment. The respondent also submits that the applicant's written contract of employment was not for a period of three months even though this is stated in the contract and the respondent argues that the contract rolled over at the end of the three month review period stated in the contract. The respondent denies that the applicant is due the commission she is claiming as at the time she sought payment of her commission, monies had not been paid by the clients.

40 The respondent submits that even though in the past it has relied on receiving deposits to pay the applicant her commission, under the applicant's contract commission is not payable until sales are completed and a completed sale comprises a signed advertising order, a full deposit payment and the artwork layout. The respondent also submits that the applicant did not contest her termination at the time nor was she sympathetic to the respondent's financial situation when she asked to be paid the monies owing to her given that she stated in an email that she did not care about the business or its financial situation.

Findings and conclusions

Credibility

41 I listened carefully to the evidence given by each witness and closely observed them. It is my view and I find that each witness gave their evidence honestly and to the best of their recollection so I accept the evidence they gave. In reaching this conclusion I take into account that the evidence given by both the applicant and Mr Turner was in accord with documentation tendered during these proceedings. Even though I have made this finding I do not accept Mr Turner's evidence about his views about the construction of the applicant's contract of employment with the respondent as this contract is to be interpreted according to its terms.

42 Paragraph 3 sets out the background to the applicant's employment with the respondent.

Was the applicant unfairly dismissed?

43 The applicant claims that she was unfairly terminated by the respondent. The test for determining whether a dismissal is unfair or not is well settled. The question is whether the employer acted harshly, unfairly or oppressively in dismissing the applicant as outlined by the Industrial Appeal Court in ***Undercliffe Nursing Home v Federated Miscellaneous Workers Union of Australia, Hospital Service and Miscellaneous WA Branch*** (1985) 65 WAIG 385. The onus is on the applicant to establish that the dismissal was, in all the circumstances, unfair. Whether the right of the employer to terminate the employment has been exercised so harshly or oppressively or unfairly against the applicant as to amount to an abuse of the right needs to be determined. A dismissal for a valid reason within the meaning of the Act may still be unfair if, for example, it is effected in a manner which is unfair. However, terminating an employment contract in a manner which is procedurally irregular may not of itself mean the dismissal is unfair (see ***Shire of Esperance v Mouritz*** (1991) 71 WAIG 891 and ***Byrne v Australian Airlines*** (1995) 61 IR 32). In ***Shire of Esperance v Mouritz***, Kennedy J observed that unfair procedures adopted by an employer when dismissing an employee are only one element that needs to be considered when determining whether a dismissal was harsh or unjust.

44 The applicant submits that she did not breach her contractual obligations to the respondent nor did the respondent have sufficient reason to terminate her and the email exchange between herself and Mr Turner prior to her termination demonstrates that she was only seeking her retainer and commission owing to her. The respondent maintains that the applicant threatened the respondent's business contrary to the provisions of Clause 11 and 12 of her contract of employment and it was therefore appropriate to terminate her which it did so with the payment of two weeks' notice.

45 After carefully considering the evidence given in these proceedings and the email exchange between the applicant and Mr Turner which resulted in the applicant's termination and the context within which this exchange occurred I find that the respondent did not have sufficient reason to terminate the applicant and that the applicant was unfairly dismissed.

46 Following is a summary of the emails exchanged between the applicant and Mr Turner about the payment of the applicant's commission and retainer from mid December 2010:

- On 16 December 2010 the applicant sent Mr Turner details about the fortnightly commission due to be paid to her up to that date;
- Mr Turner replied on 17 December 2010 at 8.04 am and 12:41 pm indicating that it would be hard to pay her this commission as the respondent had cash flow problems;

- On 20 December 2010 at 11.58 am the applicant emailed Mr Turner as he had not returned her telephone calls from the previous week and she raised a number of issues about sales she was dealing with and she asked for clarification about whether she was still employed and whether or not she would be paid her retainer and when she would be paid the commission owing to her;
- On 20 December 2010 at 12.58 pm Mr Turner asked the applicant not to sell anything as he is 'broke and I cant (sic) pay you' and he stated that he would see what he could do in the New Year. At 1.09 pm that day he referred to cash flow problems that he and the respondent was experiencing and he said he needed a holiday and reiterated that he would contact her in the New Year;
- On 20 December 2010 at 2.03 pm the applicant sought clarification from Mr Turner about whether it was only the commission she was not to be paid at this time and she told him that she was owed her fortnightly retainer and holiday pay up to 11 January 2011, she stated that he could not expect her to wait another two weeks to know whether she had a job or whether she would be paid and she stated that she was happy to stay on if he would pay her the retainer and she would wait for her commission payment;
- On 20 December 2010 at 4.20 pm Mr Turner told the applicant that he was not paying her as he had no money and he stated that he may be able to pay her a couple of weeks' pay in two weeks if he received payments from clients;
- On 20 December 2010 at 5.39 pm the applicant expressed her concern and anger about the way Mr Turner had treated her, she offered to follow up clients and collect outstanding payments even though this was not part of her role and she stated that if she was not paid her retainer, commission and holiday pay in the New Year she would reluctantly contact the Fair Work Ombudsman. The applicant also stated that she had all the respondent's client details and she was 'sure they wont (sic) mind getting a call from me to tell them I got screwed over by you at xmas (sic)';
- On 20 December 2010 at 7.05 pm the applicant again emailed Mr Turner saying she had gone through the bookings she was due to be paid commission for and she stated that the deposits that had been paid for these bookings would cover the commission owed to her and she stated that it was not her fault that clients had not been invoiced or their payments followed up and that she would have been happy to do this if he had asked;
- On 20 December 2010 at 9.06 pm Mr Turner emailed the applicant stating that he could not pay any commission to her, he stated that these clients had not paid deposits even though they had been billed immediately, he talked about cash flow problems the respondent was having, he stated that he could keep her if she was willing to work for three months on wages only but he could not afford to pay her commission and he stated that he would have to close for three months and do all the work himself;
- On 20 December 2010 at 9.10 pm Mr Turner again emailed the applicant stating he was off work until after the following week and she could come into the office after this to go over issues as it was salvageable but he could not afford to pay her the same rates in the New Year;
- On 20 December 2010 at 10.46 pm the applicant emailed Mr Turner stating that he could not change her agreement without consulting her, that her agreement says her commission will be paid fortnightly, that it was wrong of him not to pay the retainer and commission owed to her, that his business problems were nothing to do with her, if he could not afford to pay her then he should tell her so they could sort it out or finish her up properly with the money he owed her or a payment plan and she stated that she had no choice but to take it through the proper channels to be paid what she was owed;
- On 21 December 2010 at 8.27 am Mr Turner emailed the applicant saying 'we will call it quits as of today';
- On 21 December 2010 at 8.59 am, after receiving an email from the applicant whereby she stated how much she enjoyed her job and that she had worked hard for the respondent, Mr Turner told the applicant again that 'we are done', he asked her to leave him alone and he told her he would pay her out in full in a couple of weeks and give her a 'termination form';
- On 21 December 2010 at 3.21 pm the applicant emailed a copy of a letter to Mr Turner that had been mailed to him that day. The letter sought the payment of her retainer for the period 13 December 2010 to 21 December 2010, two weeks' pay in lieu of notice, holiday pay and commission owing to her. Attached to the letter was the commission payment she was seeking which had been sent to Mr Turner by email on 16 December 2010;
- On 21 December 2010 at 8.20 pm Mr Turner responded asking the applicant to adjust the commission she was claiming in relation to three clients which had not paid the respondent and he stated that two of these clients had gone into administration;
- On 21 December 2010 at 9.08 pm the applicant replied to Mr Turner agreeing to deduct two amounts from the commission she was claiming, for clients which had gone into administration;
- On 21 December 2010 at 9.20 pm Mr Turner in reply stated that he could pay the adjusted amount of commission to her on 24 or 25 December 2010 and that this depended on money being paid into the respondent's bank account;
- On 29 December 2010 at 8.18 am the applicant asked Mr Turner if he had paid her as he had agreed to do so on 21 December 2010;
- On 29 December 2010 at 8.23 am Mr Turner told the applicant that he had paid her some money but not the commission and he could not pay this commission until 16 January 2011;

- On 29 December 2010 at 2.56 pm the applicant asked Mr Turner for a payslip for the money he had paid. The applicant stated that her commission was overdue, she was disappointed given his commitment to pay her this money by 24 or 25 December 2010 and she stated that if she did not have her full entitlements and commission paid by 31 December 2010 she would lodge a claim in the Commission on 4 January 2011;
- On 29 December 2010 at 7.18 pm Mr Turner emailed the applicant stating that as he would not have the money by 4 January 2011 she should go to the Commission;
- On 29 December 2010 at 9.11 pm Mr Turner emailed the applicant stating that sales contracts are not valid until the deposit is paid by the client and she would be paid when the contract deposit from which her commission was derived is paid by the client and not before and he stated that a number of sales she had made had failed and he would adjust these sales;
- On 30 December 2010 at 12.11 pm Mr Turner emailed the applicant stating that he could change her commission structure whenever he wanted to and he only needed to pay her commission on money received by the respondent. Given this the applicant will owe the respondent a significant sum of money;
- On 30 December 2010 at 7.22 pm Mr Turner emailed the applicant stating that after reviewing her employment contract and obtaining legal advice the respondent did not owe her any further commission, commission was only payable when a deposit is secured by the applicant and this agreement ceased once the applicant ceased working for the respondent and Mr Turner asked the applicant to refund the overpaid commission by 4 January 2011. Mr Turner reiterated this in an undated letter he sent to the applicant and a further letter sent to the applicant on 30 December 2010 asking for overpaid commission to be repaid to the respondent;
- Around the end of December 2010 Mr Turner provided a pay advice to the applicant for her retainer and holiday pay paid on or around 29 December 2010 and a note with this pay advice stating that 'commissions will be paid Jan 16'; and
- On 13 January 2011 Mr Turner sent a letter to the applicant asking her to repay overpaid commission to the respondent.

47 I find that the respondent had insufficient reason to terminate the applicant. I find that the applicant was terminated by Mr Turner after she sought clarification as to when she would receive her fortnightly retainer and commission owing to her from 16 December 2010 onwards and when this information was not forthcoming and she was not given a firm date as to when these payments would be made to her she foreshadowed taking action to recover the retainer and commission due to her and Mr Turner responded by terminating her. I find that from the commencement of the applicant's employment with the respondent the retainer and commission due to the applicant were paid fortnightly by the respondent, pursuant to an ongoing arrangement between the applicant and Mr Turner and I find that the commission paid to the applicant was 15% of sales made by her each fortnight as calculated by the applicant. I find that the applicant provided details of her completed sales and the nature of the contractual arrangement with the client to Mr Turner and the commission due to her each fortnight and I find that Mr Turner then paid the applicant the commission due to her each fortnight whether or not the respondent had received any money from a client for this advertising. I find that in the period immediately prior to the applicant's termination on 21 December 2010 she and Mr Turner liaised by email about the quantum of the applicant's fortnightly commission payment and the retainer due to be paid to the applicant and when the respondent would make these payments and I find that during this exchange Mr Turner advised the applicant that the respondent was experiencing cash flow difficulties at the time and he was therefore unable to pay the applicant's retainer and commission in the normal manner. I find that as a result of Mr Turner indicating to the applicant that he did not have sufficient funds to pay the applicant her retainer and commission it was unclear to the applicant as at 20 December 2010 if and when she was going to receive these payments. I find that as a result of this uncertainty the applicant became upset and she requested that Mr Turner confirm a date as to when she would be paid her retainer and commission and I find that at the same time she put the respondent on notice that if she was not paid the monies due to her, she foreshadowed taking action against the respondent in order to recover these monies. I also find that it was within this context that the applicant referred to having the respondent's client details and stating to Mr Turner that she was 'sure they wont (sic) mind getting a call from me to tell them I got screwed over by you at xmas (sic)' (Exhibit A3 document 10). I find that Mr Turner took umbrage at the applicant foreshadowing taking possible action to obtain her retainer and commission due to her and as he was under pressure at the time due to the respondent's financial difficulties he responded by terminating the applicant. I find that the respondent reacted negatively and in an unco-operative manner in response to the applicant's attempt to clarify when she would be paid her retainer and commission even though the applicant indicated to Mr Turner during their email exchange that she was happy to wait to be paid the commission owing to her. I find that when the respondent terminated the applicant it therefore did not have sufficient reason to terminate the applicant and the applicant was therefore unfairly dismissed.

48 I reject the respondent's claim that it terminated the applicant because she breached her contract of employment with the respondent given her comments to Mr Turner on 20 December 2010. I find that the comments made by the applicant in the email she sent to Mr Turner on 20 December 2010 at 5.39 pm, which are contained in paragraph 46, did not warrant her termination given the context in which these comments were made nor in my view were these comments in breach of Clauses 11 and 12 of the applicant's contract of employment as claimed by Mr Turner. Clauses 11 and 12 read as follows:

11. Information Acquired During Employment

11.1 You shall keep confidential all information of any kind concerning the business of Adconnect and any of its affiliated companies including, without limitation, any formula, process, method of manufacture, trade secret, record, data or any information concerning the business, affairs or customers of the Group which may come to your knowledge, except:

(a) disclosure or use in the proper course of your duties;

(b) for information which is freely available to the public; or

(c) to the extent you are required to disclose information by law or requirement of any regulatory body.

11.2 All products of your services created in the course of your employment with Ad connect (sic) belong to Adconnect. The physical ownership of all lists, files, correspondence, advertising contracts, agreements and other materials stored electronically or otherwise shall vest in Adconnect.

11.3 You must not without the prior written consent of the Company or any Relevant Group Member directly or indirectly be concerned or interested whether as principal, agent, partner, shareholder, director, employee or otherwise in any firm, corporation or entity involving the conduct of, or preparation for, any business in competition with, or of a similar nature to, any business for the time being carried on by the Company or any Group Member during your employment with the Company.

12. Your Obligations after Employment Ceases

12.1 Confidentiality

(a) Subject to paragraph (b), you undertake to the Company and each relevant group member that you will not, at any time after your employment ceases, in any manner directly or indirectly disclose or use any confidential information of any kind, including, without limitation, any formula, process, method of manufacture, trade secret, record, data or any information concerning the business, affairs or customers of the Group acquired by you in the course of or in consequence of your employment, whether before or after the date of this Agreement.

(b) Paragraph (a) does not apply to the disclosure of information, which is freely available to the public, or disclosures required of you by any applicable law or requirement of any regulatory body,

12.2 Covenant not to Compete

(a) This Clause 12.2 and the Schedule have effect as if they consisted of separate provisions, each being severable from the other. Each separate provision consists of the covenant set out in Clause 12.2(b) combined with each separate period referred to in the Schedule combined with each separate area referred to in the Schedule. If any of those separate provisions is invalid or otherwise unenforceable for any reason, the invalidity or unenforceability shall not affect the validity or enforceability of any of the other separate provisions.

(b) You covenant with the Company that, within any of the periods and in any of the areas specified in the Schedule, neither:

(i)you whether

(A) directly or indirectly; or

(B) on your own account; or

(C) jointly with or on behalf of any other person or corporation as an officer, employee, independent contractor, partner, joint venture or agent; or

(D) as principal, employee, partner, agent, director or otherwise on any account or pretence;

(ii) any agent, independent contractor or employee while employed or engaged by you or by any firm or corporation in which you have a substantial interest whether that interest is legally enforceable or not; or

(iii) any firm or corporation in which you may be interested as an employee, director, shareholder, beneficial owner or controller (whether that control can be legally enforced or not) of shares, lender or adviser or otherwise,

will:

(iv) carry on or be engaged or concerned in, any business in competition with, or of a similar nature to, any business being carried on by the Company or any Group Member as at the Termination Date; or

(v) either on your own account or for any person, firm, company, organisation or entity solicit or endeavour to solicit or entice away from the Company or the Group any director or employee or any customer or supplier of the Group.

12.3 Exception

Clause 12.2 shall not prevent you from holding less than 5% of the issued capital of any company whose shares are listed on the Australian Stock Exchange Limited or any other recognised exchange.

12.4 Remedies

You acknowledge that the remedy at law for breach of Clause 12.1 or 12.2 would be inadequate and that temporary and permanent relief by way of injunction against you may be granted in any proceedings which the Company or any relevant group member or any persons on its behalf may bring to enforce any

of the provisions of that clause without the necessity of proof of actual damage suffered by the Company or any relevant group member as the case may be.

12.5 Protection of goodwill

You acknowledge that having regard to your duties with the group, your undertakings in Clauses 12.1, 12.2 and 12.4 are reasonable and necessary for the protection of the goodwill of the group.

(Exhibit A3 document 3)

49 I find that there was no evidence that both prior to and after the applicant was terminated that she disclosed any information relevant to the respondent's business to a third party nor was there any evidence that the applicant was competing with the respondent during her employment with the respondent. Clause 12 of the applicant's contract refers to obligations on the applicant subsequent to her employment ceasing and there was no evidence given at the hearing that the applicant was competing with the respondent or soliciting the respondent's customers after she ceased employment with the respondent.

50 I am satisfied on the evidence that the working relationship between the applicant and respondent has broken down such that an order for reinstatement or re-employment is impracticable. In any event the applicant is not seeking reinstatement. In reaching this view I note the tone of Mr Turner's emails following the applicant's termination and the applicant's evidence that since her termination she has received numerous harassing and abusive emails from Mr Turner.

51 I therefore now turn to the question of compensation. I apply the principles set out in ***Bogunovich v Bayside Western Australia Pty Ltd*** (1998) 78 WAIG 3635 and ***Tranchita v Wavemaster International Pty Ltd*** (1999) 79 WAIG 1886. The applicant has a duty to mitigate her loss however the onus of proof of failure to mitigate loss is on the respondent. In ***John Palermo v Charles Rosenthal*** (2011) 91 WAIG 129 at 159 Smith AP and Beech CC stated the following with respect to mitigating loss:

> Whether an employee has mitigated his or her loss usually turns on whether he or she has taken reasonable steps to find alternative employment after their dismissal. The reasonableness of the conduct depends upon an assessment of the facts and circumstances in each case: *BHP Billiton Iron Ore Pty Ltd v The Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch* (2006) 86 WAIG 642 [101] – [103]. However, it is for the employer to establish that an employee has failed to take reasonable steps to mitigate. If the employee obtains alternative employment, the employee's entitlement to compensation is reduced by the amount received from the alternative work. If the employee fails to mitigate, the loss is reduced by the amount they could have earned if they had done so: *Merredin Customer Service Pty Ltd* [72].

52 On the evidence, I am satisfied the applicant took reasonable steps to mitigate her loss. After being terminated and even though it was during the Christmas holiday period the applicant immediately applied for at least three positions and was successful in obtaining alternative employment in a similar role which she commenced on 24 January 2011. I find that in this position the applicant is earning the same annual base salary as she had with the respondent but she has a different commission structure which, from the taxation records tendered into evidence show that the applicant is earning approximately $38,616.40 per annum less than what she was earning with the respondent.

53 In assessing compensation due to the applicant I find that the applicant would not have remained employed with the respondent for a period any longer than eight weeks. In reaching this conclusion I take into account that the relationship between the applicant and the respondent had to some extent broken down as at 21 December 2010 however a situation of this nature had occurred previously and the applicant and Mr Turner were able to work through that issue. In this particular instance and because of the financial pressures that the respondent was facing it is my view and I find that it would have been within a period of approximately eight weeks that the respondent may well have sought out alternatives to retaining the applicant in her position. In the circumstances I find that the applicant is entitled to be paid eight weeks' remuneration as compensation for her unfair dismissal less the notice paid to her by the respondent at termination and less any income she has earned during this period.

54 The applicant was terminated on 21 December 2010 and paid two weeks' notice which is to be deducted from the compensation awarded to her. According to the applicant's bank records and the pay advice that issued to her on 29 December 2010 the applicant was paid up to and including 4 January 2011. The applicant therefore had no earnings for two weeks and three days until she commenced employment in her new position on a reduced income and I calculate the compensation owing to the applicant as follows:

> The period 5 January 2011 to 21 January 2011 inclusive (13 days) = $5,285.80 gross
>
> (Income earned with respondent for 2009/2010 tax year $106,018 ÷ 52.14 weeks = $2033 gross per week. Two weeks + three days = $5,285.80)
>
> The period 24 January 2011 to 15 February 2011 inclusive (17 days) = $2,760.80 gross
>
> (Income earned with respondent for 2009/2010 tax year $106,018 ÷ 52.14 weeks = $2033 gross per week. Average income in new position during this period calculated using income earned from 24 January 2011 to 30 June 2011 - $28,084 ÷ 23 weeks = $1,221 gross per week. Difference per week in income = $812 gross. Three weeks + two days = $2,760.80)

55 An order will therefore issue that the applicant be paid $8,046.60 gross as compensation for her unfair dismissal.

Claim for a Denied Contractual Benefit

56 The applicant is claiming $8,528.18 in commission owing to her under her contract of employment with the respondent.

57 The claim before the Commission is one for an alleged denial of a contractual benefit and the law as to these matters is well settled. For an applicant to be successful in such a claim a number of elements must be established. The claim must relate to

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

58 It is for the Commission to determine the terms of the contract of employment and to ascertain whether the claim constitutes a benefit which has been denied under the contract of employment, having regard to the obligations on the Commission to act according to equity, good conscience and the substantial merits of the case and consider the relief to be ordered in the event the claim is proved (***Belo Fisheries v Froggett*** (1983) 63 WAIG 2394; ***Waroona Contracting v Usher*** (1984) 64 WAIG 1500; ***Perth Finishing College Pty Ltd v Watts***).

59 A contractual agreement between parties is to be interpreted using the ordinary words of the contract unless there is ambiguity. In ***Noel Edward Knight v Alinta Gas Ltd*** (2002) 82 WAIG 2392 at 2397 His Honour, Sharkey P stated the following:

> Somewhat axiomatically, there is no scope for interpreting a contract unless there is ambiguity or the words in issue are otherwise susceptible to more than one meaning (see *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (op cit) at page 352 per Mason J and see also *Rankin v Scott Fell and Co* (op cit)).
>
> There are no strict rules of law governing the interpretation of contracts apart from the relevant rules of evidence. The plain, ordinary or natural meaning of the words used by the parties to express a term will prevail unless the context warrants otherwise. However, the process of construction of a contractual provision means more than merely assigning to the words of a written instrument their plain and ordinary meaning (see *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (op cit) at page 348 per Mason J). The parties' apparent or objective intentions, as evidenced by the context in which they contracted, control the process of interpretation, an issue which the court necessarily approaches objectively (see *The Life Insurance Co. of Australia Ltd v Phillips* [1925] 36 CLR 60).

60 In determining whether or not a contractual entitlement is due to the applicant the onus is on the applicant to establish that the subject of the claim is a benefit to which she is entitled under her contract of employment.

61 There is no issue in this matter and I find that at all material times the applicant was an employee of the respondent and she was employed under a contract of service. I find that this claim is also an industrial matter for the purposes of s 7 of the Act as it relates to payments the applicant claims are due to her which arise out of the applicant's employment with the respondent. It is also common ground that the benefits that the applicant is claiming do not arise under an award or order of this Commission. The issue to be determined therefore is what were the terms of the applicant's contract of employment with the respondent and whether it was a term of the contract of employment that the applicant is entitled to the commission payment she is seeking.

62 It was not in dispute and I find that after the applicant's termination Mr Turner told the applicant that her retainer would be paid on the first available date after it was due because of Christmas public holidays and the respondent paid the applicant her retainer on or about 29 December 2010 but not the commission due to her (see Exhibit A3 document 34).

63 The applicant maintains that she is owed the commission initially agreed to be paid to her by Mr Turner in his email dated 21 December 2010, which he sent to her at 9.20 pm after she was terminated. This commission was based on amounts specified in the applicant's email to Mr Turner dated 16 December 2010, less the amount she agreed to offset against this commission for sales the respondent did not receive payment for in the amount of $8,528.18. The respondent does not contest the quantum of the commission being claimed by the applicant but argues that the applicant is not due payment of this commission as the requirements contained in Clause 1 of the applicant's contract of employment with respect to the payment of commission to the applicant have not been complied with. The respondent also maintains that the applicant is not due these payments as she was not employed when the respondent received payments for these sales and no commission is due to be paid to the applicant because some clients did not pay for advertising arranged by the applicant for which she was already paid commission. The respondent is therefore claiming that the applicant owes the respondent $4,548 by way of reimbursement of this commission.

64 I find that when the applicant commenced employment with the respondent on 23 February 2009 her terms and conditions of employment were those contained in the applicant's written contract of employment with the respondent and I find that this contract expired after three months given the express terms of Clause 6 (Exhibit A3 document 3). I find that notwithstanding this the applicant and the respondent continued to rely on the contract as a basis for the terms and conditions of the applicant's employment with the respondent, as varied from time to time by agreement between the applicant and Mr Turner. I find that based on the requirements contained in Clause 1 of the applicant's written contract of employment and by agreement between the applicant and Mr Turner the method by which the applicant was paid commission was as follows. The applicant sold advertising on behalf of the respondent and she was paid 15% of the value of the sale in commission upon notifying the respondent of this sale. Relevant paperwork with respect to these contracts was then forwarded by the applicant to Mr Turner. Commission due to the applicant with respect to these sales was paid regularly each fortnight to her and I find that this arrangement was the custom and practice as to how the applicant was paid her commission throughout her employment with the respondent whether or not the respondent received a deposit or the full amount for advertising sold by the applicant and whether or not art work had been completed for each sale. I find that the commission being claimed by the applicant is for 15% of advertising sold by the applicant and as I find that sales paperwork and deposits for these sales were received by the respondent prior to the hearing, as confirmed by Mr Turner, and this was in accord with the requirement for the payment of commission to the applicant in Clause 1 of her written contract of employment, I find that the applicant is entitled to be paid the commission she is claiming. I also find that the applicant is entitled to this payment even though she ceased being employed by the respondent as she completed the sales for which she is claiming commission prior to her termination.

65 I note that apart from assertions made by Mr Turner, no particulars of any offset which should apply to the commission being claimed by the applicant was provided by the respondent. Even though Mr Turner referred to proceedings occurring in another place with respect to recovering monies the respondent claimed the applicant owed to the respondent and it sought to tender confirmation of these proceedings, leave was not granted to tender this information as this document had not been discovered to the applicant prior to the hearing, nor was the content of this document put to the applicant in cross-examination. In the event I find that even if this document was tendered into the evidence it would not have assisted the respondent as the claims against the applicant have not been proven.

66 When taking into account equity and fairness and the substantial merits of this case and as I have found that the commission being claimed by the applicant should be paid to the applicant, an order will issue that the respondent pay the applicant $8,528.18 by way of commission to the applicant.

2011 WAIRC 00953

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EMMA CRINITI
	APPLICANT
	-v-
	SCOTT TURNER FAMILY TRUST TRADING AS VIP PUBLISHERS AND ADCONNECT LOCAL MARKETING
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 11 OCTOBER 2011
FILE NO/S	U 4 OF 2011
CITATION NO.	2011 WAIRC 00953

Result	Upheld and Order issued
Representation	
Applicant	Mr P Mullally (as agent)
Respondent	Mr S Turner

Order

HAVING HEARD Mr P Mullally as agent on behalf of the applicant and Mr S Turner 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 Scott Turner Family Trust trading as VIP Publishers and Adconnect Local Marketing be substituted thereof.

2. DECLARES THAT the dismissal of Emma Criniti by the respondent was unfair and that reinstatement is impracticable.

3 ORDERS THAT the respondent pay Emma Criniti compensation in the sum of $8,046.60 gross within 14 days of the date of this order.

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

2011 WAIRC 00952

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EMMA CRINITI
	APPLICANT
	-v-
	SCOTT TURNER FAMILY TRUST TRADING AS VIP PUBLISHERS AND ADCONNECT LOCAL MARKETING
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 11 OCTOBER 2011
FILE NO/S	B 4 OF 2011
CITATION NO.	2011 WAIRC 00952

Result	Upheld and Order issued
Representation	
Applicant	Mr P Mullally (as agent)
Respondent	Mr S Turner

Order

HAVING HEARD Mr P Mullally as agent on behalf of the applicant and Mr S Turner 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 Scott Turner Family Trust trading as VIP Publishers and Adconnect Local Marketing be substituted thereof.
2. DECLARES that the respondent denied Emma Criniti a benefit under her contract of employment.
3. ORDERS that the respondent pay Emma Criniti $8,528.18 gross within 14 days of the date of this order.

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

2011 WAIRC 00822

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DENISE DRAKE-BROCKMAN
	APPLICANT
	-v-
	THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER SECTION 7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
HEARD	MONDAY, 18 APRIL 2011 AND TUESDAY, 19 APRIL 2011
DELIVERED	FRIDAY, 12 AUGUST 2011
FILE NO.	U 82 OF 2010
CITATION NO.	2011 WAIRC 00822

CatchWords	Summary termination on notice – principles – procedural fairness – principles – s 29(1)(b)(i) *Industrial Relations Act 1972* (WA)
Result	To be listed for further hearing
Representation	
Applicant	Mr M Clancy (as agent)
Respondent	Mr D Matthews (of counsel)

Reasons for Decision

1 Ms Denise Drake-Brockman (the applicant) made an application pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979* (WA) (the Act) for an order pursuant to s 23A of the Act. The applicant claims that she was harshly, oppressively and unfairly dismissed by The Minister for Health in his incorporated capacity under section 7 of the *Hospitals and Health Services Act 1927* (WA) as the hospitals formerly comprised in the Metropolitan Health Service Board (the respondent). The applicant commenced employment with the respondent in 1988 and became a level 1 mental health nurse in 2005.

2 The applicant was terminated on 28 April 2010 with five weeks payment in lieu of notice. The applicant alleges the dismissal to be harsh and unfair and seeks reinstatement without loss of entitlements as a result of the dismissal. The respondent submitted the applicant was terminated for misconduct relating to the fraudulent claiming of meal expenses and seeks an order dismissing the application.

Background to the application

3 Conciliation proceedings took place on 21 June 2010 and 14 February 2011 before Scott ASC. No agreement was able to be reached and the applicant sought to have the matter heard and determined. Subsequent to the second conference, the application was referred back to Beech CC for reallocation.

Background to proceedings

4 Prior to the matter being reallocated Beech CC listed a preliminary issue for hearing and determination relating to the issue of onus in such proceedings. Onus in matters of summary termination is on the applicant to, on the balance of probabilities, demonstrate that the dismissal was harsh, oppressive or unfair recognising that the onus is on the respondent to prove that the summary dismissal was justified, such principles having been reflected in *Newmont Australia Ltd v Australian Workers' Union, West Australian Branch, Industrial Union of Workers* (1988) 68 WAIG 677, 679. The respondent submitted that the evidentiary onus is similar in all applications of unfair dismissal whether the dismissal was summary or not and indeed whether the employee is dismissed with or without notice *The Construction, Forestry, Mining and Energy Union of Workers v Fieldway Enterprises Pty Ltd* (2002) 82 WAIG 873 [2].

5 The matter was then reallocated to Mayman C and listed for hearing. The matter was heard on 18 and 19 April 2011. Evidence was given by the applicant and on behalf of the respondent by Mrs Tamara Sweeney an industrial relations advisor employed by the respondent to provide advice to the investigator from time to time regarding the alleged misuse of the meals and entertainment expenses by a number of employees.

6 Following the hearing the Commission sought further information from the parties. Subsequently written submissions were received by the Commission on 5 and 11 July 2011.

General background

7 A brief history of the matter is as follows. The applicant has worked as an employee of the respondent for some 23 years, initially as a ward clerk principally employed at Sir Charles Gairdner and Royal Perth Hospitals. In 2005 she became a registered nurse and was then employed as a level 1 nurse at Graylands Hospital where she worked through until her termination for serious misconduct on 28 April 2010 (exhibit R18).

8 A salary sacrifice arrangement became available for employees of the respondent in 1998 whereby such persons could have a portion of salary put to one side to enable expenses to be deducted from pre-tax income. This arrangement was then organised through one contractor, namely McMillan Shakespeare. The respondent later contracted the arrangements out to two contractors: SmartSalary and Paradigm.

9 The salary sacrifice scheme was expanded in 2004 to include meal entertainment expenses, whereby an employee, in this case the applicant, was able to spend salary on restaurant and hotel meals and have the money reimbursed as pre-tax income. Such an arrangement allowed for employees of the respondent to participate in the system by signing up with either SmartSalary or Paradigm. At its height there were 8,000 employees of the respondent claiming meals and entertainment expenses as pre-tax income. An important aspect of the scheme was that employees were required to incur the expenditure at a restaurant or hotel. In other words, it was necessary that the employee actually met the expense they were seeking to subsequently claim (exhibit R2). Original receipts were able to be photocopied or scanned by the employee at the respondent's place of work and forwarded electronically to the provider. The employee then retained the original receipt and claim form.

10 There were two methods by which employees of the respondent could participate in the scheme. Either:

> a certain amount of money per fortnight could be put aside and employees could draw down on those claims once they had the receipts; or
>
> employees could submit receipts and ask for the money to be set aside.

Seemingly, the contractors responsible for processing the claims did not undertake internal verification or cross-checking of claims to ensure that the same expenditure or claim was not being sought by other employees with the same receipt(s). Such an approach was far from satisfactory as the respondent had contracted the responsibility out to two contractors and employees could be members of either scheme.

11 In October 2008 an employee of SmartSalary received a claim from an employee of the respondent and soon after received another claim from a different person. That person noticed that the same receipt was being submitted by two separate employees. Each employee had claimed to have made the expenditure and then subsequently submitted the receipt as a claim. The two employees concerned were interviewed and claimed that the practice of employees sharing receipts was commonplace. As a result of this discovery in October 2008 the respondent carried out an investigation in respect of a sample of the respondent's employees. A number of irregular claims were revealed and another, more detailed investigation was conducted. As a result, a total of 253 employees faced allegations of improper use of the system. One of these employees was the applicant.

Respondent

12 It was not in dispute that the applicant joined the meals reimbursement system through SmartSalary in 2005. Mrs Sweeney gave evidence for the respondent that the Corporate Governance Directorate undertook an audit of a number of employees regarding meal entertainment expenses. Mrs Sweeney gave evidence that the scope of the audit was that anyone claiming over $10,000 in a particular year (or more than 20% of their income) became the subject of the audit.

13 The witness gave evidence relating to the process of joining the scheme. Any employee joining the scheme was required to fill out a salary packaging application form (exhibit R1). Relevant to the completion of such forms was the declaration an employee was required to sign that:

> I hereby declare that:
>
> - the information provided on this form is to my knowledge true and correct,
> - I have read and accept the SmartSalary Terms and Conditions available on Smart Salary's website,
> - I have read and accept the SmartSalary Salary Packaging Handbook, and
> - I have seen a qualified independent financial adviser regarding my Salary Packaging arrangements

Mrs Sweeney gave evidence that this form was operative at the time the applicant became a member of the scheme. Also submitted in evidence was the documentation Salary Packaging Services for Employees – Terms and Conditions (exhibit R2) and Salary Packaging at the WA Government Health Services – Employee Handbook (exhibit R3).

14 The respondent submitted the issues of concern arose from the claim as forwarded by the applicant through to SmartSalary at 7.15 pm on 13 July 2008. The respondent submitted that this particular claim covered the period from 3 May 2008 to 10 July 2008. Of particular concern amongst the claim were receipts purporting to represent meals purchased from:

Coco's an amount of $405.30;

Villa Italia an amount of $709.60;

Harvest an amount of $1297.30;

7 Spices an amount of $245.10;

Seven Seas Bar & Restaurant an amount of $126.80;

Atrium Buffet an amount of $320.70; and

Last Drop Brewery Restaurant an amount of $156.20.

15 As part of the initial investigation it was determined that seven other people had made the same claims using one or all seven of the receipts referred to in [14] of my reasons. The total claims made by the applicant over the three month period totalled $3,722.36. It was submitted by the applicant in her correspondence of 13 January 2010 (exhibit R8) that the expenses from the seven restaurants had never been incurred by herself.

16 Formal correspondence relating to these claims (exhibit R6) was forwarded to the applicant in January 2010 by the respondent. The correspondence:

Dear Ms Drake-Brockman

NOTIFICATION OF SUSPECTED MISCONDUCT

I suspect that you may have committed acts of misconduct in connection with your salary packaging arrangement with your employer, the Minister for Health in his incorporated capacity under s7 of the *Hospitals and Health Services Act* 1927 (WA) as the board of the Hospitals formerly comprised in the Metropolitan Health Service Board.

In particular it is alleged you have committed acts of misconduct in that:

1. On or about the dates set out in Column 1 of **Table 1** (**attached**), you made improper use of the meal entertainment reimbursement process in that you made a claim where more than one person made a claim using the same receipt or a copy thereof. It is alleged that each claim made by you listed in Column 1 of Table 1 is a separate act of misconduct.

A copy of each receipt listed in Table 1.

I am hereby providing you with an opportunity to submit an explanation in relation to the suspected acts of misconduct.

Your response to me must be in writing in an envelope marked **PRIVATE AND CONFIDENTIAL** and must be received at my office at:

Office of the Director General

Department of Health

189 Royal Street

EAST PERTH WA 6004

within 5 working days on receiving this letter.

Having considered any explanation and evidence you may provide, I may then do one of the following:

1. inform you that no further action will be taken;
2. inform you that I propose to take disciplinary action against you and provide you with an opportunity to comment about the proposed action which may include the termination of your employment;
3. inform you that I intend to have the matters further investigated.

If you have any questions regarding the allegations or the evidence put to you, you should contact Noel Stone at the Corporate Governance Directorate on 08 9222 2152.

If you choose to seek professional advice, you should do so in sufficient time to provide your response.

Given the serious nature of the alleged misconduct and the need for you to properly respond, I am relieving you of the requirement to attend at your workplace until further notice from me. Your pay and accumulation of entitlements will not be affected during this period.

Yours sincerely

Dr Peter Flett

DIRECTOR GENERAL

January 2010

(exhibit R6)

17 Attached to the correspondence was a table of dates, claim reference numbers, dining establishments and receipts where the respondent asserted the applicant had made improper use of the meal entertainment reimbursement process:

TABLE 1

Denise Drake-Brockman

Sharing

Date of Your Claim	Date of Other Claim	Claimant's Name	Claim Ref No.	Establishment	Date of Receipt	Value of Receipt
	06/06/2008	Gail Farrington	330980	Coco's	27/05/2008	$405.30
	26/08/2008	Lynne Beech	368879	Coco's	27/05/2008	$405.30
	31/07/2008	Trina Deakin		Coco's	27/05/2008	$405.30
13/07/2008		**Denise Drake-Brockman**	**398735**	**Coco's**	**27/05/2008**	**$405.30**
	07/08/2008	Mark Shooter	361184	Coco's	27/05/2008	$405.30
	15/08/2008	Trina Deakin		Villa Italia	20/06/2008	$709.60
	24/07/2008	Mark Shooter	345274	Villa Italia	20/06/2008	$709.60
13/07/2008		**Denise Drake-Brockman**	**398735**	**Villa Italia**	**20/06/2008**	**$709.60**
	31/10/2008	Justin Dorigo		Villa Italia	20/06/2008	$709.60
	26/08/2008	Lynne Beech	368931	Villa Italia	20/06/2008	$709.60
	14/09/2008	Marian O'Farrell	382334	Villa Italia	20/06/2008	$709.60
	04/07/2008	Gail Farrington	348784	Villa Italia	20/06/2008	$709.60
13/07/2008		**Denise Drake-Brockman**	**398735**	**Harvest**	**06/10/2007**	**$1,297.30**
	15/5/2008	Lynne Beech	322257	Harvest	06/10/2007	$1,297.30
	24/02/2008	Marian O'Farrell	275185	Harvest	06/10/2007	$1,297.30
	29/03/2008	Mark Shooter	294558	Harvest	06/10/2007	$1,297.30
	24/03/2008	Mark Shooter	291453	Harvest	06/10/2007	$1,297.30
13/7/2008		**Denise Drake-Brockman**	**398735**	**7 Spices**	**05/06/2008**	**$245.10**
	04/08/2008	Dianne Passamani	361458	7 Spices	05/06/2008	$245.10
	04/07/2008	Gail Farrington	348784	7 Spices	05/06/2008	$245.10
	26/08/2008	Lynne Beech	368931	7 Spices	05/06/2008	$245.10
	14/09/2008	Marian O'Farrell	382334	7 Spices	05/06/2008	$245.10
	24/07/2008	Mark Shooter	354278	7 Spices	05/06/2008	$245.10
	15/08/2008	Trina Deakin		7 Spices	05/06/2008	$245.10
	26/08/2008	Lynne Beech	368929	Seven Seas Bar	03/05/2008	$125.80
	14/09/2008	Marian O'Farrell	382334	Seven Seas Bar	03/05/2008	$125.80
	15/08/2008	Trina Deakin		Seven Seas Bar	03/05/2008	$125.80
	04/07/2008	Gail Farrington	348784	Seven Seas Bar	03/05/2008	$125.80
	24/07/2008	Mark Shooter	354278	Seven Seas Bar	03/05/2008	$125.80
13/07/2008		**Denise Drake-Brockman**	**398735**	**Seven Seas Bar**	**03/05/2008**	**$125.80**
13/07/2008		**Denise Drake-Brockman**	**398735**	**Atrium Cocktail Bar & Buffet**	**10/06/2008**	**$320.70**
	26/08/2008	Lynne Beech	368920	Atrium Cocktail Bar & Buffet	10/06/2008	$320.70
	31/07/2008	Trina Deakin		Atrium Cocktail Bar & Buffet	10/06/2008	$320.70
	06/06/2008	Gail Farrington	330980	Last Drop Brewery	02/06/2008	$156.20
	31/07/2008	Trina Deakin		Last Drop	02/06/2008	$156.20

Date of Your Claim	Date of Other Claim	Claimant's Name	Claim Ref No.	Establishment	Date of Receipt	Value of Receipt
				Brewery		
13/07/2008		**Denise Drake-Brockman**	**398735**	**Last Drop Brewery**	**02/06/2008**	**$156.20**
	07/08/2008	Mark Shooter	361182	Last Drop Brewery	02/06/2008	$156.20
	26/08/2008	Lynne Beech	368882	Last Drop Brewery	02/06/2008	$156.20

[my emphasis]

18 The respondent submitted a series of receipts (exhibit R7) including copies of similar claims that had been made by various persons including Ms Deacon, Ms Farrington, Ms Beech, Mr Shooter, Ms O Farrell and Ms Passamani as well as the applicant. With respect to each of the seven receipts made by the applicant there were matches with other persons, sometimes five, sometimes seven and sometimes one or two persons. In addition to the correspondence forwarded by the respondent to the applicant it was submitted that the copy of each claim page from other employees referred to in table 1 of exhibit R6 would be submitted as part of the evidence package relating to the applicant in order for her to respond (exhibit R7).

19 In response to the correspondence from the respondent the applicant submitted:

13 January 2010

Dear Sir/Madam

Re: <u>NOTIFICATION OF SUSPECTED MISCONDUCT</u>

I strongly deny knowingly or deliberately committing any act of misconduct in connection with my salary packaging arrangement.

I have no knowledge as to how the receipts listed in Table 1 came to be included with the receipts that I submitted on the 13th July 2008 as part of my claim for meals reimbursement.

I have never shared receipts with any of the persons listed on Table 1 or any other person at any time. I do not associate with any of the persons on Table 1. I have never worked with any of the persons on Table 1. This can be verified by the nurse managers at Graylands Hospital.

I obtained a meal entertainment card at the beginning of September 2009. Prior to this I kept receipts for meals I had paid for and were [sic] entitled to claim for under the salary packaging arrangement.

I have on many occasions accumulated a number of receipts over some time before having the time to submit a claim. I have not always dealt with paperwork in a timely manner and at times was so far behind that I made an error of judgement and tried to complete my paperwork whilst on afternoon shift at work. I now realize that this was not the right thing to do and sincerely regret doing so.

My meal receipts were taken to work to be photocopied, sorted and listed and eventually faxed to Smart salary [sic]. This process would sometimes be started without much progress being made due to the demands of the shift. Sometimes it would take several shifts as I may only have a small window of opportunity to begin the processing task. I remember having large amounts of receipts at times as I would eat out several times every week and would just put them in a plastic bag to sort through when I had time. The amounts on the receipts and the number of receipts varied over time and I did not always pay much attention to the details as I was filling out the paperwork. I remember being focussed on the patients in the ward and it was a very busy ward on most afternoon shifts.

I was not the only staff member to complete salary packaging paperwork on an afternoon shift as a lot of staff do not have access to a photocopier or fax machine outside of work. There were times that more than one person would be sorting through their receipts on afternoon shifts.

I remember having to constantly leave the desk that I had my paperwork spread out on in order to attend to patient's requests, phone call, visitors etc. The ward that I was working on was very busy on afternoon shifts and I was in and out of the office for extended times. I did not have time to pack up my paperwork when a patient came to the office door for immediate attention and would just leave receipts lying around unattended on the desk whilst on the ward. At times on return to the office another staff member would have moved the receipts in order to make a clear work space and I sometimes remember having to try sort out moved paperwork including numbers of individual original receipts. Some of these original receipts had been photocopied in preparation to fax to Smart salary [sic].

I do not recall ever seeing the receipts listed on Table 1 and would certainly never knowingly claim that they were my receipts. The period of time that has lapsed since 13th July 2008 makes it extremely difficult to remember exact details of what might have occurred on the ward whilst I was processing paperwork related to salary packaging.

My paperwork relating to patient care has always been acceptable but I admit that my personal paperwork related to other aspects of my life has been less than satisfactory. It is possible that the receipts listed in Table 1 belonged to another person who was sorting their receipts in the office at the same time that I was processing my receipts. As previously stated there were times that I had returned to the office after seeing to a patient to find that another employee had in my absence cleared the desk of my receipts in order to create a work space. On another afternoon shift when returning to the task I have not clearly checked the paperwork that I had packed away from previous shifts and have unknowingly included the receipts that were not mine when finishing the claim process.

> I have now been through all my paperwork and have original receipts for 478 claims, totalling $22,476.81 submitted over the period 4th October 2006 to the 8th May 2009. These are all my receipts for meals that I have paid for and can be produced immediately.
>
> I would like to reimburse any amount that is necessary as a result of this incident and furthermore any financial penalty that you may wish to impose would be paid immediately.
>
> I have had a meal entertainment card since September 2009 and no longer send in receipts in order to claim meal allowance. I am extremely distressed over this incident as I have never and would never knowingly commit any offence. My level of distress is such that I have had to seek medical attention. My job is very important to me and I believe I am a good nurse. The patient's needs were my main priority and this continues to be the case. It was very wrong for me to try and process entertainment claims at work and this is something I very much regret ever doing.
>
> My doctor feels that I am physically and emotionally unwell as a result of the process which began at 1500 hours on the 11th January 2010 and has given me a medical certificate until the 27th January 2010. You can understand the impact on an innocent person who is accused of such misconduct. I have been too unwell to seek out legal advice prior to submitting this letter.
>
> I would welcome any further discussion on this matter should you require to do so but request that this not take place until I am physically and emotionally able to deal with the stress after seeing my doctor on the 27th January 2010.
>
> Yours sincerely
>
> DENISE DRAKE-BROCKMAN (exhibit R8)

20 The respondent indicated the applicant had not denied submitting the claim on 13 July 2008 however she did deny that they were her receipts. The respondent noted it had been claimed by the applicant that she was not as careful with her paperwork as perhaps she could have been based on the fact that the ward was busy (exhibit R8).

21 The respondent advised the applicant on 19 January 2010 (exhibit R10):

> Having considered the evidence before me including your response, I intend to have the matters further investigated.
>
> The investigation will lead to a finding in relation to the suspected misconduct and may result in me taking disciplinary action, which may include the termination of your employment.
>
> An investigator is to be appointed by the Corporate Governance Directorate to conduct the investigation and you will be contacted after 27 January 2010.
>
> Some steps that may be taken in conducting the investigation include interviewing you and any other relevant persons. Examination of records and other documentary material may also occur. To facilitate the investigation you may be required to attend an interview with the investigator who will contact you in due to [sic] course to arrange a suitable time and date. You are able to attend this meeting with a representative capable of providing you with advice, if you wish.
>
> I remind you that as [sic] employee of WA Health Employee Assistance Program, which is a free service available to all staff and their families, providing professional and confidential counselling, is available to you via the toll-free telephone service on 1 800 337 068.
>
> Should you have any further enquiries in relation to this matter, please contact Mr Noel Stone at Corporate Governance on 9222 2152.
>
> (exhibit R10)

22 Mrs Sweeney gave evidence that the response from the applicant (exhibit R8) led to a memorandum being issued internally (exhibit R9) recommending the respondent wait until such time as the other employees' responses (those employees referred to in table 1 of exhibit R6) had been received to make a decision. Further, the respondent noted that the applicant had requested she not be contacted until after 27 January 2010 and once that period had lapsed it was recommended that the applicant be advised that corporate governance would carry out a further investigation. Mrs Sweeney, in response as to whether a further investigation was carried out, gave evidence the respondent was awaiting responses from other employees which, when received:

> did not enlighten them as to whether or not Ms Drake–Brockman's response was true or not.
>
> (ts 15)

23 Mrs Sweeney gave evidence that a review of the documentation did not take the matter any further given there was no mention of the applicant in any of the responses received. The consideration of the position of the applicant was mostly undertaken on a review on the papers as to whether her response was believable. Relevant to this consideration was an exchange between counsel for the respondent and Mrs Sweeney:

> Was Ms Drake Brockman interviewed? --- No, she wasn't.
>
> Do you have knowledge of why that occurred? --- It wasn't believed that there was need to interview her because she had already provided her response. She'd been given an opportunity to provide additional information. In that letter previously we had said that may be … may be necessary but, given no one else had mentioned her, there was nothing further to, I suppose, question her about as to the other employees that she was accused of sharing with.

> Right, and from where have you formed that opinion? --- That was a further request to clarify from Michelle Wakka, who was the investigator. She's provided additional information but on our request prior to this hearing. She's based in Sydney now and wasn't able to be present, so we asked her again as to why they didn't interview.
>
> (ts 16 and 17)

24 The respondent submitted that the fact the applicant was not interviewed was not a major issue in determining whether she was to be terminated. Similarly the reliability of the evidence being presented to the Commission through Mrs Sweeney rather than through the person who was appointed to undertake the investigation of the applicant, Ms Michelle Wakka was, in the respondent's view, a matter for the Commission to determine.

25 The respondent submitted an internal memorandum sent to the respondent on 4 March 2010 (exhibit R12). The memorandum analysed the claims made by the applicant between August 2007 and February 2009. During that period some 382 receipts were submitted totalling $20,490. Of the 382 receipts submitted by the applicant between August 2007 and February 2009, 372 of the receipts were valued at less than $240 and the average value of each receipt was $53.64. The memorandum referred to summarised the applicant's explanation that she had unknowingly included receipts that did not belong to her was not considered by the respondent to be persuasive particularly given the difference in the average value of receipts she submitted when compared to the value of receipts that were submitted on 13 July 2008 (exhibit R6).

26 On 11 March 2010 the respondent wrote to the applicant (exhibit R13) advising:

> Having considered the evidence before me including your response, I find you have committed acts of serious misconduct in that you made improper use of the meals entertainment reimbursement process.
>
> Each claim made by you listed in column 1 of Table 1 (attached) is a separate act of serious misconduct.
>
> I have provisionally determined that as a result of you committing these acts of serious misconduct, the appropriate action is to terminate your employment. Although in cases of serious misconduct it is open to me to terminate your employment without notice, I may also decide to terminate your employment with notice.
>
> Prior to taking this action, I am providing you with an opportunity to make a written representation to me on the proposed termination of your employment, and if I decide to terminate your employment, whether it should be with notice.

27 The correspondence requested the applicant respond in writing within five working days of receipt of the letter advising in the event no submission was received that the applicant's employment would be terminated and she would be notified accordingly. It was at this point the applicant responded requesting the respondent take no further action until such time as she had received advice from her union. The applicant's request of the respondent was denied. Furthermore, the applicant advised the respondent she had been denied procedural fairness given previous written advice from the respondent indicated 'an investigator was to be appointed by the Corporate Governance Directorate to conduct an investigation and that I would be contacted after 27 January 2010. This has not occurred and I have been denied procedural fairness' (exhibit R14).

28 In cross-examination, the witness Mrs Sweeney, explained her role with the respondent was as a senior industrial relations consultant. Specifically she helped draft correspondence and provide advice when necessary. The witness gave evidence she reviewed some of the more minor cases as to outcome and made recommendations through Mr Marshall Warner. The witness gave evidence that the by the end of 2008 the respondent had introduced new governance arrangements for meal reimbursements requiring employees to submit original receipts to the contractors. Of particular relevance in cross-examination was the correspondence the applicant had forwarded in reply to the respondent (exhibit R8) whereby the applicant had admitted not always dealing with her paperwork in a 'timely manner'. She went on to say 'I now realise that this was not the right thing to do and I sincerely regret doing so'. In answer to a question as to whether the content of the applicant's correspondence was discussed at all the witness replied 'Not … not that I'm aware of, no' (ts 37).

29 Both Mrs Sweeney and subsequently the applicant gave evidence that the applicant had undertaken a double shift on the day the claims were submitted. Such information was not available until discovery occurred as part of the proceedings. The witnesses gave evidence that it was a widespread practice that employees put their meal reimbursement claims through from work. Additionally, there was an acceptance that photocopiers and faxes in the workplace could be used.

30 The witness gave evidence that the meeting she had requested did occur, some seven months following the applicant's termination.

31 Counsel for the respondent indicated through written submissions that each of the persons listed in table 1 of exhibit R6 had been terminated by the respondent or alternatively, had chosen to resign regarding the claiming of identical meal reimbursement receipts from the contractors; SmartSalary or Paradigm.

32 In closing, the respondent submitted it was reasonable to form the view that the applicant's behaviour amounted to serious misconduct sufficient to summarily terminate the applicant.

Applicant

33 It was submitted the applicant was terminated on 28 April 2010 after:

> a minimal investigation into the documents obtained from the salary packaging provider;
>
> a written statement from the applicant; and
>
> a brief telephone discussion initiated by the applicant with Ms Wakka.

34 The applicant submits she is innocent of the misconduct complained of, conduct that seemingly occurred 18 months prior to the applicant receiving correspondence alleging misconduct from the respondent (exhibit R6). The applicant continually denied throughout her written and verbal evidence that she had deliberately or intentionally committed any act of misconduct

regarding the meals reimbursement claim submitted on 13 July 2008. The applicant claimed she had no knowledge as to how the receipts listed in table 1 of exhibit R6 came to be included in her claim. The applicant submitted she had never worked with any of the persons listed in table 1, that she did not know any of those persons and furthermore she had never attended any of the seven restaurants (with the exception of Sienna's). The applicant submits that what she did was done in error and that at the time she must have been distracted. The applicant gave evidence she was on her second shift of the day, an overtime shift.

35 Agent for the applicant submitted that the misconduct complained of by the respondent was not related to her role as a nurse. It was a taxation offence. The employer failed to provide sufficient control and oversight for the meal and entertainment allowance (given photocopied receipts were allowed to be used) the transparency of the system was far from perfect.

36 The applicant submitted she did not receive a fair go all round. She is a 52-year-old mother of three children who has worked for the respondent for 23 years and through that period has raised the children by herself, undertaken university studies and still is required to support her children. Given that the respondent employs the majority of mental health nurses in Western Australia action taken against the applicant severely limits her ability to find employment as a nurse. She has mitigated her loss by attempting to find other employment as an agency nurse. The applicant is seeking reinstatement in her employment without loss of entitlements.

37 The applicant gave evidence informing the Commission she had no recollection of the day in question given it was so long ago. She explained the usual process for making a claim was to photocopy the receipts at the workplace and fax them through to SmartSalary. It was not always possible to complete the task on one shift and sometimes it would occur over several shifts dependent on conditions on the ward. For example, if the ward became busy then the process of submitting the claim would have to be abandoned and would be continued on another occasion. The applicant gave evidence that interruptions on the ward were frequent. The ward she was working on 'was an acute early–episode ward with patients displaying challenging behaviours' (ts 56).

38 It was submitted by her agent that the applicant on a number of occasions asked for certain persons from her workplace to be interviewed to illustrate what conditions were like on the ward particularly Ellis Ward. The applicant asked for the respondent to take into consideration her character and long service.

39 The applicant described herself as an honest person with integrity who worked hard and took her job very seriously. When she was first approached regarding concerns she was advised there would be a formal meeting the following day. The applicant gave evidence she had no idea what had occurred, perhaps it was an injection wrongly given to a patient, perhaps it was one of her children. That night she did not sleep well and the following morning made an appointment at the medical centre. She explained her concerns to the doctor and was provided with a medical certificate. The applicant gave evidence that she rang her supervisor and advised that she was unable to attend the meeting. That afternoon a courier arrived on the applicant's doorstep with correspondence from the respondent (exhibit R6). The witness gave evidence that the seven receipts complained of by the respondent had not been seen by her prior to receipt of the respondent's correspondence. The witness gave evidence she stayed up all night going through paperwork and writing correspondence in response (exhibit R8). Part of that process included checking salary sacrifice records and payment records. The witness indicated with respect to her collection of receipts and in particular exhibit R6:

> I had bags of paperwork all over the place. I've never been particularly good at paperwork, and I just had receipts, a few photocopies and, yes, that was it really.
>
> …. I didn't have any of the receipts on table 1.
>
> (ts 58)

40 When asked as to why the seven receipts might have been included in her claim the applicant gave evidence it was normal practice to accumulate a number of receipts prior to submitting a claim. It was standard for the applicant to be behind with her receipts and therefore from time to time she attempted to complete paperwork at work. In quoting from her response to the respondent (exhibit R8) the applicant said 'I now realize that this was not the right thing to do and sincerely regret doing so'.

41 The applicant gave evidence so far as she was aware she had never shared receipts for meals with anyone and given the 18 month time lapse could speak only in a general sense:

> I remember having to constantly leave the desk that I had my paperwork spread out on in order to attend to patient's requests, phone calls, visitors, etc. The ward that I was working on was very busy on afternoon shifts, and I was in and out of the office for extended times. I did not have time to pack up my paperwork when a patient came to the office door for immediate attention and would just leave receipts lying around unattended, on the desk, whilst on the ward. At times, on return to the office, another staff member would have moved the receipts in order to make a clear work space, and sometimes I remember having to try and sort out moved paperwork, including numbers of individual original receipts. Some of these original receipts had been photocopied in preparation to fax to SmartSalary.
>
> (exhibit R8)

42 Throughout the period the applicant expected to be contacted as part of the undertaking by the respondent to carry out an investigation given the correspondence she had received from the respondent (exhibits R6 and R10). The applicant gave evidence that at no stage was she called in to an interview to enable her to explain the work environment on Ellis Ward. At one stage the applicant contacted one of the investigators, Ms Wakka to ask her when she would be contacted for an interview. The applicant was informed that she would shortly hear from the Director General. Correspondence (exhibit R16) was submitted by the applicant's counsel to the respondent outlining in relation to the investigation:

> Her record as a nurse is impeccable and she would welcome a full investigation of her alleged conduct, and investigation which has not occurred despite being promised in your letter to her dated 19 January 2010.

(ts 63)

43 The applicant gave evidence that of particular relevance would have been for the respondent to have knowledge of what it is like to work in an acute mental health locked ward. On 28 April 2010 the applicant received correspondence from the respondent (exhibit R18) advising:

> I refer to my letter dated 11 March 2010 in which I notified you that it had been found that you had committed acts of serious misconduct. I further informed you of the action I propose to take.
>
> You have been given a reasonable opportunity to provide representations concerning the proposed disciplinary action. I have received and considered your submissions and I have also considered the representations made by your legal counsel on your behalf.
>
> After considering the matter, I have determined that your employment will be terminated today with 4 weeks payment in lieu of notice.

44 The applicant gave evidence that at no stage did she feel the respondent had considered her submissions nor considered any extenuating factors. At no stage was anything that occurred in the ward considered. In particular the applicant requested two persons be interviewed to clarify what was being said and neither person was contacted. A further interview did occur some time after she had been terminated, approximately November 2010, some eight months later.

45 The applicant conceded that she should not have processed her receipts at work and perhaps undertaken her application for reimbursement through the use of an entertainment card. The applicant gave evidence that the termination had affected her badly. Her current monetary commitments were significant given the repayments arising from her nursing studies. Additionally, she was supporting one daughter who was studying and a son undertaking an apprenticeship. Each of these children lives at home. Subsequent to being terminated the applicant gave evidence she has earned some money through an employment agency, working as a casual nurse. The applicant gave evidence that the principal issues emanating from the termination involved the loss of reputation, the time and effort the applicant put into defending herself over the last 15 months and the waiting around for the respondent to investigate the matter when subsequently no investigation occurred. The applicant gave evidence she would like to be reinstated, working at Graylands Hospital, enjoying her job as a nurse, specifically in the mental health sector where there is a shortage of nurses.

46 The witness confirmed where patients were in locked wards they were allowed out of those wards in circumstances where they had ground access privilege. From time to time such patients would be escorted by a nurse, and on occasion without a nurse. On the day in question the ward reports (exhibit R23) show that nothing out of the ordinary happened on either of the two shifts. Of the 14 patients in Ellis Ward a number of persons went out for half an hour and several were out with family.

47 The applicant gave evidence in cross-examination that she was frustrated at the way she had been treated by the respondent since January 2010.

48 The applicant re-confirmed in evidence she had never attended the restaurants in question with the exception of Sienna's. When counsel for the respondent identified that the receipt from Harvest and the receipt from Sienna's (page 5 of exhibit R4) were on the same page the applicant responded that the receipts were either a cut-out photocopied version or an original receipt. The applicant confirmed that she may have found a cut-out of the Harvest one and put it on the photocopier together with an original receipt from Sienna's. The applicant confirmed in cross-examination that if the receipts were to be believed that over a two-day period 20 – 21 June 2008 she had spent over $2,000 on meals. The applicant confirmed that in circumstances where she had spent over $2,000 on food in two days that that would be something she would remember.

Concluding submissions

49 In conclusion, the agent for the applicant summarised the circumstances commencing on 11 January 2010, the date the applicant received correspondence from the respondent alleging she had misused the meals entertainment benefits claims. Attached to the correspondence (exhibit R6) was a table referring to receipts used by up to seven other persons including the applicant. At that point it was submitted the applicant had actually checked all 457 receipts in her possession and found she held none of the seven receipts referred to in table 1. The names of the other people referred to in table 1 were unfamiliar to the applicant. To the best of her knowledge she had in fact never worked with those people, never socialised with them and what remained curious was how could this happen. The applicant did recall her practice was to download the claim form, photocopy receipts, fill out the detail of those receipts and fax the claim to the provider.

50 Lengthy evidence was submitted as to the applicant's attempts to complete paperwork in the office on Ellis Ward and being distracted because of work needs. Although the applicant was, at the time, feeling unwell, she responded to the respondent in writing attempting to convey how such an error might have occurred (exhibit R8). The reply from the respondent spoke of a further investigation and interview and at that stage the applicant thought she would be provided with such an opportunity. After many requests such an opportunity was denied and an interview and full investigation never occurred. On 28 April 2010 the applicant was terminated by the respondent, in her view, without an opportunity to have the matter fully investigated, including the opportunity to fully submit her side of the story.

51 The applicant submits that at no stage did she receive a fair go all round and that the termination was harsh, unjust and oppressive. The method of delivery was clumsy and caused her great harm at a time when the applicant was forced to respond quickly to allegations that were made by the respondent against her. The respondent conceded that the investigation into the applicant's alleged misconduct was conducted principally on the papers. The respondent considered the applicant's story based on her correspondence of 13 January 2010 (exhibit R8); they did not believe it and they then considered the applicant's history of meal reimbursement claims and offered the applicant an opportunity to determine whether she wished to be terminated with notice.

52 Agent for the applicant referred to the *Western Australian Public Sector Code of Ethics* (exhibit A4) at page 5 and submitted the applicant had been denied due process:

Protect people's right to due process

Due process means respecting the rights that all people have to be treated fairly. Importantly, it includes the right of people to be treated fairly when they have been accused of doing something wrong. Processes must observe the rules of fair play. These are embodied in the principles of procedural fairness (sometimes called natural justice).

According to these principles:

- decision makers must act fairly and without bias;
- a person should not be judged in his or her own cause;
- people must be informed about allegations made against them when they are affected by those allegations; and
- all parties potentially affected by a matter must have the opportunity to put their case, and have all relevant arguments considered, before a decision is made.

53 Agent for the applicant submitted the applicant had been denied procedural fairness in determining whether she ought be dismissed having regard for the principles reflected in the decision of *Bi–Lo Pty Ltd v Hooper* (1992) 53 IR 224, 229.

54 Counsel for the respondent asserted the applicant's actions to be a clear case of wrongdoing. In the course of the proceedings the applicant had admitted submitting claims for expenses which she did not incur, and further attaching receipts for claims that were not hers. When asked to explain why such actions had occurred the applicant admitted that it happened due to inattention, tiredness and the working nature of Ellis Ward.

55 The respondent submitted the relevance of a summary of the claim (exhibit R4 at page 2) that had been undertaken in the applicant's own hand, reflecting some detail and accuracy associated with listing the expenses by hand. The respondent submits that a sufficient amount of work went into the preparation of such a list, including the transferral of information from receipts to the list, including dates, including venues and including amounts that had been spent. In addition, in relation to one item there appeared to be a crossing out, reflecting a change of mind. Counsel for the respondent asserted that the difficulty accepting the claim made that the expenses were not those of the applicant and in relation to seven receipts they were clearly outside the applicant's history of claiming (given the applicant's average claim was $53.20 and the overwhelming majority (some 95%) were for amounts less than $240). When reflecting on the seven receipts in question (the amounts contained table 1 of exhibit R6) such amounts were significantly outside of the normal claim sought by the applicant.

56 Counsel for the respondent considered on balance it was extending belief too far to suggest that expenditure of amounts of $1,297 and $709 over a short period of time could have been included in error. Further, the applicant refused on four occasions to give a yes or no answer to the question as to whether she recalled spending more than $2,000 on food three weeks earlier prior to submitting a claim. The respondent submits it is inconceivable that someone would not have remembered expending such an amount and would not be aware when they came to write down such amounts that they were not their expenses.

57 It was submitted by the respondent the test would be whether the employer held a reasonable and genuine belief that misconduct had occurred and whether it was reasonable for the employer to so believe. The respondent submitted that it was not reasonable to consider that the applicant had received the receipts, the receipts had then been used by other people and then become confused with the applicant's claim.

58 The applicant admitted that she commenced filling out the form (exhibit R4) on 10 July 2008 and essentially, given the days off in between, there were only two days on which the form could be worked on, namely 10 and 13 July 2008.

59 Counsel for the respondent submitted that the more the story was examined the harder it was to believe, in particular the evidence suggesting the applicant could not differentiate between a photocopied document and an original receipt. The applicant's evidence was that she always used original receipts and on this occasion she used original receipts and if they were not original, she thought it was because photocopier paper is the same as the paper on which restaurant till receipts are printed.

60 The respondent submitted each of the seven restaurant claims made on the day in question was a separate act of misconduct having regard for:

the applicant’s average claim between 2007 and 2009;

the applicant’s handwritten list which (among others) included the seven restaurants (exhibit R4), a total of $3,260;

the applicant's demeanour in the witness box;

the respondent's policy associated with the meals reimbursement process (exhibit R1), claim forms and services for employees (exhibit R2 and R3); and

the associated declaration made by every employee in submitting a meals reimbursement claim.

61 Counsel for the respondent submitted that the applicant was given an opportunity to submit issues in her defence and present information she wished in her defence. The applicant asserts that just because there was no face-to-face interview that there was a breach of natural justice. Finally, when an interview did take place the applicant did not advance the issues any further than had already been done in writing. The respondent submitted that there was nothing that could have been done which would have made any difference in respect of the respondent’s decision to terminate the applicant. This included the applicant's complaint about the respondent’s failure to speak to other persons the applicant worked with.

62 Of particular relevance to the applicant was information that was not disclosed. Agent for the applicant in response to a question from the Commission as to what was not disclosed outlined:

> Reference to other people having given information in relation to her. It was of great concern to her that she did not know what had been said.
>
> (ts 16)

63 On reflection, counsel for the respondent conceded an ambiguity existed within the correspondence forwarded by the Director of Corporate Governance on 16 April 2010 to the applicant (exhibit R16), and conceded the letter could have been worded in a more appropriate manner. In particular, the correspondence refers back to the table outlined in exhibit R6 and outlines:

> I refer to previous correspondence regarding this matter in particular to your recent correspondence citing a failure by the Department of Health to conduct a further investigation into your matter.
>
> For your information, the further investigation into your matter consisted of a detailed examination of the responses from all employees named in Table 1 in conjunction with the evidence obtained during the initial investigation. Where an interview or additional information may have been required prior to obtaining the responses from the employees, once the responses were received and examined, further interrogation was not required.

64 The respondent submitted that at the end of the day the applicant's concern that the persons listed in table 1 (exhibit R6) may have said something about her when in fact they had not was not relevant. It was unfortunate that the applicant's concern carried over for a period of time however ultimately, such a concern was unfounded given none of the employees concerned had said anything about the applicant. Accordingly, that matter falls away.

65 Additionally, the applicant's complaint that other people she worked with on a regular basis were not consulted is not relevant. The respondent accepts that Ellis Ward was a busy and stressful place to work although submits that the applicant perhaps embellished such circumstances. Counsel for the respondent submitted that the applicant's version required the Commission to consider that some of the receipts reflected in exhibit R6 were accidentally mixed up, the applicant neglected to notice that she was spending enormous amounts of money, the applicant returned to formulate the claim on several occasions and therefore undertook an amount of processing and the receipts go back out of the applicant's possession. There is just too much against the applicant to be explained by a challenging work environment. If talking to persons who work at Graylands Hospital was a critical aspect of the applicant's case then clearly, it was submitted by the respondent, contact could have been made by the applicant herself. Such contact did not occur.

66 Counsel submitted it conducted an extensive investigation into all relevant matters as was reasonable in the circumstances. The applicant was given ample opportunity to make whatever submissions and present whatever evidence she sought to in her defence. At the end of the day the respondent honestly and genuinely believed that the applicant was guilty of misconduct. Counsel for the respondent referred to the principles reflected in the decision of Gregor SC in *Down v Argyle Diamond Mines Pty Ltd* (1999) 79 WAIG 574:

> It is common ground that the Applicant's employment was terminated summarily. She was dismissed from her employment for alleged dishonesty. The Respondent says she dishonestly claimed reimbursement for expenses not incurred by her or, alternatively, retained money paid as reimbursement for expenses to which she was not entitled. The Applicant denies any such dishonest conduct. Furthermore, she says that her dismissal was effected without 'procedural fairness' and was inconsistent with similar situations which had arisen in respect of other employees of the Respondent. Accordingly, the Applicant asserts that she was either harshly, oppressively or unfairly dismissed from her employment and seeks compensation by way of relief.

Counsel for the respondent drew on the case to reflect a transgression by an employee. In the case commented on by Gregor SC clearly a wrongdoing had occurred. The employer was entitled to ask for an explanation and called on the applicant to do so. The applicant was obviously the best person to offer such an explanation in relation to the circumstances and then, based on the explanation provided, determine whether it was reasonable for a belief to be formed by the respondent that the misconduct complained of had occurred.

Conclusion and findings

67 I have listened carefully to each witness and closely observed them during the giving of evidence. In my view the applicant gave her evidence honestly and to the best of her recollection however she did, on occasion, refuse to answer questions. In making my findings, I have had regard for the applicant's conduct in the witness box. In making my findings I have not relied on the applicant's evidence that photocopier paper and restaurant till receipts were similar. Accordingly, I did not find credible that aspect of the applicant's evidence. I do accept that recall at times was difficult given time (almost two years) that had lapsed between the day in question (13 July 2008) and the hearing. The applicant was, on occasion, particularly candid in the giving of her evidence which didn't always compliment her manner however, the Commission accepts that by the time of the hearing the applicant was particularly perturbed and became somewhat frustrated which in part drove the way in which she gave evidence.

68 With respect to the evidence given by Mrs Sweeney for the respondent I didn't find her evidence particularly useful beyond what was provided in a general sense as to how the respondent had initiated an audit of the meals reimbursement scheme. Mrs Sweeney was unable to recall critical aspects given her role had been on the periphery. I find the evidence given by Mrs Sweeney therefore to be largely hearsay. In summary, there were inconsistencies by both witnesses.

69 The Commission is of the view that the procedures permitted by the contractors associated with processing meal reimbursement claims on behalf of employees of the respondent require significant alteration.

70 Relevantly, the documentation provided by the applicant and the respondent was largely unchallenged. I have had regard for the submissions, both written and verbal, the documentation and verbal evidence of the parties in these proceedings and have closely read the transcript before making my decision. It was unfortunate Ms Wakka was not able to give evidence given her role in carrying out the audit on the applicant.

This dismissal was summary in nature. The onus in such matters is on the applicant to demonstrate that the dismissal was unfair on the balance of probabilities. However, there is an evidential onus upon the employer to prove that summary dismissal is justified as per *Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers* (1988) 68 WAIG 677, 679. The respondent submitted that the payment on notice was made having regard to the applicant's years of service.

71 Prior to her termination the applicant was employed pursuant to the Agreement. Relevant to the current dispute is the Disciplinary Procedure outlined in cl 59(6)(d) which provides:

> Where the Employer seeks to discipline an employee, or terminate an employee, the following steps shall be observed:
>
> ….
>
> (d) The above procedure is meant to preserve the rights of the individual employee, but it shall not, in any way, limit the right of the Employer to summarily dismiss an employee for gross misconduct.

The award itself is not considered as the source of the right of the respondent to dismiss the applicant. An assumption is made that such a right exists at law and that the award simply preserves such a right *Williams v Printers Trade Services* (1984) 7 IR 82.

72 To consider the starting point for misconduct is the statement by Lord James of Hereford in *Clouston and Co v Corry* where it was said:

> There is no fixed rule of law defining the degree of misconduct which will justify dismissal.

Lord Evershed MR in *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285, 287:

> since 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.

73 The Commission finds the applicant expressed remorse in that she expressed in correspondence to the respondent:

> I have not always dealt with paperwork in a timely manner and at times was so far behind that I made an error of judgement and tried to complete my paperwork whilst on afternoon shift at work. I now realise that this was not the right thing to do and sincerely regret doing so.
>
> (exhibit R8)

74 The Commission finds that as soon as the applicant was made aware of the issues associated with the meal reimbursement claim of 13 July 2008 she contacted the Australian Taxation Office, informed them of her taxation error, filled out a claim form and paid back $1376.92 that was owed.

75 The Commission finds the applicant did submit the seven receipts as part of her meal reimbursement claim on 13 July 2008. In my opinion, the submission of receipts complained of did not strike at the root of her contract of employment with the respondent and therefore the Commission considers the applicant was not entitled to be summarily terminated. The Commission finds that the claim was neither a positive nor intentional wrongdoing. Accordingly, the Commission finds that what occurred on the day in question was a mistake, having regard to a range of factors including:

> the commencement of the claim form during an overtime shift;
>
> the stressful circumstances on Ellis Ward;
>
> the fact that claim forms were left on the ward overnight;
>
> the admission by the applicant that she was not as careful with her paperwork as she could otherwise have been;
>
> the acceptability by the respondent in allowing meal reimbursement claims to be filled in during working hours;
>
> the respondent allowing employees to use Graylands Hospital’s photocopiers and facsimile machines to copy and submit meal reimbursement claim forms to salary sacrifice contractors;
>
> the applicant's length of service with the respondent;
>
> the applicant's expressed remorse (exhibit R8); and
>
> the applicant’s repayment of outstanding taxation based on the meal reimbursement claim (13 July 2008) to the Australian Taxation Office.

76 Even if I am wrong with respect to the factors referred to, the Commission has had regard for the average claim made by the applicant for reimbursement of meals as pre-tax income between August 2007 and February 2009. The average claim (of the seven restaurants identified in table 1 of exhibit R6) made on 13 July 2008 the Commission finds to be quite incongruous to some two years of meal reimbursement claims made as pre-tax income. Relevant also is the consideration that many of these claims were made subsequent to the claim of 13 July 2008. Of the 382 receipts in total that were submitted by the applicant during this period, each of the 372 receipts was valued at less than $240 and the average value of all of the receipts made was $53.64. Clearly the value of receipts referred to in exhibit R6, namely the seven receipts was inconsistent with the standard claims made by the applicant. The Commission finds this too adds to the view that the action taken by the applicant on 13 July 2008 in submitting the claim which included the seven restaurants (exhibit R4) was indeed a mistake, given the average of the seven receipts was $466.00.

77 In exhibit 16 Mr Shayne Sherman drafted an internal memorandum to Mr Shane Wilson dated 24 March 2010. In the memorandum it was said:

> Given the difference in average value of receipts Ms Drake–Brockman submitted and the values of the receipts that were submitted by other employees, sufficient doubt was raised as to the veracity of Ms Drake–Brockman's statements and as such, it was viewed that an interview would not glean any further relevant information. On 11 March 2010, Mr Snowball provisionally determined to terminate Ms Drake–Brockman's employment (attached).

The Commission finds that the veracity of Ms Drake-Brockman's statements could not have been called into question based on the difference in the value of receipts between the applicant and those other employees who submitted receipts.

78 The Commission finds that the applicant had no knowledge of the claim submitted on the day in question other than the information provided by the respondent that she had worked a double shift on Ellis Ward (exhibit R23). The Commission finds that what was relevant was the applicant's general knowledge of procedures used to complete meal reimbursement claim forms. The Commission finds, on the basis of the procedures adopted by employees of the respondent Salary Packaging Services for Employees – Terms and Conditions (exhibit R2) that the claim submitted by the applicant on 13 July 2008 was a single claim.

79 An allegation of having been denied procedural fairness was raised on the part of the applicant with reference to the further investigation the respondent committed would be undertaken (exhibits R6 and R10). Of particular relevance is whether the respondent carried out a sufficient enquiry or investigation into the matter. The Commission has had regard for the principles reflected in *Sangwin v Imogen Ltd* (1996) 40 AILR 3-338 where it was found by the Court for a belief to constitute a valid reason for dismissal, an employer must establish that the allegation was investigated as fully as the circumstances permitted.

80 The Commission has examined carefully the procedures undertaken by the respondent. Initially, the respondent advised that a meeting was about to occur to raise concerns regarding the applicant, the details of which were not provided. Through no fault of the respondent the meeting did not occur given the applicant went home on sick leave. The applicant then received by courier:

- formal notification from the Director General (exhibit R6) advising of a suspicion of seven acts of misconduct having been committed by the applicant and seeking a written response within five days. That correspondence advised once the applicant's response was received the Director General may do one of three things:

1. inform you that no further action will be taken;
2. inform you that I propose to take disciplinary action against you and provide you with an opportunity to comment about the proposed action which may include the termination of your employment;
3. inform you that I intend to have the matters further investigated.

- the applicant responded in writing to the Director General on 13 January 2010 (exhibit R8). The applicant advised the respondent she was on sick leave and requested there be no discussion of the matter with her until she visited her doctor on 27 January 2010;
- on 18 January 2010 an internal memorandum was sent to the Acting Director General (exhibit R9) advising:

> In light of Ms Drake–Brockman's request and until such time as the responses from the other employees are received, I recommend that you advise Ms Drake–Brockman that Corporate Governance will further investigate.

- accordingly the Acting Director General sent correspondence dated 19 January 2010 to the applicant (exhibit R10) advising 'I intend to have the matters further investigated.' The nature of the investigation was then outlined to the applicant – 'Some steps that may be taken in conducting the investigation include interviewing you and any other relevant persons. Examination of records and other documentary material may also occur. To facilitate the investigation you may be required to attend an interview with the investigator who will contact you in due course to arrange a suitable time and date. You are able to attend this meeting with a representative capable of providing you with advice, if you wish.'

81 The Commission finds that of the commitments made to the applicant in relation to a further investigation (exhibit R6) and (exhibit R10) all that occurred was that the respondent examined the claims made by the applicant between August 2007 and February 2009. The Commission finds the respondent did not advise the applicant at any stage that the scope of the investigation would be so constrained. The Commission accepts that while the language used in the correspondence (exhibit R10) was not of a mandatory nature it nevertheless reflected a wide-ranging investigation was to occur. Having regard for the evidence of Mrs Sweeney, the respondent ended any intention of carrying out such an investigation at the point at which the six other employees referred to in table 1 of exhibit R6 submitted their responses to the respondent and failed to raise the name of the applicant. I consider the correspondence (exhibit R10) to be unfortunate in terms of what the applicant believed was to occur. I also consider it passing strange that the respondent determined the investigation would go no further and the truthfulness of the applicant's statements were in question given none of the employees had named the applicant.

82 The Commission finds the applicant was provided with the allegation by the respondent and given an opportunity to respond. She also requested an extension and was provided with that extension. The one aspect she was repeatedly denied was the opportunity for an interview, something the respondent had undertaken would occur. The decision the Commission has to make is whether these shortcomings amount to a breach of procedural fairness. The test setting out the requirements of

procedural fairness in respect of an investigation into alleged misconduct was considered in *Bi-Lo Pty Ltd v Hooper* (229). In that decision the Full Bench of the South Australian Commission observed:

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

The questions for the Commission to consider relate to the investigation conducted by the respondent into the alleged misconduct and include consideration as to:

> whether the investigation as wide-ranging as was realistic in the situation;
>
> whether the applicant was given sufficient opportunity to reply to all the contentions;
>
> did the respondent take into account any extenuating conditions;
>
> were all of the actions by the respondent undertaken prior to dismissing the applicant; and
>
> did the respondent hold a reasonable belief that the applicant was guilty of the allegations.

83 The Commission finds that the investigation was not as thorough as was realistic in the circumstances particularly given the commitments made to the applicant in the letter from the respondent (exhibit R6) relating to the options that may be taken by the respondent. Included in the Commission's findings on this matter are the manner in which the aspects of the investigation were described to the applicant by the respondent in correspondence from the respondent (exhibit R10). The Commission finds that at no stage prior to termination of the applicant was she provided with a further investigation and at no stage were interviews conducted with any other person.

84 The Commission finds that the applicant was provided with an initial opportunity to provide a written response however other than providing the applicant with an opportunity as to whether she should be terminated with or without notice (exhibit R13) no further opportunity was provided. In the circumstances, particularly given the issue of procedural fairness had been raised by the applicant with the respondent (exhibit R14) prior to the applicant's termination, the Commission finds that the opportunity provided by the respondent to the applicant remained wanting.

85 The Commission finds the submission of the claim (exhibit R4) on 13 July 2008 amounts to out of place behaviour on the part of the applicant. For the purposes of the respondent's Misconduct and Discipline Guidelines: Metropolitan Health Service and WA Country Health Service Staff (exhibit A1) the Commission has had regard for the respondent's document. The guidelines reflect on behaviours which constitute misconduct (see page 11). It is my view that the single act undertaken by the applicant on the day in question does not amount to misconduct.

86 The Commission accepts that a further investigation was undertaken following a request from The Australian Nursing Federation Industrial Union of Workers, Perth on behalf of the applicant. What is relevant is that on 17 September 2010, the respondent notified the applicant of additional allegations to those leading up to the applicant's dismissal and of his intention therefore to have the matters further investigated. An interview was conducted by the respondent's investigator Ms Michelle Wakka on 25 November 2010 together with the applicant and her union representative, some seven months after the applicant's termination. The respondent notified the applicant on 18 January 2011 that the further investigation into the findings of misconduct had now been concluded. It was said by the respondent (exhibit R21):

> The findings are that there is no additional evidence which would alter the original determination to terminate your employment.

The Commission considers the action taken subsequent to the applicant's termination, based on the principles reflected in *Bi-Lo Pty Ltd v Hooper* to be inconsequential in terms of procedural fairness.

87 In this matter it is clear that the applicant was denied procedural fairness in that she was given an opportunity by the respondent to provide a submission to the respondent. However, the thorough investigation promised to the applicant was never undertaken. Not every denial of procedural fairness will entitle an employee to a remedy. If after a review of all of the circumstances of the termination it could be said that the employee could be justifiably dismissed, then no injustice will result *Shire of Esperance v Mouritz* (1990) 71 WAIG 891. The outcome or implications of failing to apply natural justice were also considered in *Stead v State Government Insurance Commission* (1986) 161 CLR 141.

88 Whether the respondent took into account extenuating circumstances is a relevant matter particularly given the long service the applicant had had with the respondent. The Commission finds the respondent in this respect provided an additional week's notice to the applicant on termination (five weeks) based on her length of service. The Commission finds that at no other stage did the respondent take into consideration the applicant's record of some 23 years without any disciplinary action. The Commission finds that respondent had insufficient regard for extenuating circumstances when reaching a decision about the applicant.

89 The Commission finds that not all of the actions taken by the respondent in relation to investigating the alleged misconduct by the applicant were undertaken prior to dismissing the applicant. For example, on 15 July 2010 the applicant was advised a further investigation would be conducted into the alleged misconduct.

90 The Commission finds that new governance arrangements for meal reimbursements were introduced by the respondent following the submission of the claim by the applicant on 13 July 2008 recognising that the procedures used by the respondent for meal reimbursement claims prior to that date were far from appropriate.

91 The Commission rejects the applicant's contention that the meals reimbursement system was external to her terms and conditions of employment and therefore external to working arrangements and not relevant. The Commission finds the meal reimbursement system was a condition provided by the respondent to its employees and furthermore contracted out to SmartSalary and Paradigm. Clearly, to be able to consider the matter before the Commission the issue needs to be an *industrial matter* as defined under the Act.

92 The Commission is obliged to assess whether in all of the circumstances the dismissal was unfair. The test for determining whether a dismissal is unfair or not in this Commission is well settled. Whether the employer acted harshly, unfairly or oppressively so as to amount to an abuse of the right of an employer to dismiss an employee is to be found in the decision of the Industrial Appeal Court in *Miles v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous WA Branch* (1985) 65 WAIG 385. The onus is on the applicant to establish that the dismissal was, in all the circumstances, unfair. The principal issue for the applicant in her submissions was that at no stage was she accorded procedural fairness. The Commission has had regard in these proceedings as to whether there has been an apparent inconsistency between the applicant having regard for the action taken against other employees listed in table 1 of exhibit R6. In this regard Commission notes that each of the six employees has either been terminated or has resigned. Whether the issue of procedural fairness has been relevant with respect to the six other employees is not a matter currently before the Commission therefore has not been able to be taken into account in my considerations.

93 Having regard to the matters raised by the parties the Commission concludes that the applicant was unfairly dismissed by the respondent. Based on the submissions made by the applicant's agent, I am satisfied the applicant took reasonable steps to mitigate her loss. The Commission is aware that the applicant has had a limited number of agency positions since her termination, the income from which would need to be taken into consideration when remedy is being considered

Remedy

94 The applicant in her original application made clear her desire to be reinstated without loss of entitlements. The applicant gave evidence to the Commission regarding her desire to be reinstated:

> I want to be reinstated, working where I was before, enjoying my job and being a good nurse like I am, and specially in mental health as there always seems to be a shortage of mental health nurses, and I'm a very good mental health nurse.
>
> (ts 73)

95 The onus in such matters is on the respondent to establish that reinstatement or re-employment is impracticable as per *Liddell v Lembke* (1994) 56 IR 447; *Gilmore v Cecil Bros* 76 WAIG 4434 and 78 WAIG 1099. Other than the submission by the respondent to have the application dismissed, the Commission has no position from the respondent and given the onus in such matters, before taking any action, it is my view that the respondent's views are required. Such an approach was recognised as necessary in a recent Commission decision where an employee had been found to have been unfairly dismissed. In *AM v Commissioner of Police* (2010) 90 WAIG 283 it was considered necessary, when considering reinstatement, for the Commission to have full regard of all relevant matters before making a decision with respect to the issue of remedy. Accordingly, in the absence of submissions from the respondent, it is the view of the Commission that further submissions are necessary following the issuance of this preliminary decision on the question of:

> the practicability or otherwise of reinstating, re-employing or compensating the applicant.

96 If neither the applicant or the respondent choose to make such a submission then the Commission will determine the matter.

97 The Commission will list the matter for further submissions.

2011 WAIRC 00963

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DENISE DRAKE-BROCKMAN
	APPLICANT
	-v-
	MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER SECTION 7 OF THE HOSPITALS AND HEALTH. HEALTH SERVICES ACT (WA) AS THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICES BOARD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 17 OCTOBER 2011
FILE NO/S	U 82 OF 2010
CITATION NO.	2011 WAIRC 00963

Result	Order issued
Representation	
Applicant	Mr M Clancy as agent
Respondent	Mr D Matthews of counsel

Order

WHEREAS on 12 August 2011 the Commission issued Reasons for Decision in this matter; and

WHEREAS on 5 October 2011 a conference and hearing in relation to the issuance of a Minute was convened; and

WHEREAS written submissions were sought from the parties relating to how this matter ought be published, whether by their initials or by their full name (applicant) and title (respondent); and

WHEREAS agent for the applicant opposed the names of the applicant and the title of the respondent being referred to in full; and

WHEREAS counsel for the respondent opposed the names of the applicant and the title of the respondent being referred to by their initials; and

WHEREAS having considered the submissions of both parties the Commission is of the view that it is appropriate to issue the minute in full, particularly as the Reasons for Decision are already published in that form on the Commission website; and

WHEREAS having considered the submissions of both parties the Commission is of the view that it is appropriate to issue the minute in the terms as follows:

NOW THEREFORE having heard Mr Clancy as agent for the applicant and Mr D Matthews of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979* hereby:

1. DECLARES that the respondent harshly, oppressively and unfairly dismissed the applicant on 28 April 2010.
2. ORDERS that the respondent shall reinstate the applicant in her employment, to her former position, as if her contract of employment had not been terminated on 28 April 2010, within fourteen (14) days of the date of the issuance of this order.
3. ORDERS that the respondent reinstate the applicant's accrued entitlements and that her service with the respondent be regarded as continuous for all purposes including long service leave.
4. ORDERS that the respondent shall pay the applicant within fourteen (14) days of the date of the issuance of this order an amount of money in respect of all remuneration lost by the applicant by reason of her termination of her contract of employment an amount of $46,096.97 and in addition shall contribute $2704.48 to the applicant's superannuation fund.

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

2011 WAIRC 00993

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TERRENCE FARRELL
	APPLICANT
	-v-
	SHIRE OF MT MAGNET
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 3 NOVEMBER 2011
FILE NO/S	U 165 OF 2011
CITATION NO.	2011 WAIRC 00993

Result	Discontinued

Order

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

WHEREAS the matter was listed for a conciliation conference on 3 November 2011; and

WHEREAS on 21 October 2011 the Commission was advised that the applicant did not wish to proceed with the matter; and

WHEREAS on 21 October 2011 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 21 October 2011 the respondent consented to the matter being discontinued and the conference was vacated;

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.

2011 WAIRC 01007

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MERYL GAY
	APPLICANT
	-v-
	THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S 7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS THE HOSPITALS FORMALLY COMPRISED IN THE METROPOLITAN HEALTH SERVICES BOARD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 10 NOVEMBER 2011
FILE NO/S	U 183 OF 2010
CITATION NO.	2011 WAIRC 01007

Result	Discontinued
Representation	
Applicant	Mr M Clancy
Respondent	Mr M Golesworthy

Order

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

WHEREAS the application was lodged out of time; and

WHEREAS on 19 January 2011, and with the consent of the respondent, 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 the Commission contacted the applicant's representative on a number of occasions about the status of the matter; and

WHEREAS on 20 September 2011 the Commission wrote to the applicant's representative requesting advice as to the applicant's intentions in relation to this matter; and

WHEREAS on 20 September 2011 the applicant's representative advised the Commission that the applicant would be discontinuing the matter; and

WHEREAS on 21 September 2011 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS 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.

2011 WAIRC 00972

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHARON LEE HUGHES
	APPLICANT
	-v-
	CAROL PENN
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 24 OCTOBER 2011
FILE NO/S	B 13 OF 2011
CITATION NO.	2011 WAIRC 00972

Result	Application discontinued
Representation	
Applicant	Ms S Hughes
Respondent	Mr G McCorry (as agent)

Order

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

AND WHEREAS 4 April the Commission convened a conference for the purpose of conciliating between the parties;

AND WHEREAS on 21 July 2011 the application was listed for a Directions hearing;

AND WHEREAS on 23 September 2011 the Commission convened a further 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 23 September 2011 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.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.

2011 WAIRC 00971

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHARON LEE HUGHES
	APPLICANT
	-v-
	CAROL PENN
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 24 OCTOBER 2011
FILE NO/S	U 1 OF 2011
CITATION NO.	2011 WAIRC 00971

Result	Application discontinued
Representation	
Applicant	Ms S Hughes
Respondent	Mr G McCorry (as agent)

Order

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

AND WHEREAS 4 April the Commission convened a conference for the purpose of conciliating between the parties;

AND WHEREAS on 21 July 2011 the application was listed for a Directions hearing;

AND WHEREAS on 23 September 2011 the Commission convened a further 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 23 September 2011 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.

2011 WAIRC 00984

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KAREN JEANETTE KEELE
	APPLICANT
	-v-
	CHALLENGER INSTITUTE OF TECHNOLOGY
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 31 OCTOBER 2011
FILE NO/S	U 82 OF 2011
CITATION NO.	2011 WAIRC 00984

Result	Application discontinued
Representation	
Applicant	Mr S Millman
Respondent	Mr I Repper

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

2011 WAIRC 00976

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRUCE LULLFITZ
	APPLICANT
	-v-
	A.D.FOWLER PTY LTD, WJF FOWLER PTY LTD, RAPANUI NOMINEES PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 31 OCTOBER 2011
FILE NO/S	B 74 OF 2011
CITATION NO.	2011 WAIRC 00976

Result	Application discontinued
Representation	
Applicant	Mr J Atkinson (of counsel)
Respondent	Mr P Brunner (of counsel)

Order

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

AND WHEREAS on 6 July 2011 the Commission convened a conference for the purpose of conciliating between the parties;

AND WHEREAS at the conclusion of the conference no agreement was reached between the parties and the matter was referred for hearing and determination;

AND WHEREAS on 31 August 2011 the Commission listed this matter for hearing and determination;

AND WHEREAS on 25 August 2011 the Commission received notification from the parties confirming the matter had been settled between the parties;

AND WHEREAS on 12 October 2011 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.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.

2011 WAIRC 00973

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LAURA MCCARD
	APPLICANT
	-v-
	PARNNGURR COMMUNITY SCHOOL ABORIGINAL CORPORATION
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 31 OCTOBER 2011
FILE NO/S	U 160 OF 2010
CITATION NO.	2011 WAIRC 00973

Result	Application discontinued
Representation	
Applicant	Mr K. Trainer (as agent)
Respondent	Mr R Eagle (of counsel)

Order

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

AND WHEREAS on 8 November 2010 the Commission convened a conference for the purpose of conciliating between the parties;

AND WHEREAS at the conclusion of the conference no agreement was reached between the parties;

AND WHEREAS the matter was listed for a directions hearing on 9 December 2010;

AND WHEREAS on 16 December 2010 the Commission issued an order directing discovery to be informal and directing the respondent to submit an amended notice of answer and counter proposal;

AND WHEREAS the matter was listed for hearing on 28 and 29 March 2011;

AND WHEREAS on 29 March 2011 the hearing was adjourned to be listed on a date to be arranged;

AND WHEREAS on 18 October 20111 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.

2011 WAIRC 01006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES DEBRA MCELHINNEY

APPLICANT

-v-

LITTLE GECKO'S CHILDCARE, NINTIRRI CENTRE INC

RESPONDENT

CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 10 NOVEMBER 2011
FILE NO/S	B 158 OF 2011
CITATION NO.	2011 WAIRC 01006

Result Withdrawn by leave

Order

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

WHEREAS on 13 October 2011 the applicant filed a Notice of Withdrawal or Discontinuance in relation to the application;

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

THAT this application be, and is hereby withdrawn by leave.

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

2011 WAIRC 00977

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES MR ADAM WAKEFIELD

APPLICANT

-v-

FINLAY GROUP (AUST) PTY LTD

RESPONDENT

CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 31 OCTOBER 2011
FILE NO/S	B 119 OF 2011
CITATION NO.	2011 WAIRC 00977

Result	Application discontinued
Representation	
Applicant	Mr A Wakefield
Respondent	Ms J McWilliams

Order

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

AND WHEREAS on 13 September 2011 the Commission convened a conference for the purpose of conciliating between the parties;

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

AND WHEREAS on 10 October 2011 the applicant 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.

2011 WAIRC 00988

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RALPH STACEY
	APPLICANT
	-v-
	SOLARIS TECHNOLOGY
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 1 NOVEMBER 2011
FILE NO/S	U 152 OF 2011
CITATION NO.	2011 WAIRC 00988

Result	Application discontinued
Representation	
Applicant	Mr R Stacey
Respondent	Mr D Lange

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

2011 WAIRC 00962

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SOPHIE WEATHERHEAD
	APPLICANT
	-v-
	TERRENCE LAU
	BULLCREEK DENTAL CLINIC
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 14 OCTOBER 2011
FILE NO/S	U 151 OF 2011
CITATION NO.	2011 WAIRC 00962

Result	Order issued

Order

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

WHEREAS the applicant has made a claim of harsh, oppressive or unfair dismissal against the respondent; and

WHEREAS on Friday the 14th day of October 2011, the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of the conference the parties reached agreement in terms for the settlement of the claim, and agreed that the terms of settlement be reflected in an order of the Commission;

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

1. The respondent shall pay to the applicant an amount of eight weeks' wages and any annual leave which would accrue in that period, less any amount payable to the Australian Taxation Office.
2. The amount shall be paid within seven days of today's date.
3. This is in full and final settlement of all and any matters associated with the employment.
4. The application otherwise be and is hereby dismissed.

(Sgd.) P E SCOTT,
[L.S.] Acting Senior Commissioner.

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Steven Linoge	Dr Charles Douglas Chairman and Board Members Eastern Goldfields Halfway House Inc T/A Prospect Lodge	U 123/2011	Commissioner J L Harrison	Consent Order issued

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Australian Nursing Federation Industrial Union of Workers Perth	The Minister for Health in his incorporated capacity under s 7 of the Hospitals and Health Services Act 1927 (WA) as the hospitals formally comprised in the Metropolitan Health Services Board	Harrison C	C 24/2011	12/05/2011	Dispute re alleged misconduct of union member	Concluded

PROCEDURAL DIRECTIONS AND ORDERS—

2011 WAIRC 01015

DISPUTE RE PERFORMANCE OF DUTIES BY UNION MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S.7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD

APPLICANT

-v-

THE HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE FRIDAY, 11 NOVEMBER 2011

FILE NO. PSACR 21 OF 2010

CITATION NO. 2011 WAIRC 01015

Result Direction issued

Direction

WHEREAS this is a matter referred for hearing and determination pursuant to s 44 of the *Industrial Relations Act 1979*; and

WHEREAS the parties have agreed that directions should issue in respect of programming matters associated with the hearing, and have agreed to the terms of those directions; and

WHEREAS the Public Service Arbitrator (the Arbitrator) is of the opinion that the issuing of the directions agreed by the parties will assist in the conduct of the hearing of the matter;

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

1. THAT the parties file a statement of agreed matters and facts by Friday, 25 November 2011, that:
   (a) Identifies the names of all the persons who have previously filed a claim for reclassification, and that the parties agree, come within the scope of the matter, whose effective date will be the date that they first filed their claim (Group 1);
   (b) Identifies the names of all the persons who have not previously filed a claim for reclassification but that the parties agree come within the scope of the matter and the agreed effective date of their claim (Group 2);
   (c) Establishes the Health sites and Departments that are relevant to the matter;
   (d) Identifies the different classes of positions that are the subject of the claim;
   (e) Establishes the process upon which the parties will expedite the arbitration of reclassification claims.
2. THAT the respondent file in the Commission and serve upon the applicant, witness statements for the witnesses it intends to rely upon by Friday, 14 January 2012.
3. THAT the applicant file in the Commission and serve upon the respondent, witness statements for the witnesses it intends to rely upon by Friday, 10 February 2012.
4. THAT the witness statements filed by the parties are to stand as the evidence in chief except the respondent may further examine its witnesses on matters that arise from the applicant's statements.
5. THAT the applicant and respondent file in the Commission a Book of Agreed Documents by Monday 27 February 2012.
6. THAT the parties file in the Commission a further Statement of Agreed Facts by Monday, 27 February 2012.
7. THAT each of the parties files in the Commission and serve upon the other an outline of the submissions and any authorities that each intends to make by Monday, 5 March 2012.
8. THAT the Commission conducts inspections of workplaces that are relevant to the proceedings after the filing of witness statements and prior to the hearing of the matter.
9. THAT the parties provide a schedule of workplaces to be inspected and a proposed timetable for inspections by Monday, 5 March 2012.
10. THAT there be liberty to apply.

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

2011 WAIRC 01014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES JEFF STEPHEN ATKINSON

APPLICANT

-v-

LATRO LAWYERS

RESPONDENT

CORAM ACTING SENIOR COMMISSIONER P E SCOTT

DATE FRIDAY, 11 NOVEMBER 2011

FILE NO. B 142 OF 2011

CITATION NO. 2011 WAIRC 01014

Result Direction issued

Direction

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

WHEREAS on the 10th day of November 2011 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS the Commission is of the opinion that the issuing of the directions will assist in the conduct of the hearing of the matter;

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

1. THAT the applicant file and serve an amended application by the 18th day of November 2011.
2. THAT the respondent file and serve any response by the 25th day of November 2011.
3. THAT the parties provide mutual discovery on affidavit by the 9th day of December.

(Sgd.) P E SCOTT,
[L.S.] Acting Senior Commissioner.

2011 WAIRC 00969

DISPUTE RE EMPLOYMENT CONDITIONS OF UNION MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS

APPLICANT

-v-

MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER SECTION 7 OF THE HOSPITALS AND HEALTH. HEALTH SERVICES ACT (WA) AS THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICES BOARD

RESPONDENT

CORAM COMMISSIONER S M MAYMAN

DATE WEDNESDAY, 19 OCTOBER 2011

FILE NO. C 25 OF 2011

CITATION NO. 2011 WAIRC 00969

Result Recommendation issued.

Representation

Applicant Ms S Walker.

Respondent Mr M Aulfrey

Consent Recommendation

WHEREAS this application was lodged pursuant to s 44 of the *Industrial Relations Act 1979* (the Act) on 5 April 2011 and whereby The Construction, Forestry, Mining and Energy Union of Workers (the applicant union) sought the Western Australian Industrial Relations Commission's (the Commission) assistance on issues relating to occupational health and safety at Fremantle Hospital.

WHEREAS on 14 September 2011 the parties inspected the relevant sites at Fremantle Hospital in addition to holding meetings. The Commissioner met the parties both together and in divided form with a view to resolving the issues in dispute.

WHEREAS the applicant union and the Minister for Health in his incorporated capacity under section 7 of the Hospitals and Health. Health Services Act (WA) as the hospitals formerly comprised in the Metropolitan Health Services Board (the employer) have reached an agreement now therefore I make the following recommendation with the consent of the parties:

1. That the employer maintains an ongoing commitment to occupational health and safety (OSH) at Fremantle Hospital;
2. That the employer and the employees of the engineering department work to improve communication on OSH issues by ensuring all staff follow systems to ensure prompt reporting of OSH risks as they arise, and reporting back to employees as OSH risks are dealt with by the employer;

3. That the employer make available to management and employees of the engineering department alike courses in conflict resolution, issue resolution and general education as to the issue resolution process for OSH issues already in place at Fremantle Hospital;
4. That the employer will facilitate education for employees of the engineering department regarding the process requirements for reclassification;
5. That the employer will arrange for an independent assessment of any subsequent resubmissions of reclassification claims; and
6. That the employer remains prepared to provide additional training to employees of the engineering department relevant to their roles in the workplace.

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

2011 WAIRC 00987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK GRANITTO
	APPLICANT
	-v-
	THE ROMAN CATHOLIC ARCHBISHOP OF PERTH
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 31 OCTOBER 2011
FILE NO.	U 96 OF 2011, B 96 OF 2011
CITATION NO.	2011 WAIRC 00987

Result Direction issued

Direction

WHEREAS these are applications pursuant to Section 29(1)(b)(i) and (ii) of the *Industrial Relations Act 1979*; and

WHEREAS on Tuesday the 25th day of October 2011 the Commission convened a directions conference for the purpose of dealing with directions sought by the applicant; and

WHEREAS the Commission is of the opinion that the issuing of the directions will assist in the conduct of the hearing of the matters;

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

1. THAT the applicant file and serve any application for further discovery upon which it seeks to rely in support of its application by Wednesday the 2nd day of November 2011.
2. THAT the respondent file and serve any reply by 10.00 am Friday the 11th day of November 2011.
3. THAT the hearing of the application for further discovery be set down at 2.00 pm on Friday the 11th day of November 2011.

(Sgd.) P E SCOTT,
[L.S.] Acting Senior Commissioner.

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Identitywa and Coordinator Staff Certified Agreement 2010 AG 20/2011	(Not applicable)	Identitywa	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Commissioner S M Mayman	Agreement registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
identitywa Administrative/Professional Staff Certified Agreement 2010 AG 21/2011	(Not applicable)	Identitywa	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Commissioner S M Mayman	Agreement registered
Parliamentary Employees General Agreement 2011 PSAAG 20/2011	(Not applicable)	The Civil Service Association of Western Australia Incorporated	The President of the Legislative Council, and the Speaker of the Legislative Assembly, United Voice WA, Media Entertainment and Arts Alliance of Western Australia (Union of Employees)	Acting Senior Commissioner P E Scott	Agreement registered
Tranby College (Enterprise Bargaining) Agreement 2011 AG 27/2011	(Not applicable)	The Independent Education Union of Western Australia, Union of Employees, Tranby College, United Voice WA, The Australian Nursing Federation of Western Australia Industrial Union of Workers, Perth	(Not applicable)	Acting Senior Commissioner P E Scott	Agreement registered
Department of Corrective Services - Registered Nurses (ANF) Industrial Agreement 2011 AG 28/2011	3/11/2011	Department of Corrective Services	The Australian Nursing Federation, Industrial Union of Workers Perth	Commissioner S M Mayman	Agreement registered
Public Transport Authority Railway Employees (Trades) Industrial Agreement 2011 AG 26/2011	20/10/2011	the Public Transport Authority of Western Australia	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch, The Automotive, Food, Metals, Engi	Commissioner S J Kenner	Agreement registered

NOTICES—Appointments—

2011 WAIRC 00997

APPOINTMENT

ADDITIONAL PUBLIC SERVICE ARBITRATOR

I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, acting pursuant to the provisions of section 80D(2) of the *Industrial Relations Act 1979*, hereby appoint, subject to the provisions of the Act, Commissioner SM Mayman to be an additional Public Service Arbitrator for a period of one year from the 10th day of November, 2011.

Dated the 2nd day of November, 2011.

CHIEF COMMISSIONER A.R. BEECH

PUBLIC SERVICE APPEAL BOARD—

2011 WAIRC 00955

APPEAL AGAINST THE DECISION MADE ON 23 AUGUST 2010 RELATING TO NON IMPLEMENTATION OF RE CLASSIFICATION AS DETERMINED

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2011 WAIRC 00955
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD
		THE HONOURABLE J H SMITH, ACTING PRESIDENT - CHAIRMAN
		MR B DODDS - BOARD MEMBER
		MR K CHINNERY - BOARD MEMBER
HEARD	**:**	MONDAY, 23 MAY 2011, TUESDAY, 24 MAY 2011, WEDNESDAY, 25 MAY 2011, TUESDAY, 28 JUNE 2011
DELIVERED	**:**	TUESDAY, 11 OCTOBER 2011
FILE NO.	**:**	PSAB 18 OF 2010
BETWEEN	**:**	GLENN ROSS
		Appellant
		AND
		MR PETER CONRAN, DIRECTOR GENERAL
		DEPT OF THE PREMIER AND CABINET
		Respondent

CatchWords	**:**	Industrial Law (WA) - Public Service Appeal Board - Appeal against a 'decision' not to vary the classification of the appellant - Did the notification of the outcome of a review of the appellant's classification by the Public Sector Commissioner constitute a 'decision' by the respondent - Did the respondent have the power to vary the classification of the appellant pursuant to s 29(1)(h) of the Public Sector Management Act 1994 (WA) - Pre-conditions for the exercise of power under s 29(1)(h) discussed - No power under s 29(1)(h) to classify an officer independently of classifying the officer's office, post or position - Approved Procedure 1, Approved Procedure 2 and the Re-Employment of Public Service Officers Employed in Statutory Offices Policy considered - In the circumstances respondent had no power to classify or re-classify the appellant - Rule against bias considered - Duty to act fairly considered.
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 44, s 80E, s 80E(2)(a), s 80I(1), s 80I(1)(a), s 80J;
		Public Sector Management Act 1994 (WA) s 3(1), s 5, s 5(1), s 7, s 10, s 10(1)(a), s 10(2), s 29(1), s 29(1)(h), s 29(1)(h)(ii), pt 3, s 36, s 36(1), s 36(1)(c), s 64(3), s 75;
		Corruption and Crime Commission Act 2003 (WA) s 179, s 180, s 180(3);
		Public Sector Management (Redeployment and Redundancy) Regulations 1994 (WA)
		Public Sector Reform Act 2010 (WA) pt 2 div 1;
		Administrative Decisions (Judicial Review) Act 1977 (Cth) s 3(1);
		Industrial Relations Commission Regulations 2005 (WA) reg 107(2);
		Freedom of Information Act 1992 (WA).
Result	**:**	Appeal dismissed
Representation:		
Counsel:		
Appellant	**:**	Ms P J Giles (of counsel)
Respondent	**:**	Mr R J Andretich (of counsel)
Solicitors:		
Appellant	**:**	Donna Percy & Co
Respondent	**:**	State Solicitor’s Office

Case(s) referred to in reasons:

Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2005] HCA 72; (2005) 225 CLR 88

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321

Civil Service Association of Western Australia (Inc) v Commissioner Corruption and Crime Commission [2008] WAIRC 00181; (2008) 88 WAIG 265 and [2008] WAIRC 00339; (2008) 88 WAIG 662

Director General of Health v Health Services Union of Western Australia (Union of Workers) [2011] WAIRC 00332

Ebner v Official Trustee [2000] HCA 63; (2000) 205 CLR 337

Hot Holdings Pty Ltd v Creasy [2002] HCA 51; (2002) 210 CLR 438

Kioa v West (1985) 159 CLR 550

O'Grady v The Northern Queensland Company Limited (1990) 169 CLR 356

Yougarla v Western Australia (1998) 146 FLR 128

Case(s) also cited:

C Inc v Australian Crime Commission [2010] FCAFC 4 (29 January 2010).

Civil Service Association of Western Australia (Inc) v Commissioner Corruption and Crime Commission [2008] WAIRC 01511; (2008) 89 WAIG 3

Haneef v Minister for Immigration and Citizenship [2007] FCA 1273

Jahnke v Minister for Immigration and Multicultural Affairs [2001] FCA 897; (2001) 113 FCR 268

Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; (1986) 162 CLR 24

Prasad v Minister for Immigration and Ethnic Affairs (1985) 6 FCR 155

Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355

The Civil Service Association of Western Australia Incorporated v Commissioner Department of Corrective Services [2010] WAIRC 01243; (2010) 91 WAIG 83

Reasons for Decision

SMITH AP:

The Appeal

1 On 23 August 2010, the appellant filed a notice of appeal to the Public Service Appeal Board (the Board) against what he says was a 'decision' by the respondent capable of review under s 80I(1)(a) of the *Industrial Relations Act 1979* (WA) (the Act) as the decision raises an interpretation by the respondent of s 29(1)(h) of the *Public Sector Management Act 1994* (WA) (the PSM Act).

2 At the time the appellant was engaged by the respondent in early 2007 he was in dispute about his permanent level of classification as a public service officer. The appellant sought to be classified at level 9 upon his reappointment to the public service in 2007. The appellant was first appointed as a public service officer in Western Australia in 1997 at level 7. He had been returned to the public service at level 7 following a period of work at the Corruption and Crime Commission (the CCC) during 2004 to 2006 working at Class 1 for a period of two and a half months and at level 9 for approximately one year and nine months.

3 In 2009, the respondent agreed to facilitate a review of the appellant's classification. The review was undertaken by the Public Sector Commissioner in 2010 who after considering a report by a review panel did not endorse the appellant's request to be classified as a permanent level 9 officer. On 23 August 2010, the respondent informed the appellant that the Public Sector Commissioner had not endorsed the request for reclassification and that the respondent supported the Public Sector Commissioner's view.

Background

4 The appellant has an academic background in several fields, particularly criminology. He holds the following tertiary qualifications:

(a) Bachelor of Business (Accounting), 1987

(b) Bachelor of Arts (Criminal Justice Administration), 1992

(c) Master of Social Work, 1995

(d) Master of Social Science (Criminology), 1998

(e) Graduate Certificate in Public Sector Management, 2001

(f) Master of Correctional Management, 2001.

5 From 1982 to 1993, the appellant worked for the Department of Justice in Victoria, in administration management, offender development and served a term as a Governor of a prison. From 1993 to 1997, the appellant worked for Australasian Correctional Management in New South Wales as an Offender Development Manager and in Victoria as an Operations Manager at correctional centres. He commenced employment with the Western Australian Public Service on 15 December 1997 in the Department of Justice as a Manager, Forensic Case Management Team. His substantive position was at level 7 at

the highest increment, level 7.3, in recognition of his skills and previous experience. The appellant was employed by the Department of Justice until 2002. During that period he acted for periods of time in a level 8 positions as Superintendent of Bandyup and Nyandi Prisons and a Manager of Prisoner Health Services.

6 In August 2002, the appellant was seconded to the Kennedy Royal Commission as the Manager of the Research, Policy and Reform Unit and paid as a level 8 on the highest increment level. He worked in this position until February 2004 when the Kennedy Royal Commission completed its work. He then accepted another secondment which was to the CCC to assist in the establishment of the CCC. From 2 February 2004 to 16 May 2004, the appellant acted as a Class 1 as the Director of Corruption Prevention, Education and Research (exhibit D, annexure KA 07). During this period he applied for the advertised position of Manager, Corruption Prevention, Education and Research which was a level 9 position. He acted in this position from the time he ceased to act in the Class 1 position to when he was formally appointed to the position on 8 October 2004. Pursuant to s 179 of the *Corruption and Crime Commission Act 2003* (WA) (the CCC Act) the appointment of the appellant to the level 9 position was for a term of five years from 8 October 2004 to 7 October 2009.

7 By a letter dated 16 January 2006, the CCC informed the appellant that the position he occupied had been reclassified from a level 9 to a level 8. The appellant was also advised that his salary would be maintained as a level 9: ***Civil Service Association of Western Australia (Inc) v Commissioner Corruption and Crime Commission*** [2008] WAIRC 00181; (2008) 88 WAIG 265 [2], [13] and [14] (PSACR 27 of 2006). The appellant disputed the unilateral reclassification of his position from level 9 to level 8. The appellant experienced a workplace illness of clinical depression and anxiety and he was off work for periods of absence on workers' compensation. A consequence of the dispute was that he became surplus to CCC requirements.

8 When the appellant's contract of employment with the CCC ended on 1 September 2006 he became entitled pursuant to s 180(3) of the CCC Act to be appointed to an office under pt 3 of the PSM Act of at least the equivalent level of classification as the office the appellant occupied immediately prior to his appointment under s 179 of the CCC Act, which was at level 7. The appellant was the first public service officer to be returned to the public service under s 180(3) of the CCC Act. A dispute arose as to the classification that he should be returned at. There was also an issue as to what agency he should be returned to.

9 On 14 February 2007, the appellant was offered a position in the Department of Premier and Cabinet (DPC). The position was unattached and did not carry with it any specific duties or requirements set out in a job description form (JDF). The offer of employment provided that:

(a) the appellant's employment with the DPC would commence on 16 February 2007;

(b) he would be appointed permanently to a level 7 classification; and

(c) his rate of salary would be level 7, 3rd year.

The offer also stated that his duties would be as directed by DPC and that DPC would seek to place him in a permanent position internally in the first instance and in the event that this was not possible a placement would be pursued in accordance with the *Public Sector Management (Redeployment and Redundancy) Regulations 1994* (WA). The appellant accepted the offer under protest on 22 February 2007. The appellant says he did so under duress because he had no choice. It is common ground that if he had not accepted the offer his career in the public service would have come to an end.

10 On 27 February 2007, Mr Dan Volaric of the Public Sector Management Unit of DPC referred the appellant to a position at the Department of Education and Training as a Principal Investigator. The appellant questioned the process to be followed and informed Mr Volaric that his health was not robust at that time as he had had a recurrence of previous symptoms and his psychiatrist had advised that he would not return to full health until sometime after all the outstanding matters are concluded and he had certainty about his employment circumstances. The appellant at that time sought to be placed in a suitable internal DPC position.

11 On 6 March 2007, the appellant questioned why he had not been considered for a position within DPC as Principal Policy Officer in the Office of State Security and Emergency Coordination which had been recently advertised. That position was a level 7. The appellant did not receive a response until 13 August 2007 when he was informed by the then Manager of Human Resource Services, Ms Elizabeth Delany, in a letter dated 13 August 2007, that Mr Geoff Hay, Assistant Director General of the Office of State Security and Emergency Coordination, had given his inquiry regarding possible employment opportunities serious consideration and was of the opinion that his areas of experience were of limited direct relevance to the office at that time.

12 The appellant attended for work at DPC and was provided with an office but was not provided with any work to do. He was then offered redeployment to positions in the Office of the Government and the Office of Multicultural Interests. He said, however, that there was no real position available for him at either agency.

13 In May 2007, DPC entered into negotiations for the appellant to be seconded to Edith Cowan University (ECU) as an Adjunct Associate Professor in the School of Law and Justice. That position came about as the appellant had since October 2006 been carrying out unpaid work for the university.

14 Sometime after the appellant went on secondment to ECU, the Public Sector Unit of DPC split from the DPC and became part of the Public Sector Commission and Mr Volaric moved to the new agency.

15 Prior to the appellant being offered a position with DPC, the Civil Service Association of Western Australian (Inc) (the CSA) made an application under s 44 of the Act for a matter to be referred for hearing and determination under s 44 in relation to a number of issues arising from the appellant's dispute with the CCC in PSACR 27 of 2006. In proceedings before the Commission, Mr Volaric gave evidence on 4 July 2007 about the redeployment of the appellant.

16 On 20 March 2008, Commissioner Scott issued her first reasons for decision in PSACR 27 of 2006. At [64] of the reasons for decision she held that:

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

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

17 Of significant importance in this matter is that Commissioner Scott made no orders about whether the classification of the appellant on his return to the public service in 2007 should be reviewed.

18 Commissioner Scott in PSACR 27 of 2006 later issued supplementary reasons for decision on 4 June 2008, about the matters to be considered when a public service officer is returned to the public service after being employed by the CCC: [2008] WAIRC 00339; (2008) 88 WAIG 662. In those reasons she made the following points about the general principles that should be applied to s 180(3) of the CCC Act [17], [18] and [23]:

> [17] As to the applicant's proposed criteria of principles of equity, whether the officer went to the CCC on promotion or was subsequently promoted and whether the return to the public service was at the initiative of the employee or the CCC, these are not matters which relate to the objective assessment and matching of the available positions with the officer's experience, skills and qualifications. The officer is guaranteed that his or her level upon leaving the public service will be maintained. If he or she has developed particular skills or gained qualifications which relate only to work for the CCC, or relate to positions in the public service where there are no vacancies, then to appoint the officer to a position at a level commensurate with his or her level gained in employment at the CCC would be to compromise the proper appointment and classification systems in the public service.
>
> [18] However, if the officer has, during his or her time with the CCC gained experience and skills relevant to an available position in the public service, which is at a higher level than the position he or she held before the CCC position, then that CCC experience and skills would be relevant and ought to be recognised.
>
> [23] Accordingly, taking account of the submissions made by the parties in response to the invitation to make additional submissions, I am not able to further develop objective tests which would apply as matters of principle. There will always be individual circumstances which require particular consideration. However for the purposes of a declaration as to general principles to apply, those issues set out within [64] to [67] of the Reasons for Decision of 20 March 2008 shall apply. Accordingly a declaration shall issue to the effect that:
>
> > The principles the Minister ought to consider when exercising discretion under s 180(3) of the CCC Act are:
> >
> > a. the availability of positions within the public service at the equivalent level of classification and above as the officer occupied immediately prior to appointment under s 179 of the Corruption and Crime Commission Act 2003 (WA);
> >
> > b. the nature of those positions;
> >
> > c. the experience, skills and qualifications required of those positions and the experience, skills and qualifications of the officer concerned.

19 On 28 November 2008, Mr Peter Francis Conran was appointed as the Director General of DPC. He became the appellant's employing authority under the provisions of the PSM Act.

20 In April 2009, the appellant exchanged a number of emails with Mr Gregory John Moore, the Assistant Director General, State Administration and Corporate Support in DPC. The emails were in part about the appellant's grievance about being classified at level 7.

The appellant's evidence about the assessment of his classification in 2010

21 On 6 May 2009, the appellant met with Mr Conran and Mr Moore. The appellant requested the meeting as his intention was to find out what was happening about an assessment being made of his classification as a result of the decisions made by Commissioner Scott in 2008. The meeting was convivial. The appellant and Mr Conran discussed a common acquaintance, Mick Palmer, who had been the Commissioner of Police in the Northern Territory. The appellant knew Mr Palmer as a result of being involved in an inquiry that Mr Palmer undertook into a matter involving a person known as Cornelia Rau.

22 The appellant gave evidence that Mr Conran told him at the meeting that if he wanted a level 8 classification it was no great difficulty to achieve that and he would simply create a level 8 position and put him in it. The appellant told Mr Conran that he believed he should be classified at level 9. Mr Conran then told him that that was more difficult and required some form of assessment to take place. The appellant, at that point in time, was happy to be assessed as he was confident of his experience and skills. He was then told the process that would be applied would be the policy that applied to a 'RECAP' process which is a reclassification process that applies to public service officers returning to the public service from ministerial offices. The appellant had no knowledge of such a process but the process was explained to him.

23 At this meeting the appellant also had a discussion with Mr Conran about his work at ECU. The appellant explained to Mr Conran that he had been developing and delivering course material relating to policing, corrections and child protection. Mr Conran expressed a view that he would explore whether a position could be created at ECU that DPC could pay for at level 9 whereby state government agencies could be provided with research through the appellant's masters students, or PhD

students, or request grant funding to the university for research. The appellant thought this was a very good suggestion. After the meeting finished the appellant returned to ECU, collected some course materials that he had been developing and delivering, including a graduate certificate in child protection that he had developed and was about to commence to run. He returned to DPC and delivered those documents to the receptionist for Mr Conran to review. Mr Moore later informed the appellant that Mr Conran had spoken to the Commissioner of Police about the proposal, but he was not aware of what the outcome of that discussion was.

24 On 16 July 2009, Mr Conran wrote to the appellant. He informed him that the Public Sector Commissioner had now released via Circular 2009-35 a policy framework for the Re-Employment of Public Service Officers Employed in Statutory Offices (the Statutory Officers Policy) which he believed would assist to address the appellant's classification assessment and provided the appellant with a copy of the Statutory Officers Policy and said (exhibit 1 – GJR 35):

> I have requested that the Department carry out a formal assessment along the lines envisaged in the framework and although parts of the framework do not necessarily apply as a good fit to you, I believe it provides the process and structure to address your circumstances to assess your rightful classification having regard for all of your circumstances.

25 The appellant was not, however, given an explanation as to what part of the Statutory Officers Policy fitted well and what parts did not and how this would be overcome.

26 On 8 September 2009, the appellant emailed Ms Kathryn Andrews, the A/Manager of Human Resources at DPC, and asked her what parts of the Statutory Officers Policy would be applied and what parts would not be. He also asked for the process to be set out in detail so that it was clear and settled before the classification process commenced. Ms Andrews responded by email on 11 September 2009. In her email she informed the appellant that the DPC would provide the advice that the CCC would otherwise have been required to provide under the Statutory Officers Policy. She also said that the appellant was to complete the application as per cl 4.2 of the Statutory Officers Policy and provide the following:

(a) his resume;

(b) JDF whilst at CCC (if he had it);

(c) work value information as stated; and

(d) a summary and nature of alternative public service positions that he considered to be appropriate having regard to his skills, experience and qualifications.

27 Ms Andrews also told the appellant that she would seek a duly authorised employment record statement from the CCC and once he was happy with the application they would meet with the officers from the Public Sector Commission to deal with the next steps as outlined in the Statutory Officers Policy.

28 The appellant said when giving evidence that he found Ms Andrews' advice problematic, as the Statutory Officers Policy gave no advice as to what the assessment panel was to do or how they were to do it. He later received another email from Ms Andrews on 15 September 2009 in which Ms Andrews said that he should address 'work value' items listed in cl 4.2(c) of the Statutory Officers Policy such as policy, legislation, etc, in his submissions. She also informed the appellant that he could add anything he wished in terms of work value of the duties of the position he had at the CCC.

29 On 10 November 2009, the appellant sent his classification assessment submission to Ms Andrews by email. He informed her that he had been unable to attach JDF documents and asked her for a copy of any that she was able to obtain and advised her that he may need to make additional submissions in light of those documents and said that he was keen to have the opportunity to address the assessment panel. In a letter attached to his submission addressed to Mr Conran the appellant stated that he was still unclear whether it was his former positions that were being evaluated or whether the assessment was of his particular skills, knowledge and experience (exhibit 1 – GJR39).

30 On 30 November 2009, the appellant sent Ms Andrews an email asking whether the information that he had provided in the classification assessment submission was sufficiently detailed or would greater depth and explanation be of assistance. He also sent an email to Ms Andrews on 30 November 2009, asking whether his request to make an oral presentation had been agreed to, and if there was an intention to contact his nominated referees. He also asked who was going to sit on the panel.

31 On 30 November 2009, Ms Andrews replied to the appellant by email and informed him that she was waiting for some JDFs from the CCC and would then forward his submission to the Public Sector Commission. She told him that according to the Statutory Officers Policy the panel would have a representative from DPC which would most likely be herself and she was awaiting Public Sector Commission advice on the composition of the panel. She also told him in the email that she would refer to his request to make an oral presentation and to contact her if they intended to consult with referees.

32 On 1 December 2009, the appellant sent an email to Ms Andrews stating that he would like it recorded that he had previously expressed that he had an apprehension of bias by persons formerly employed within the Public Management Division of DPC who were now employed with the Public Sector Commission who have previously had involvement in his classification. Although the officers were not mentioned in the email, the appellant was particularly concerned that Dan Volaric and another officer, Mike McLaughlin, would be biased against him in any assessment of his classification. He was wary of the involvement of Mr McLaughlin as not only had Mr McLaughlin given evidence in the proceedings before Commissioner Scott in PSACR 27 of 2006, he was the author of the Statutory Officers Policy. He was also concerned that there was an apprehension of bias by Mr McLaughlin and Mr Volaric not on grounds that they had been involved in assessing him previously rather that they had been involved in giving evidence before Commissioner Scott.

33 On 2 December 2009, Ms Andrews sent an email to the appellant in which she informed him that she was waiting on some information from the CCC, but she had drafted a memorandum from Mr Conran to the Public Sector Commissioner to refer his submission and supporting his request for a classification review. She also informed him that the draft memorandum had included a request to have the officers involved in previous assessments not involved in this assessment and that he be given

an opportunity to present his claims to the assessment panel. She, however, advised the appellant that the decision on these matters would be for the Public Sector Commissioner.

34 The appellant was concerned about Ms Andrews referring to the process of a 'reclassification' review as he was of the view that he was without classification and hence could not be reclassified and what was required was a classification 'de novo'.

35 On 9 December 2009, the appellant received a further email from Ms Andrews asking him to confirm that he was seeking reclassification to a level 9 as this was not stated in his letter. On the same day the appellant sent an email to Ms Andrews stating that he requested classification at level 9, or greater, if the assessment establishes that is what he equated to.

36 On 11 December 2009, Mr Conran sent a letter to the Public Sector Commissioner requesting that the appellant's classification be reviewed in accordance with the Statutory Officers Policy. The appellant again was concerned with the terms used in this letter because it was stated that he was seeking to have his classification reviewed when he was seeking to be given a classification through a de novo assessment. He was also concerned that the letter wrongly stated that the termination of his employment by the CCC was effective from 15 February 2007, when the notice of termination was 1 September 2006 with voluntary payments being made after that time until such time as the DPC took over the arrangement.

37 On 22 December 2009, the appellant was asked to identify some positions that he believed he would be suitable for. He responded to that request by email to Ms Andrews on 23 December 2009 and stated:

> In respect of positions that I am suitable for. It is my understanding that positions at Level 9, Class 1 and above employed in SES organisations within the public service have an expectation of interagency mobility – hence the use of generic selection criteria. I would therefore expect that I too would be capable of filling positions at these levels in any number of Departments. Having said this, my strengths would obviously see me best utilised in organisations that have a law enforcement, judicial or quasi-judicial function, inquiry or review focus, security, or strong regulatory role. This would include Police, Corrective Services, Ombudsman, Child Protection, Office of State Security and Emergency Coordination, any commissions of inquiry, Auditor General, Attorney General, etc.

38 Ms Andrews advised the appellant that unless he knew of some suitable positions he should go to the Jobs Board at www.jobs.wa.gov.au and look at closed jobs in the agencies he had mentioned at level 9 and find three positions that he believed would be appropriate for his skills, experience and qualifications. She also informed him if he wanted to include jobs above level 9 he could do so.

39 The appellant looked at advertised positions that were current and selected four vacant prison superintendent positions. He also selected a position at the Department of Regional Development and Lands as the Director Corporate Services. He forwarded this information to Ms Andrews by email on 27 December 2009 and said that it was his view that his classification did not derive from the Statutory Officers Policy but from the order of Commissioner Scott and there was no requirement to compare his former positions with any other positions in the public service but that the requirement was to assess his skills, experience and qualifications. On 29 December 2009, Ms Andrews replied to the appellant and informed him that she would pass the information on to the Public Sector Commission and stated that the Statutory Officers Policy was being used as a guide at this stage.

40 On 30 December 2009, Ms Andrews passed the information provided by the appellant about suitable positions to Mr Volaric. Shortly before that time the appellant received a letter from the Public Sector Commission in which the contact person named was Mr Volaric. This was of concern to the appellant. In an email to Ms Andrews on 23 December 2009 he again raised his concern that he had an apprehension of bias in respect of Mr Volaric and stated that Mr Volaric should not be involved in the current assessment however peripheral.

41 On 25 February 2010, the appellant met with the assessment panel. The appellant gave evidence that when he met with the panel they advised him that this was the first occasion that they had met together, that they had not read his application so they knew nothing about it, and hence they had no questions of him. He found this disconcerting. Despite this, he endeavoured to make use of the opportunity and gave them his views about what was required by the decision given by Commissioner Scott to assess his skills, experience and qualifications. Ms Andrews made a comment that the assessment of qualifications did not necessarily mean the assessment of tertiary qualifications. When he queried if that was the case what did it mean, they said they did not know. The appellant made a file note of the meeting with the panel. In his file note he recorded what he says he discussed with the panel:

> The public sector arbitrator had found that s. 180 of the CCC Act enabled that an officer returning to the public service could be returned at a level higher than that which they had previously held in the public service.
>
> A simple translation at the level held in the CCC was not desirable as it was possible that after appointment to the CCC an employee could gain a promotion based on skills developed and experience and qualifications gained that were not relevant to the public service.
>
> An example was given of a person selected to be a monitor at the CCC based on the skills they held in the public service but who subsequently gained promotion at the CCC performing duties associated with physical surveillance or the deployment of covert electronic surveillance equipment. Given that these latter skills and experience would be unable to be put to good use upon a return to the public service, that person would be returned at their previously held level in the public service.
>
> Given that such cases could occur, the PSA determined that each returning officer should undergo an assessment of their skills, experience and qualifications to ensure that any skills, experience or qualifications gained that merited promotion at the CCC were relevant to public service positions.
>
> When this context was applied to my circumstances, I advised that to assess my classification at less than level 9 would require it to be established that I did not have the skills, experience and qualifications to fulfil a level 9 position in the public service.

> I advised that I was selected for appointment to the CCC based on the skills, experience and qualifications that I had displayed in the public service and had brought with me to the position at the CCC.
>
> I did not receive any subsequent promotion within the CCC, hence it could not be argued that I gained any skills, experience or qualifications that were not relevant to the public service. This is particularly so given the increase in the attention being paid by agencies to issues of professional standards, integrity and ethics, etc.
>
> I also advised that the classification review process differed from an appointment process in that, whereas the appointment assessment is designed to identify if an applicant has the desired SE&Q to fulfil the duties of the advertised position, There has been no suggestion that I did not fully perform all of the required duties satisfactorily at the CCC and subsequently. I reminded the panel that since February 2004 I had been performing duties at level 9 or better - Class 1 and Associate Professor.
>
> This, I suggested, created somewhat of a reverse onus such that in reviewing my classification at level 9 there was prima facie evidence that I was suitable for continuation at that level or beyond, and it would be necessary to advance evidence to the contrary to disturb that position. This I thought would be difficult to do when consideration was given to my skills, experience and qualifications.
>
> I next discussed the basis for the classification review - skills, experience and qualifications. It was discussed whether these were the criteria on·which the assessment should be made. I advised that these were the criteria that had been nominated by the PSA and which featured in the Policy document. I also posed the proposition that if these criteria didn't apply then what did? There was no cogent response provided.
>
> I advised of my belief that I had superior tertiary qualifications to most and that I should be rated highly in this regard. It was suggested that 'qualifications' might refer to something other than formal qualifications but it was not explained just what that be if that were to be the case.
>
> I next spoke about skills and referred to the difference between domain general and domain specific skills, and my understanding that, as that I was seeking classification at level 9 or above, it was general skills that were being referred to. This assertion was not contested.
>
> I advised of research that evidenced that the single most desired skill sought by industry was the ability to write. I then elaborated on my writing skills and also on my research capabilities - the next most desired skill sought be [sic] employers.
>
> In dealing with the experience criterion I informed that this basically referred to 'where have you been and what have you done'. This assertion was not contested.
>
> I advised that I had experience in three States and at Commonwealth level and, more lately, at international level, and I had worked both in public and privates [sic] sectors and now in academia. I had worked in a number of areas of government.

42 The appellant was very disappointed with the composition of the panel as the panel did not include a representative from the Department of Corrective Services. He was of the opinion that such a person would understand the context in which his skills and experiences operate. He was also critical of the panel because the panel did not contact any of his referees. Whilst he had been in dispute with the CCC, in his written submission he had stated that if they needed comment from the CCC they could contact Irene Froyland who was his immediate supervisor and Director.

43 On 16 April 2010, a letter was sent from the Public Sector Commissioner to Mr Conran informing him that he (the Public Sector Commissioner) had not endorsed the appellant's request to be classified as a permanent level 9 officer upon his return to the public service effective from 16 February 2007. It appears that a copy of this letter was not sent to the appellant.

44 On 12 August 2010, the appellant wrote to Mr Conran requesting advice on the progress of his classification assessment.

45 On 23 August 2010, Mr Conran responded as follows:

> I refer to your letter of 12 August 2010 and to your request in accordance with the Public Sector Commission's 'Re-employment of Public Service Officers Employed in Statutory Offices Policy' (the Policy) to be classified at Level 9 upon your reappointment to the Public Service following your appointment at the Corruption and Crime Commission.
>
> The Public Sector Commissioner in his advice to me dated 16 April 2010 has not endorsed your request to be classified at Level 9. A copy of this advice is attached.
>
> In accordance with the Policy, I am formally advising you of this determination and that I support the Commissioner's view.
>
> You may lodge a grievance with the Public Sector Commissioner, if you felt you have not been fairly dealt with in this process. However such a grievance is confined to the issues involving the reclassification review process and not the determination.
>
> If you have any queries in relation to this matter, please contact the Manager Human Resource Services, Ms Kathryn Andrews.

The respondent's evidence

46 The witnesses for the respondent included the respondent himself, Peter Francis Conran, who is the Director General of DPC, Gregory John Moore, the Assistant Director General, State Administration and Corporate Support, and Kenneth Allan Jones who is a Principal Project Officer and Senior Integrity Officer for DPC. These reasons, however, do not refer to the evidence of Mr Jones as I did not find his evidence to be relevant as it dealt with classification of political office holders under the RECAP policy which was not a policy that applied to the appellant's circumstances. Those who were involved in the

reclassification assessment of the appellant were also called to give evidence on behalf of the respondent. Each member of the reclassification panel gave evidence. Those persons were Ms Andrews, John Mercadante, the Acting Director of Corporate Services of the Department of Regional Development and Lands, and Aaron Pittock, a Principal Policy Officer at the Public Sector Commission. Dan Volaric, the Deputy Commissioner Agency Support of the Public Sector Commission, also gave evidence of his involvement in the classification of the appellant.

47 Prior to March 2009, Mr Moore had only been broadly aware of the appellant's circumstances. He was aware that whilst the appellant came to be employed by DPC in February 2007, he had never held a position in the line structure or attached list of DPC. Mr Moore did not know why the DPC had offered the appellant employment. At the request of the appellant, Mr Moore and the appellant met on 20 March 2009. The appellant briefed him on his classification issues following his departure from the CCC. The appellant summarised his circumstances and the decisions of the Commission. He informed Mr Moore that he believed DPC should undertake an assessment of his skills and that DPC should regard him is a level 9 officer and he should be remunerated as such. Mr Moore told him he would bring himself up to date on the appellant's position and undertook to get back to him. Over the next few weeks Mr Moore discussed the matter with officers of the Public Sector Commission who had been involved in the appellant's classification dispute in PSACR 27 of 2006. He did so to obtain information about the issues. After discussing the matter with the appellant in a number of emails and with officers in the Public Sector Commission, Mr Moore briefed Mr Conran about the appellant's circumstances and arranged for the appellant to meet with Mr Conran. The meeting took place on 6 May 2009. Mr Moore attended the meeting.

48 Mr Conran was appointed to the position of Director General of DPC on 28 November 2008. At that point in time he became the appellant's employing authority pursuant to s 5 of the PSM Act. In early May 2009, he was briefed by Mr Moore about the appellant's circumstances. Mr Moore informed Mr Conran that Mr Ross was a surplus officer who had been on secondment to Edith Cowan University since 21 June 2007. He was also informed the appellant had been employed by DPC in February 2007 after his return from the CCC at his previous substantive level 7.3 classification under the *Public Service Award 1992*. Mr Moore also told Mr Conran that the appellant had lodged an appeal in PSAC 27 of 2006 to the Public Service Arbitrator in 2005 and the Public Service Arbitrator did not recognise his level 9 classification, but did make a declaration as to the principles that should apply in accordance with s 180(3) of the CCC Act.

49 Prior to meeting the appellant, Mr Conran was aware that the former Director General of DPC had commenced formulating a policy to give effect to the statutory rights of return of persons returning to the public service such as those persons who were entitled the right to do so under s 180(3) of the CCC Act, but before any such policy had been implemented the public sector management functions undertaken by DPC were transferred to the Public Sector Commission on 28 November 2008. From that time DPC had no role in developing and implementing policy for statutory rights of return.

50 Mr Moore advised Mr Conran that the appellant was still seeking a review of this classification on exit from the CCC, but there was no capacity for him to do so either under Approved Procedure 1 or Approved Procedure 2. Approved Procedure 1 was limited to classifications up to and including level 8 and Approved Procedure 2 applied to Senior Executive Service (SES) positions. Mr Conran was also informed that at no time had the appellant occupied a substantive position with the DPC that could be assessed in accordance with these procedures.

51 Mr Conran was told by Mr Moore that work was now being undertaken by the Public Sector Commission to develop a policy framework for the re-employment of public service officers employed in statutory offices and that could provide a mechanism which the appellant might be able to use to seek an assessment of his classification above level 8.

52 Mr Conran accepted the advice that was given to him that it was not possible for him to assess the appellant's classification in accordance with s 29(h)(ii) of the PSM Act given the effect of Approved Procedure 1 and Approved Procedure 2. Consequently, he decided that the only avenue available to the appellant to have his classification reviewed on re-entry to the public service was the application of the Public Sector Commission's policy framework being developed for the re-employment of public service officers employed in statutory offices.

53 When asked in cross-examination whether emails sent by Mr Moore, Ms Andrews and Mr Volaric indicated that the DPC were setting in place an internal classification assessment of the appellant, Mr Conran said he could not comment on that. Mr Conran then said Mr Moore and Ms Andrews were DPC's human resource experts and he relied upon their advice as he was not familiar with the RECAP process, nor was he familiar with the intricacies of human resource arrangements. He also said whether he had the power or authority to classify the appellant was a matter that he took advice on. He said he was trying to assist the appellant with the resolution of his issues. It was his understanding that the process itself that would be applied to the appellant's circumstances was uncertain because policy issues in relation to former employees of the CCC had not yet been dealt with. When asked why he did not consider the Statutory Officers Policy to be a 'good fit', he was unable to recall why he had formed that view. He said, however, he wanted the classification process to occur in a fair and transparent way as he had some sympathy for the appellant's position.

54 On 6 May 2009, Mr Conran and Mr Moore met with the appellant and discussed a range of matters including his wish to have his classification assessed. He told the appellant he had no power to review his classification given the effect of Approved Procedure 1 and Approved Procedure 2, but the Public Sector Commission was in the process of developing a policy framework for the re-employment of public service officers employed in statutory offices that could potentially be applied to his circumstances. He also told the appellant that if he wished to access this process once it was in place he was more than happy to ask the Public Sector Commissioner to apply the policy framework. He informed the appellant that determination of his classification was a matter for the Public Sector Commissioner and not for him, as the Director General of DPC, and he had no influence over the outcome. When asked in cross-examination about his recollection of other matters discussed at that meeting, Mr Conran said they discussed whether the appellant would remain at ECU carrying out work that he was doing which involved treatment of sex offenders which potentially had some value for police and corrections.

55 Mr Moore's recollection of the meeting was a little different to Mr Conran's. Mr Moore testified that Mr Conran indicated to the appellant that there were processes that he had to follow when looking at a classification for him, but he was prepared to look at those processes and procedures, but said he may not be able to 'make the final call'. In particular, he told the appellant that if he was looking at a position above a level 8, he may not be able to do anything other than make a recommendation to the Public Sector Commission. Mr Conran also indicated to the appellant in a broad sense that he was aware that the Public Sector Commission were addressing a classification process for statutory officers who were returning to the public service, but as they did not know how long the Public Sector Commission were going to take to addressing the process they would attempt to put in place a process whereby the appellant could have his classification assessed. So Mr Moore set about shaping a 'RECAP classification process' for the appellant.

56 On 11 June 2009, Mr Moore took steps to apply the RECAP process. He sent an email to Mr Volaric informing him that he had drafted a proposal to undertake an assessment of the appellant based on the RECAP process for ministerial officers. However, that process did not proceed as Mr Volaric, on the following day, provided to Mr Moore a draft copy of a draft policy which provided for a process for statutory office holders to be returned to the public service. In an email sent to Mr Moore on 12 June 2011, Mr Volaric also questioned the process that was being contemplated by DPC in respect of the proposed review of the classification of the appellant. He said his concerns were the review could set a precedent for other returning CCC employees, could pre-empt what they were considering in regard to the officers from non-statutory bodies and that DPC could be determining a policy matter that the Public Sector Commission was responsible for.

57 Following the Public Sector Commissioner formally announcing the Statutory Officers Policy on 16 July 2009, Mr Conran wrote to the appellant and drew his attention to the policy framework and indicated that the processes and structure of the framework provided might address his circumstances to assess his rightful classification.

58 On 7 August 2009, Ms Andrews and Mr Moore met with the appellant. At the meeting, the appellant questioned whether the process contemplated in the Statutory Officers Policy would suit his situation. Mr Moore told him that it was not a neat fit, but it was his opinion that it at least addressed the issue of the classification review process and criteria to be addressed. When giving evidence Mr Moore explained that the Statutory Officers Policy contemplates that an officer is still working for a statutory body and is about to cease employment with the statutory office either through some fixed term arrangement or some other arrangement and resume their public service career. However, this was not going to happen in the case of the appellant because the appellant had already exited from the CCC and was on secondment to another organisation. After that meeting, Mr Moore had no further role in the appellant's classification assessment.

59 After the appellant submitted his application for classification assessment on 9 November 2009, Mr Conran wrote to the Public Sector Commissioner on 11 December 2009 requesting the appellant's classification be reviewed in accordance with the Statutory Officers Policy. On 22 December 2009, the Public Sector Commissioner wrote to Mr Conran asking him to request the appellant to write a summary of the alternative public service positions that he considered appropriate for the review having regard for the skills, experience and qualifications required, and his own skills, experience and qualifications. Mr Conran referred this request to Ms Andrews who emailed the appellant a copy of the request to the appellant for his attention.

60 On 16 April 2010, Mr Conran received written advice from the Public Sector Commissioner notifying him that the appellant's submission for reclassification submitted in accordance with the Statutory Officers Policy had been assessed by a review panel and the review panel's findings did not support the appellant's reclassification to level 9. In the letter to Mr Conran the Public Sector Commissioner stated as follows:

> Mr Glenn Ross submitted a request in accordance with the Public Sector Commission's *'Re-employment of Public Service Officers Employed in Statutory Offices' Policy* (Policy) to have his reappointment to the Public Service following his appointment at the Corruption and Crime Commission (CCC) determined at Level 9.
>
> In accordance with the abovementioned policy, a review panel was established to consider Mr Ross's request having regard for the terms and conditions outlined in the policy.
>
> The panel comprised:
>
> - Mr John Mercadante, A/Director HR, Department of Regional Development and Lands (Chairman),
> - Ms Kathryn Andrews, A/HR Manager, Department of the Premier and Cabinet and
> - Mr Aaron Pittock, A/Manager, Agency Support, Public Sector Commission.
>
> The panel recommended against Mr Ross's appointment at Level 9 and outlined its considerations as follows:
>
> - Mr Ross undertook a range of duties at the CCC such as expert consultancy, liaison with senior officers, conduct of reviews and inquiries, analysis of intelligence and reporting. The nature of these duties was considered to be highly specialised in relation to the operations of the CCC and in comparison to the majority of Level 9 positions available in the Public Service. The opportunity to transfer this experience to positions at Level 9 in the Public Service, which are predominantly broader executive leadership and management orientated, was considered limited.
> - Mr Ross provided details of two positions that he believed he would be suitable for, namely Director Corporate Services, Department of Regional Development and Lands, and Superintendent, Department of Corrective Services. The panel considered that the skills, knowledge and experience required for these roles are vastly different to those developed and applied by Mr Ross whilst at the CCC. Accordingly, direct transferability to these roles was considered limited. Of particular note in this regard was the specific knowledge of the chair of the panel of the role at the Department of Regional Development and Lands.

- The number of and frequency of available vacancies at Level 9 in the Public Service which require skills, knowledge and abilities congruent with the type of role, and claimed by Mr Ross, at the CCC is low. Accordingly, the panel formed the view that placement options for Mr Ross at Level 9 would be limited. Considered also in this regard was the predominantly finite nature of roles at Level 9 due to them normally being included in the Senior Executive Service (SES).
- In summary, the panel was not satisfied that Mr Ross's employment at Level 9 with the CCC supported his claim for reappointment to the Public Service at Level 9, and in particular the skills and abilities required at the CCC were not readily and appropriately transferable to the broader public service at Level 9, which would in all likelihood be within the SES and on a finite basis.

After considering the panel's report and recommendation, I have not endorsed Mr Ross's request to be classified as a permanent Level 9 Officer upon his return to the Public Service effective from 16 February 2007.

For your information, under the Policy, Mr Ross has the opportunity to lodge a grievance confined to the issues involving the review process, however not my determination. A copy of this letter will be forwarded to Mr Ross.

61 At the time Mr Conran received the letter from the Public Sector Commissioner he noted that the advice indicated a copy had been sent to the appellant. Mr Conran formed the view that the appellant had been appropriately notified of the outcome of his application and that no further notification was necessary.

62 On 12 August 2010, the appellant wrote to Mr Conran. Among other matters raised, the appellant sought formal advice on the outcome of his application for a classification assessment. Whilst Mr Conran was of the opinion that the copy of the advice provided by the Public Sector Commissioner to the appellant in April 2010 was all that was necessary to be provided to the appellant as he (Mr Conran) had not made any assessment of the appellant's classification, Mr Conran complied with the appellant's request and formally replied to the appellant on 23 August 2010. Mr Conran said, however, that he made no decision regarding the appellant's level of classification, but simply accepted the decision of the Public Sector Commissioner.

63 Ms Kathryn Andrews is the Manager of Human Resource Services of DPC. She was appointed to this position on 18 August 2008. As a long-standing HR practitioner in the public service, Ms Andrews has considerable experience in reclassification of offices. On her appointment to DPC she was briefed about the DPC establishment including what employees were on the supernumerary list. About that time there were approximately 35 people on the supernumerary list, of whom, the appellant was one. She was also told that the appellant was seconded to ECU and that he was seeking a review of his classification on re-entry to the public service from the CCC. Ms Andrews advised Mr Conran that there was no capacity for him to review the appellant's classification under Approved Procedure 1 and Approved Procedure 2 as the Director General of DPC does not have the capacity to reclassify above level 8.

64 Ms Andrews also became aware that the Public Sector Commission was developing a policy framework for the re-employment of public service officers employed in statutory offices. She was of the view that this was the only process the appellant might seek to use as a review of his classification.

65 Ms Andrews and Mr Moore met with the appellant on 7 August 2009. At that time the appellant was reluctant to prepare an application to be considered under the Statutory Officers Policy. Ms Andrews says that Mr Moore informed the appellant that certain aspects of the framework were not a perfect fit, but it was the only mechanism that would address his request for a classification review and provide the criterion that needed to be addressed.

66 Ms Andrews met with the appellant again on 4 September 2009 to discuss the Statutory Officers Policy. She discussed with him what information was required to enable the Public Sector Commission to conduct an assessment. Ms Andrews advised the appellant that she would seek information with respect to cl 4.2(d) of the policy which requires a duly authorised employment record from the statutory office. At that meeting the appellant indicated to Ms Andrews again that he was not sure that he wanted to undertake this process. Ms Andrews again informed him that this policy was the only avenue for his classification on re-entry to the public service and that his application would be assessed on its merits.

67 After Ms Andrews received the appellant's submission on 10 November 2009 she asked him if the more detailed earlier version of his curriculum vitae (CV) that DPC had on file could be included in the submission. The appellant agreed. On 1 December 2009, the appellant reiterated his request to Ms Andrews that certain officers of the Public Sector Commission who had been involved in the previous assessments should not be involved in the current assessment. Ms Andrews informed the appellant that she would pass on his request to the Public Sector Commission. On 9 December 2009, Ms Andrews sent an email to the appellant asking him to confirm he was seeking reclassification to a level 9. On 9 December 2009, he replied that he was seeking a level 9 or higher. On 10 December 2009, Ms Andrews advised the appellant by email that he could only be reclassified to a level 8 or a level 9 as he must have been held against a higher position for a minimum period of two years as per the classification eligibility criteria.

68 The panel that assessed the appellant's submission to be classified to level 9 was composed of Ms Andrews, Mr John Mercadante and Mr Aaron Pittock.

69 Mr Aaron Pittock is employed at the Public Sector Commission. At the time of his involvement in this matter he was the Acting Manager of the Agency Support Division. He was asked by Dan Volaric, to facilitate the consideration of the appellant's classification in accordance with the principles of the Statutory Officers Policy. When Mr Pittock considered the policy he was of the view that the appellant's home agency was DPC and this was despite the fact that the appellant had not in fact performed any substantive position within DPC.

70 Mr John Mercadante agreed to act as an independent chair of the assessment panel to review the classification of the appellant in accordance with the Statutory Officers Policy. Mr Mercadante has worked in the public sector for about 20 years. He has extensive experience with PSM Act approved classification systems, job design and classification of senior positions, and recruitment to those positions. He has also managed the creation and restructuring of several senior management structures in

the public sector. Mr Mercadante gave evidence that he was of the opinion that the role of the panel under the Statutory Officers Policy was to look at what positions the appellant could be placed into subsequent to a reclassification to level 9. He also said it was not a question of looking at whether there was one vacancy within level 9 which had been historically available. If they were to reclassify the appellant they would need to be confident that there was a likelihood that the appellant would be able to be realistically placed in a level 9 position within a reasonable period of time.

71 When the panel met with the appellant on 25 February 2010, Mr Mercadante informed the appellant that he was invited to address the panel and the panel had not yet commenced the assessment process and they were there to make the assessment. Mr Pittock gave evidence that the panel explained to the appellant that the panel's role was to assess his application against the policy despite certain aspects of the policy not being strictly applicable to him. Mr Pittock also said they informed the appellant that they had read the documents, but they had not made any assessment or commenced any assessment process at that point. Ms Andrews gave evidence that at that meeting they advised the appellant that they would follow the process outlined in the policy. She had looked at the documents before the meeting took place because she had done a pre-assessment of the papers before submitting them to the Public Sector Commission. She agreed with the evidence given by the appellant that she might have said that formal qualifications were not relevant to the exercise before the panel as qualifications are desirable and form part of the skills and experience of the person, but are not a key factor to reclassification to a level 9. Ms Andrews explained to the Board that the task of the panel was to assess the skills and experience the appellant had acquired in the level 9 position at the CCC. To do so they considered the JDF of the CCC level 9 position and they listened to the appellant at the meeting of about what work he had performed at the CCC and made an assessment of the transferability of those skills and experience to the public sector in level 9 positions.

72 The panel met to consider the appellant's submission on 18 March 2010. The panel considered all information available, including the appellant's CV and submission, as well as the information orally provided to the panel. To enable the assessment of the appellant's skills, Ms Andrews obtained copies of three JDFs from the CCC. The first was for the position of Director which was the Class 1 position that the appellant acted in for a period of time. The second was a JDF for the level 9 position that he held which was Manager Corruption Prevention, Education and Research. The third JDF was a draft level 8 position with the title, Manager, Corruption Prevention Research and Education. As the appellant had carried out the level 8 position for a very short period of time, they focused on the work he had carried out in the level 9 position. When asked specifically about the skills of the duties set out in the level 9 CCC JDF, Ms Andrews said that those duties were not transferrable outside of the CCC, with the exception of analytical duties.

73 The panel concluded that the appellant was not suitable for appointment at level 9. They found that the duties of the appellant at the CCC were of a more specialised nature than those found in SES roles and the positions nominated by the appellant were not considered appropriate. Consequently, they concluded that the prospect of finding the appellant a level 9 position that matched his skills and experience was low and the appellant's application to be reclassified to a level 9 could not be supported. Mr Pittock explained the reason why he decided that the appellant did not warrant a level 9 classification. These were a number of factors which were considered together. These were:

(a) the duration of the recent position held at the CCC by the appellant and other previous positions held by him were not reflective of the broader positions in government at level 9;

(b) there was a gap between the role held in recent times at the CCC and the appellant's other knowledge, skills and experience.

74 When these factors were matched against predominantly SES positions in government, which require certain criteria and broader experience or qualifications in particular at a higher level in terms of leadership and management, it was apparent that the appellant did not have these skills or experience. Mr Pittock has a broad knowledge of what is available at level 9 as vacancies of those positions are dealt with by the Public Sector Commission. He also reviewed positions that had been available at level 9 in a six-month period prior to the appellant's assessment in March 2010. This information was obtained from the online government service Jobs Board. He was unable to locate a position at level 9 that he considered would be within the appellant's skill and capability. Whilst Mr Pittock was unable to say or give any details of the vacant positions that he examined in the six-month period, he said his recollection was that those positions were at the high end of executive leadership and management which were broader than the work that had been carried out by the appellant.

75 Ms Andrews gave evidence that the panel looked at the appellant's skills and experience whilst at the CCC. She said they also gave some consideration to his skills and experience since leaving the CCC in terms of his work at ECU and assessed the transferability of those skills. They concluded that the transferability of those skills was limited across the public sector at level 9 as the appellant's work at ECU had little relevance to positions in the public sector. Ms Andrews also gave evidence that Mr Pittock advised the panel members that he had done a comprehensive search of available level 9 positions. Her evidence was that he did not show a list to the panel members. However, they discussed a couple of 'positions' and a couple of agencies, but there were no positions that had come available in the last two to three years with the kinds of skills and experience that were required. She also said that the positions at level 9 in the appellant's skill set were very limited. When asked about the research of level 9 positions that Mr Pittock had undertook, Ms Andrews said that she did not look at any of the jobs that Mr Pittock had located and identified, as he did not print out a list. She said they had a very general discussion about level 9 positions and Mr Pittock simply said he had done an assessment of level 9 positions across the sector and there were limited positions in the appellant's skill set. She did not disagree with his assessment of the availability of level 9 positions as she regularly reviews the availability of positions at that level from time to time and she is aware of the type of positions that become available at level 9.

76 Mr Mercadante said the assessment was not a straightforward matter. There were a couple of elements of the policy that could not be strictly applied and they were asked to put those matters aside. Unlike Ms Andrews, he recalled viewing a list which he said was a computer spreadsheet setting out a list of level 9 positions that had been advertised in the public sector in the past six to 12 months. Mr Mercadante said there were about 20 positions in that list that had been advertised during that period.

Whilst he could not recall the titles of any of those positions, he said they were very much generalist SES managerial positions. Mr Mercadante said that the positions on the list were considered to be unsuitable as the SES is designed as a generalist managerial role and that their assessment of the appellant was whilst he had carried out some managerial roles in the past they had been done a reasonable while ago and the path of his career had become specialised. Therefore, they formed the view that his skills were not transferrable to a generalist management role. They did not, however, look at any JDFs of positions on the list. Mr Mercadante said that it was not necessary for him to do so as he was very familiar with the positions in that list because when they create executive roles they use job descriptions as comparatives in classification exercises. Consequently, he was broadly familiar with the nature of duties with the type of roles that were in the list. Mr Mercadante did not give the appellant's work at ECU a lot of weight on account of the work being quite specialised in nature and not of a managerial function.

77 When cross-examined, Mr Mercadante conceded that the positions held by the appellant at the CCC at Class 1 and level 9 were managerial positions. He said, however, the managerial positions held by the appellant at the CCC were not in the nature of executive positions and that the management roles were limited. He also pointed out that there were not many positions that reported to the positions that the appellant had acted in or worked in at the CCC. He also said whilst they had regard to the fact that the appellant would have attained managerial experience as a Prison Superintendent whilst working in Victoria that period of work was very short and the experience was not recent. Consequently, it was the level 9 position at the CCC that they gave most weight to. When Ms Andrews was asked why she thought the appellant was unsuitable for the prison superintendent's positions, Ms Andrews said that she thought his current skills and experience had moved away from the managerial type competencies required of those positions and he would not be competitive in that environment anymore. Mr Pittock also expressed a similar opinion. As to the role of Director of Corporate Services, Mr Pittock said that was a mainstream SES role which seemed to be vastly different to the appellant's previous experience. When asked to explain what are the skills required for an SES position, Mr Pittock said SES positions are fairly broad leadership executive management roles and their core duties are quite specific. When asked about his views of the leadership and management skills that the appellant had acquired generally and at the CCC, Mr Pittock said based on the role and duties performed and the requirements of the CCC environment the work performed by the appellant was fairly narrow. He said the transferability of those skills to the broader requirements of level 9 positions would be difficult.

78 Mr Mercadante also said that the appellant's work had an extremely strong focus in the justice, crime and education areas and that although such work (including some of the overseas work the appellant spoke about), was of high value, important work, it was not comparable with the types of roles that were generally available at level 9 and it was the similarity of roles, the nature of the experience, the length and the recency that were factors that had to be considered.

79 Ms Andrews said that the panel made the assumption that the appellant had satisfactorily performed all of the functions of the level 9 position at the CCC as they did not ask the CCC for a duly authorised statement. When asked why the panel did not contact the person nominated by the appellant as a contact person at the CCC, Ms Andrews said they did not feel comfortable approaching the CCC regarding the appellant so they made an assessment of the work performed by the appellant at the CCC solely based on the JDFs. She, however, conceded she only had a cursory understanding of the 'workings' of the CCC. When asked why they did not contact the appellant's nominated referee from the CCC, Ms Andrews said that the Statutory Officers Policy required the panel to obtain a statement from the CEO at the time. She also said she had no idea who the person was that the appellant nominated and was not aware that the person had been his supervisor at the CCC. She also said that she did not consider that the referees could provide them with any assistance, as they had to make an assessment of the transferability of skills to the public sector and there was no requirement in the policy to seek referees.

80 When asked why referees were not contacted, Mr Pittock said that the reason why the panel did not contact any referees was because they were of the view that it was quite clear from the information provided there was a large gap between suitability of the appellant to be classified at a level 9. He said, however, if the panel members had been vacillating between being in favour of the reclassification then they would have considered contacting the referees. Mr Mercadante simply said he did not find it necessary to speak to any of the appellant's referees as he accepted that the appellant had carried out his functions and duties at the CCC competently.

81 The panel's assessment report was prepared by Mr Pittock. He provided a draft copy to Ms Andrews. Ms Andrews made no changes to that report and simply signed it. Mr Mercadante was not aware that Mr Volaric was going to be playing a role in checking or assessing the report. When he received a draft report, he made some changes to that report, but he could not recall exactly what they were.

82 In 2006, Mr Volaric was employed in DPC and was the officer responsible for assessing whether the appellant was entitled to return to the public service pursuant to s 180(3) of the CCC Act. At that time there was no mechanism in place to deal with officers returning from the CCC and they took the view that the appellant's appropriate classification upon return, given the circumstances involved, was level 7, which was the classification the appellant held prior to his appointment to the CCC. The appellant was a level 9 officer with the CCC, although that was in dispute as the CCC had reclassified his role. Mr Volaric said they took that into account and the appellant's limited prospects of obtaining a level 9 position in the SES or in a non-SES position. When giving evidence in PSACR 27 of 2006 Mr Volaric had said ((2008) 88 WAIG 265 [8]):

> … that based on past experience it would not be easy to redeploy Mr Ross at Level 9 within the public service due to the seniority of the level and the nature of such positions as those opportunities were few and far between.

83 Mr Volaric explained to the Board in this matter that SES positions are very senior positions within the public service, that they are generally second or third tier in nature and they fundamentally are a role of leadership and executive management, with perhaps, a policy function attached to it. He considered that that the appellant's background at the CCC was more specific to the workings of the CCC. He also said that other non-SES level 9 positions are not positions that come available on a regular basis. However, in early 2007 the only involvement the DPC had with non-SES level 9 positions was determining their suitability for inclusion in the SES as at that time the appointment processes for the establishment of level 9 non-SES

positions were largely left up to the agencies. For this reason at that time he did not become aware of ongoing availability of level 9 non-SES positions as those positions require a particular expertise or a particular requirement specific to a role or an agency.

84 When the Public Sector Commission was created on 28 November 2008, several functions were transferred from DPC to the Public Sector Commission. As part of that process Mr Volaric left the DPC and went to work in the Public Sector Commission. When the office was created, among other matters, the Public Sector Commissioner under delegation was provided with all the powers and functions of the Minister for Public Sector Management, including being the employer of chief executive officers. Pursuant to s 10 of the PSM Act, the Public Sector Commissioner as delegate of the Minister was required to advise on structural changes, programs for management improvement, policies, practices and procedures relating to any aspect of management that should be introduced to improve the effectiveness of the public sector. As part of the delegated function under s 10 of the PSM Act, the Statutory Officers Policy was created by the Agency Support Division of the Public Sector Commission. Mr Volaric's role was to instruct staff to develop the policy and in doing so to take account of the principles set out in the decisions given by Commissioner Scott in PSACR 27 of 2006. He saw the circumstances involving the appellant as fundamental in establishing the policy. However, Mr Volaric took the view that the appellant was not eligible for consideration of classification under the policy because one of the criteria under the Statutory Officers Policy is that a person who has won a higher classification at a statutory office needs to have carried out that work through a merit based process and have undertaken that role for a continuous period of not less than two years. Mr Volaric said the appellant did not fulfil the later requirement as he was appointed to a level 9 role at the CCC in October 2004 and the position was downgraded by the CCC in January 2006. Also, the policy required an indication to be given by the statutory office, in this case the CCC, of the performance of the individual concerned. Notwithstanding these issues, he was of the view that it was reasonable and fair that the appellant be given an opportunity to present his case for reclassification in accordance with the intent behind the policy.

85 Mr Volaric was aware that the appellant had objected to him and Mr McLaughlin having any involvement with the classification process. Yet he did not agree with this objection. When the Public Sector Commissioner, Mr Mel Wauchope, received Mr Conran's letter dated 11 December 2009 requesting an assessment of the appellant's classification, Mr Wauchope asked Mr Volaric for advice and preparation of a draft response. Mr Volaric spoke to Mr Wauchope about the letter and the request contained in the letter that officers involved in previous assessments not be involved in the assessment. Mr Volaric told Mr Wauchope that he would not be on the panel, but that the panel report would have to come through him. He also told Mr Wauchope that he disagreed with the claims made by the appellant that he not be involved. He told the Board it had been four years since he had made the previous assessment and he said that he would not suggest to people in the Public Sector Commission to allow the appellant to make an application in accordance with the Statutory Officers Policy, if he would object to the appellant being classified at level 9.

86 Mr Volaric gave instructions to Mr Pittock to form a panel comprising a representative from the department at which the appellant was employed, an independent chairperson and a senior officer from within the Public Sector Commission, as all such persons would be familiar with HR management practices and processes. Mr Volaric anticipated the panel could have a discussion with the appellant, have a look at the information he presented, consider the application and the suitability of positions at the level the appellant sought, then consider the frequency of those positions being made available and the transferability of his skills in line with the principles set out by Commissioner Scott. He also told Mr Pittock to research available level 9 positions over a six-month period.

87 Mr Volaric said that he was satisfied with the people who were nominated to form the panel as all three members were level 8 officers with a HR background. As to the composition of the panel, he suggested to Mr Pittock he would need to get someone from DPC and he suggested to Mr Pittock that Ms Andrews would be suitable because she was the manager of human resources. Mr Volaric, however, did not make any suggestion to Mr Pittock that Mr Mercadante should be on the panel.

88 After the selection panel made its recommendation, the report of the classification panel came to Mr Volaric prior to being in its final form, and prior to the report being considered by the Public Sector Commissioner. When Mr Pittock provided Mr Volaric with the draft report Mr Volaric made his own assessment as to whether the panel had engaged in a meaningful process to address the principles in the Statutory Officers Policy and whether they had made a recommendation that he agreed with. He spent some 30 minutes to an hour discussing the assessment report with Mr Pittock. He made general comments to Mr Pittock about grammar and style. Mr Volaric said he did not alter the report in any way that was fundamental to the panel's decision-making process. He formed the view that the panel had appropriately considered the appellant's claim and had justified the reasons for the recommendation they made.

89 When it was put to Mr Volaric in cross-examination that no notes were kept of the assessment panel's discussion, Mr Volaric said that notes should have been taken as the policy allows a person to seek redress regarding the process undertaken by the panel and if there was an objection to the process, the Public Sector Commissioner through him (Mr Volaric), would wish to be able to review that process by having regard to those notes. Mr Volaric was also not aware that at no time was the appellant invited by the panel to address the SES selection criteria. When asked whether it would be fairer for the appellant to have had an opportunity to make a submission about the SES selection criteria, Mr Volaric said the difficulty with that was that the SES criteria are very broad and it would be impracticable for the appellant to identify his ability to meet broad criterion such as shaping strategy, unless the criterion specifically related to a position that was available as an actual position, so that the panel could make an assessment of the suitability of the appellant for such a role. When it was put to Mr Volaric that Mr Pittock primarily looked at SES positions, Mr Volaric said (ts 147):

> … Well, I can't speak on behalf of the panel. However I would take the ... part of the view I would take is before we get to the question of his transferability of skills I need to satisfy myself are there the available positions of the nature that may be suited to Mr Ross, and then the transferability of skills may certainly be an issue that has to be considered in that

context. If that was to be the case then I'd suggest that some further clarification by the panel as to his appropriateness for an SES-type position could be further explored.

90 Mr Volaric explained the application of the Statutory Officers Policy was intended to achieve recognition of a classification held in a statutory office where an appointment has been through merit based process, and the nature and the skills and experience of an individual could enable a readily appointment to a particular position outside the statutory office, at the level of classification sought. In an ideal situation that would be in a position that was currently available within the officer's home organisation. He told the Board that immediate appointment is not necessary, it is more about the availability of a position at the level sought and the likelihood of a position being readily available. In particular, the nature of positions of a particular classification would have to be assessed as relatively frequent in nature, so that they are either readily available within a home agency, or the person could be realistically redeployed reasonably soon and quickly to another agency.

91 When it was put to Mr Volaric that the appellant's referees were not consulted, Mr Volaric said in his view that it would be appropriate to contact the referees if the panel had come to the view that they were considering supporting a higher level classification.

92 Mr Volaric explained that level 9 SES positions are finite. An appointment to the SES is only for a contract for a fixed term period so that the classification that attaches to the SES position does not attach to the officer who holds the SES position.

93 Mr Volaric said that personal reclassifications are not prevalent and have not been supported following the introduction of broadbanding. They do, however, approve personal classifications under Approved Procedure 1 based on the work value considerations of an actual position carried out by an individual. If the individual can demonstrate they have undertaken work at the higher work value for a continuous period of 12 months, the chief executive officer of an agency has some discretion to provide the higher classification to the individual. Mr Volaric also described the process to create a level 9 position. A chief executive officer writes to the Public Sector Commission seeking approval to create a position at level 9 or above and for its inclusion in the SES. The chief executive officer is required to provide the rationale and supporting documentation which is outlined in an executive classification framework. The Public Sector Commission then forms a preliminary view whether or not there is sufficient work value to warrant the establishment of a position at that level. They may hold discussions with the agency, but in the past few years they have referred those discussions and an assessment to an independent company, Mercers, to undertake an assessment using the Mercer Cullen Egan Dell job methodology. The Public Sector Commission then evaluates the assessment and forms a view as to whether the classification request is justified.

94 For positions within the SES, a chief executive officer has the ability to appoint an individual to that position on a contract up to five years, but the person appointed does not hold that classification permanent on an ongoing basis. Up to level 8, agencies may determine a classification for a position. Above level 9, the classification of a position is to be determined by the Public Sector Commissioner. The whole process of an assessment for the creation of the position relies upon assessment of work value and has nothing to do with the classification of an officer. A SES officer at the conclusion of a work contract has an automatic right of return under the PSM Act to their previous level, if they were a public sector employee for a period greater than six months on a continuous basis. However, those who are appointed to the SES from outside the public sector have no right of return. Where a person is a permanent officer who is seeking to be redeployed, SES positions have been made available to redeploy such a person. This has occurred on one occasion to a person who had a permanent classification of level 9. The person concerned was redeployed to a level 9 SES position. He was required to enter into an SES contract and his right of return remained at level 9.

Statutory Officers Policy

95 The Statutory Officers Policy provides:

> **BACKGROUND**
>
> The enabling legislation of a number of Statutory Offices provides some permanent public service officers appointed to the Statutory Office with, inter alia, an entitlement upon expiry of their appointment to be re-employed back in the public service at a classification at least the equivalent level to that held prior to their employment at the Statutory Office.
>
> However, the enabling legislation does not identify the process and mechanisms to give effect to this statutory entitlement of re-employment.
>
> **PURPOSE**
>
> This policy has been introduced pursuant to s10 of the Public Sector Management Act 1994 to give reasonable effect to the entitlement of principal statutory office holders and employees of statutory offices to be re-employed in the public service.
>
> **POLICY APPLICATION**
>
> The policy applies to those persons with a statutory right to be re-employed in the public service only.
>
> It provides for the Public Sector Commissioner, working with the returning person's former home agency, to facilitate the person's re-employment; terms and conditions of appointment to be applied including the classification/status of the person.
>
> The re-employment of an employee returning from a statutory office must comply with the attached operating principles and classification review processes.
>
> The terms and conditions of re-employment of a principal statutory office holder is at the discretion of the Public Sector Commissioner.
>
> **EFFECT**
>
> This policy comes into effect on 6 July 2009

INQUIRIES

Inquiries regarding this policy should be directed to the Agency Support Division, Public Sector Commission on 9219 6200.

OPERATING PRINCIPLES AND PROCESSES

1. Eligibility

This policy applies to officers employed in Statutory Offices, who are eligible under relevant enabling legislation, for re-employment to an office under Part 3 of the *Public Sector Management Act 1994*. With respect to principal statutory office holders, their terms and conditions of re-employment will be at the discretion of the Public Sector Commissioner.

2. Operating Principles and Expectations

- The re-employment provisions under enabling legislation need to be activated by eligible employees in writing, confirming their election to exercise their right to be re-employed under those relevant provisions.
- Such an election needs to be done in advance of the employees' cessation of employment with the Statutory Office. It is not open for an eligible employee, once having left the Statutory Office, to choose at a later date whether or when they intend to exercise a return to public service employment.
- The provisions apply to eligible employees, regardless of whether they had or had not formally resigned from their former public service position.

3. Re-Employment Process

To give efficacy to re-employment arrangements, the following arrangements apply:

- **Eligible Employees**: to provide written notice to their (Statutory Office) employing authority of their intention to exercise a right of re-employment under enabling legislative provisions
- **The Statutory Office**: to provide interim meaningful work and be responsible for the continued payment of the employees' salary until the cessation of their employment at the Statutory Office.

Where an employee elects to return to public service employment, the Statutory Office is to:

– formally notify the Public Sector Commission (PSC) of the officer's election;

– certify that the employee satisfies the enabling legislative provisions; and

– advise of a proposed re-employment date.

Ideally, this advice will be provided at least 3 months, but no less than one month, prior to the employee's intended cessation date at the Statutory Office. This would provide time to give effect to re-employment arrangements and to minimise disruptions to the relevant Statutory Office, the employee and the re-employing Department.

The PSC will work with the employee's former department to facilitate their re-employment.

Employees will be re-employed at their pre-Statutory Office substantive (public service) classification level. However, where an employee has been appointed at a higher classification with the Statutory Office, they will be provided with the opportunity (but no guarantee) to be re-employed to a position at a higher classification to that of their former public service position based on the following principles:

a. the availability of positions within the public service, at the equivalent level of classification and above as the officer occupied immediately prior to appointment to the Statutory Office;

b. the nature of those positions; and

c. the experience, skills and qualifications required of those positions and the experience, skills and qualifications of the officer concerned (i.e. transferability of those skills, experience and qualifications).

Attachment 1 diagrammatically portrays the re-employment process.

Note: where the former public service Department no longer exists, an alternative Department under the same or nearest relevant Minister's portfolio may assume responsibility for the officer's re-employment.

4. Classification Review Process

Consideration of re-employment to a position at a classification above that occupied immediately prior to appointment to the Statutory Office will, ideally, be undertaken prior to, but no later than three months following their re-employment to the public service, or as otherwise determined by the Public Sector Commissioner. The process to give effect to this is referred to as "Classification Review".

4.1 Classification Review Criteria

The classification review process seeks to provide a model whereby the principles outlined can be considered and applied, where appropriate. Before consideration for classification review is made the following is to be met:

Eligibility Criteria

- The re-employment provisions under enabling legislation must have been activated by eligible employees.
- The officer must have secured an appointment to a position at the Statutory Office (excluding acting) which is above the officer's public service substantive classification through an open market merit based appointment.

- At the date of re-employment to the public service and excluding acting, the officer must have continuously performed the full duties and responsibilities of their higher classified position at the Statutory Office for a minimum period of two years.
- The Statutory Office is to formally confirm that the officer has competently and consistently demonstrated their capacity to satisfactorily undertake the duties and responsibilities of the position and at the classification determined.

4.2 Application Format

Applications by an employee for classification review should be addressed to the Public Sector Commission (PSC), and contain the following:

a. A resume and/or details of the officer's work history, with particular reference to duties undertaken in the officer's substantive public service position and that subsequently held at the Statutory Office.

b. A copy of the Job Description Form applicable to the position occupied at the Statutory Office and on which classification review is being based.

c. Work value information concerning work undertaken at the Statutory Office using headings such as those examples listed below:

Policy – involvement in and influence on the policy development process, e.g. what type of policies were involved? Did the role initiate, develop, advise, coordinate, negotiate, implement or monitor policy initiatives, or support other officers carrying out some or all of these responsibilities? What was the reporting relationship with the Government and the Statutory Office? What were some of the direct results of the officer's input?

Legislation – was there any roles in instructing Parliamentary Draftsperson? involvement in assisting bills through Parliament?

Research – types of research, including examples of subjects, sources of research, results and examples of research (speeches, reports, briefing notes), reporting lines, etc.

Management – advice of responsibilities that could include the number of staff supervised, human resource management and financial responsibilities, reporting lines and to whom. Advice on compliance with any legislative requirements such as *the Freedom of Information Act* and *the Financial Administration and Audit Act.*

Any other matters that may affect the assessment of the value of the work undertaken at the Statutory Office in relation to comparably classified public service positions.

d. A duly authorised employment record statement from the Statutory Office to confirm that:

The officer secured their appointment to the higher classified Statutory Office position(s) through a merit based appointment process;

The officer, at the date of re-employment to the public service, had continuously performed the full duties and responsibilities of the higher classified Statutory Office position for a minimum period of 2 years; and

That such performance had been undertaken at the Statutory Office classification level, competently and satisfactorily in all respects.

e. A summary and the nature of alternative public service positions that the employee considers to be appropriate having regard for their skills, experience and qualifications, and any other requirements required for appointment, and those held by the employee.

4.3 Assessment Procedures

Provided that a classification review application meets the above criteria, the following procedures will apply:

- The application will initially be assessed by officers of the PSC, including an analysis of the work undertaken and the availability of vacant positions within the public service, at the equivalent level of classification and above as the officer occupied immediately prior to appointment to the Statutory Office. The assessment may involve interviews, including meetings with the applicant and his/her Statutory Office supervisor, and if required additional advice being sought from that Office. The applicable assessment period will be limited to the period that formal notification of the officer's election to return to the public service is received and ending 3 months following their re-appointment to the public service (unless otherwise approved by the Public Sector Commissioner);
- A formal recommendation will then be forwarded to a *Statutory Office Classification Assessment Panel* (Assessment Panel established by the PSC);
- The Assessment Panel will forward its recommendation to the Public Sector Commissioner for determination;
- The applicant will be advised in writing of the Commissioner's decision.

4.4 Assessment Panel

The *Statutory Office Classification Assessment Panel* will consist of a senior representative from the PSC with appropriate HR/Classification determination experience, a representative of the employee's home agency and an independent chairperson.

4.5 Classification Determination

Each case will be dealt with on its merits and the Public Sector Commissioner's determination is final.

Applicants will have the opportunity to lodge a grievance with the Public Sector Commissioner if they consider they have not been fairly dealt with in this process. However, such a grievance is confined to the issues involving the reclassification review process and not the determination.

The effective date of reclassification is the date of the employee's re-employment to the public service under enabling legislation.

POLICY FOR THE RE-EMPLOYMENT OF STATUTORY OFFICERS

Cease Employment at Statutory Office [in accordance with enabling legislative provisions]

Potentially Activated through

- Employee Resigns
- Statutory Office doesn't renew contract
- Employee notifies Statutory Office of non-interest in renewal of contract

Requirements

- Only applies to employees who were permanent public servants prior to their appointment to the Statutory Office
- Doesn't apply to an employee who is dismissed for substandard performance, breach of discipline or misconduct
- Employee required to formally notify of election prior to cessation of employment with Statutory Office

Responsibilities

- Employee required to formally notify of election prior to cessation of employment with Statutory Office
- Statutory Office to formally advise Public Sector Commissioner of employee's election and continues to provide employee with meaningful work and to pay their salary until cessation of employment
- PSC to assist returning agency in giving effect to re-employment

Re-Employment in Public Service

Effected

- Through return to pre-Statutory Office employing agency
- Returns at pre-Statutory Office substantive public service classification level but consideration given to appointment at a higher level, where applicable, based on endorsed principles

Responsibilities

- Employing authority to give effect to through formal offer to include re-employment conditions.
- Employing authority assumes responsibility as 'employing authority'

Access to Redeployment	**Eligibility** • Following re-employment, the Employment Authority may request registration where internal employment opportunities are unavailable • Request to be considered subject to all eligibility requirements being met **Responsibilities** • Employing Authority pays salary, and provides interim work and case management services until redeployment resolved

The appeal

96 On 23 August 2010, the respondent sent a letter to the appellant in which he advised the appellant that his request to be classified as level 9 upon his reappointment to the public service following his appointment to the CCC had not been endorsed by the Public Sector Commissioner. The letter also stated that the assessment had been conducted in accordance with the Statutory Officers Policy and that he (the respondent) supported the Public Sector Commissioner's view. The appellant contends that this letter constituted a 'decision' within the meaning of s 80I(1)(a) of the Act as the respondent had a duty, subject to the PSM Act and to any other written law, pursuant to s 29(1)(h) of the PSM Act to 'classify, and determine the remuneration of,' the appellant.

97 The appellant says that the respondent improperly delegated his duty to conduct the classification process to the Public Sector Commissioner, and having done so, failed to properly consider the decision of the assessment panel and simply adopted the recommendation made by the panel. In support of this argument the appellant relies upon s 33 of the PSM Act which provided at the relevant time that a chief executive officer may, in writing either generally or otherwise provided by an instrument of delegation, delegate to an employee in his or her department or organisation any of his powers or duties under the PSM Act, other than the power of delegation. The appellant contends the delegation by the respondent to the Public Sector Commissioner to carry out the classification assessment was not properly done because it was not in writing, nor was the delegation to an employee in the respondent's department or organisation.

98 The respondent says the appeal is incompetent on the following grounds:

(a) The respondent points out the only relief that can be claimed against the respondent is to require him to assess the appellant's level of classification under s 29(1)(h) of the PSM Act, if the complaint is that he did not do so. The respondent cannot determine a classification above level 8 and that is a different process than the one conducted, that is the subject of this appeal. The determination and process appealed from was under s 180(3) of the CCC Act which was made and conducted by the Public Sector Commissioner, not by the respondent, who had no role under the CCC Act. Pursuant to s 29(1)(h) of the PSM Act as it stood at the relevant time, the respondent only had power to classify, and determine the remuneration of, employees in a department and their offices and vary such classification and remuneration in accordance with such classification systems and procedures, if any, as are approved in respect to those employees or any class of those employees.

(b) Section 29(1)(h) of the PSM Act is not applicable because the classification system, Approved Procedure 1, only permits chief executive officers to classify jobs up to level 8. Where classifications above level 8 are sought the Public Sector Commissioner is required to assess and approve the classification.

(c) To the extent that this appeal seeks to review the classification of the appellant's level of appointment per se, that is a matter which is within the exclusive jurisdiction of the Public Service Arbitrator by s 80E of the Act.

(d) The appeal does not come within s 80I(1)(a) of the Act as:

(i) It concerns salary which is determined by the level of classification therefore within the jurisdiction of the Public Service Arbitrator.

(ii) It concerns salary which is excluded from consideration under s 80I(1)(a).

(iii) It does not concern the conditions of public service officers but the appellant's.

(iv) It concerns the application of s 180 of the CCC Act and to that extent it is an industrial matter which is within the exclusive jurisdiction of the Public Service Arbitrator.

(v) It does not concern the interpretation of any provision of the PSM Act, rather it concerns the merit of the decision not to classify the appellant at level 9 under s 180(3) of the CCC Act, from the date of his return to the public service in February of 2007.

(vi) It does not concern the decision of an employing authority (s 5(1) of the PSM Act).

99 The remaining grounds of contention put forward on behalf of the appellant and the respondent go to the merit of the process conducted by the assessment panel and the Public Sector Commissioner and whether the process was affected by actual or apprehended bias.

(a) Was a decision made by the respondent within the meaning of s 80I(1)(a) of the Act and did the respondent have the power to classify the appellant?

100 This appeal is sought to be brought pursuant to s 80I(1)(a) of the Act which relevantly provides:

> Subject to section 52 of the *Public Sector Management Act 1994* and subsection (3) of this section, a Board has jurisdiction to hear and determine —
>
> (a) an appeal by any public service officer against any decision of an employing authority in relation to an interpretation of any provision of the *Public Sector Management Act 1994*, and any provision of the regulations made under that Act, concerning the conditions of service (other than salaries and allowances) of public service officers;

101 The question whether the respondent made a 'decision' within the meaning of s 80I(1)(a) of the Act turns on several issues. The first is whether the respondent as a chief executive officer of a department had the power to classify the appellant, that is, did he have the power to make a decision. The second issue is when Mr Conran wrote to the appellant on 23 August 2010 and informed the appellant the Public Sector Commissioner had not endorsed the appellant's request to be classified at level 9, did this communication constitute a 'decision' within the meaning of s 80I(1)(a) of the Act. For the reasons that follow these two issues are inextricably tied.

102 Although s 80I(1)(a) of the Act empowers the public service to review a 'decision' of an employing authority in relation to an interpretation of any provision of the PSM Act, what constitutes a 'decision' of an employing authority in this legislative provision is not defined in the Act or in the PSM Act. In considering this issue it is helpful to have regard to what constitutes a 'decision' under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Under that legislation a 'decision' of a decision-maker of an administrative character that is reviewable under s 3(1) of the *Administrative Decisions (Judicial Review) Act* is an ultimate or operative determination and not a mere expression of opinion: ***Australian Broadcasting Tribunal v Bond*** (1990) 170 CLR 321 (338) (Mason CJ). Whilst s 80I(1)(a) of the Act enables a review of a 'decision' that is narrower in scope to the power to review in s 3(1) of the *Administrative Decisions (Judicial Review) Act*, which enables the review of a decision of an administrative character made, or required to be made under an enactment, the observations of Mason CJ are apposite in construing s 80I(1)(a) of the Act as the power of the Public Service Appeal Board to adjust a 'decision' could only be effective if the 'decision' that is reviewed had operative effect.

103 At the relevant time pursuant to s 29(1)(h) of the PSM Act, the respondent was empowered to classify or vary the classification of an employee and their office, post or position in accordance with any classification systems and procedures, if any, as were approved in respect of an employee. Whilst a classification procedure is not defined in the PSM Act, a classification system is defined in s 3(1) of the PSM Act to mean a:

> system relating either to an office, post or position or to an employee that provides a basis for the remuneration of employees by identifying the level which correctly reflects the functions and responsibilities of the office, post or position or of the employee;

104 Evidence has been given in these proceedings of four classification policies that apply to public service officers. The first three are Approved Procedure 1, Approved Procedure 2 and the Statutory Officers Policy. The fourth is a procedure that applies to public service officers who are employed in ministerial offices. This classification procedure applies to the class of employees who are public service officers seconded to a special office to assist a political office holder for a continuous period of two years. They have a statutory right to have their level of classification reviewed under s 75 of the PSM Act. This classification procedure is known as the RECAP process. This procedure did not apply to the appellant's circumstances.

105 At the time the Statutory Officers Policy was made in July 2009, s 10(1)(a) of the PSM Act provided:

> The functions of the Minister are —
>
> (a) to promote the overall effectiveness and efficiency of the Public Sector, having regard to the principles set out in section 7;

106 Section 10(2) of the PSM Act at that time also provided:

> The Minister has power to do all things that are necessary or convenient to be done for or in connection with the performance of the functions of the Minister.

107 Under s 7 of the PSM Act the general principles of public administration and management were and continue to be as follows:

> The principles of public administration and management to be observed in and in relation to the Public Sector are that —
>
> (a) the Public Sector is to be administered in a manner which emphasises the importance of service to the community;
>
> (b) the Public Sector is to be so structured and organised as to achieve and maintain operational responsiveness and flexibility, thus enabling it to adapt quickly and effectively to changes in government policies and priorities;
>
> (c) public sector bodies are to be so structured and administered as to enable decisions to be made, and action taken, without excessive formality and with a minimum of delay;
>
> (d) administrative responsibilities are to be clearly defined and authority is to be delegated sufficiently to ensure that those to whom responsibilities are assigned have adequate authority to deal expeditiously with questions that arise in the course of discharging those responsibilities;
>
> (e) public sector bodies should have as their goal a continued improvement in the efficiency and effectiveness of their performance and should be administered with that goal always in view;
>
> (f) resources are to be deployed so as to ensure their most efficient and effective use;

(g) proper standards of financial management and accounting are to be maintained at all times; and

(h) proper standards are to be maintained at all times in the creation, management, maintenance and retention of records.

108 The Public Sector Commissioner made the Statutory Officers Policy pursuant to s 10 of the PSM Act under a power of delegation from the Minister responsible for the administration of the PSM Act.

109 The power of the Minister under s 10 of the PSM Act was simply to make a classification system and procedure that relevantly in this matter provided a classification system that provides a basis for the remuneration of employees by identifying levels which reflect the functions and responsibilities of employees. Importantly, the respondent as a chief executive officer had the power to act under s 29(1)(h) of the PSM Act, to reclassify the appellant if the pre-conditions for the exercise of that power were met.

110 In May 2009, Mr Conran agreed to review the appellant's classification as he was sympathetic to the appellant's complaint that he (the appellant) had not been able to have a proper review of his classification on his return from the CCC to the public service. Mr Volaric intervened at that time and informed Mr Moore that DPC could be determining a policy matter that was the responsibility of the Public Sector Commissioner and any review by DPC would pre-empt the application of the proposed Statutory Officers Policy in respect of other public service officers returning from non-statutory bodies.

111 If the Statutory Officers Policy had been in place in 2006 when it was contemplated that the appellant was to return from the CCC to the public service, that policy would have applied to the appellant. However, that policy would have applied to him prior to his re-entry into the public service and at the relevant time, his chief executive officer would have been the chief executive officer of the CCC. While the Statutory Officers Policy was not in place in early 2007 when the appellant returned to the public service, the appellant had a statutory right of return under s 180(3) of the CCC Act. A process to facilitate that statutory right of return was not prescribed at that time. In early 2007, a sufficient assessment of the appellant's skills and experience may not have been conducted by those that managed the appellant's return to the public service. Whilst a contention to that effect has been put forward on behalf of the appellant, the Public Service Appeal Board in this matter has no power to review that process. It is not open in this matter to review the decision made in early 2007 to offer the appellant a position at DPC at level 7.3, as the Public Service Appeal Board can only review the 'decision' the subject of this appeal and that is the 'decision' purportedly made on 23 August 2010.

112 At law, the Statutory Officers Policy had no application to the appellant as the appellant had been returned to the public service in 2007 from the CCC. Consequently, at that time his right under s 180(3) of the CCC Act was complete when he accepted the position offered to him at DPC. Although he accepted that position under 'duress', he took no steps at that time to directly challenge that decision other than the issue was raised in a general way by the CSA in PSACR 27 of 2006 who did not litigate the specific issue whether the appellant should have been appointed to a higher level of classification than level 7.3 on his return to the public service. If it was intended to challenge the decision made at that time, it should have been directly raised as an issue for resolution in PSACR 27 of 2006. Consequently, irrespective of whether the appellant accepted the position at DPC under duress, that decision cannot now be considered as the time prescribed for challenging that decision has long expired: s 80J of the Act and reg 107(2) of the *Industrial Relations Commission Regulations 2005* (WA).

113 When the Statutory Officers Policy came into operation in July 2009 it had no retrospective effect. In any event, by that time the policy did not apply to the appellant as he had returned to the public service in 2007 from the CCC. Consequently, s 180(3) of the CCC Act no longer applied to his circumstances in 2009 or 2010. However, the Public Sector Commissioner through Mr Volaric advised Mr Moore that the Public Sector Commissioner was prepared to review the appellant's classification. It was agreed by the Public Sector Commissioner and the respondent to apply those parts of the Statutory Officers Policy that could have application to the appellant's circumstances. Yet at law this policy had no application.

114 If the Statutory Officers Policy had no effect at law, the question arises whether when Mr Conran in May 2009 spoke to the appellant and offered to put in place a process to review the appellant's classification could the review only be done in accordance with those classification systems and procedures that had been approved for public service officers? The other question is whether the only approved procedures that could apply to him were Approved Procedure 1 and Approved Procedure 2?

115 The respondent contends that no decision in relation to an interpretation of any provision of the PSM Act has been made by him as an employing authority on 23 August 2010 as the letter simply refers to the determination made by the Public Sector Commissioner on 16 April 2010. This was the evidence of the respondent and an expressly stated outcome of the Statutory Officers Policy. Clause 1 of the Statutory Officers Policy provides the terms and conditions of re-employment will be at the discretion of the Public Sector Commissioner and cl 4.5 provides the Public Sector Commissioner's determination is final. In essence, the respondent's argument is that 'I made no decision as I had no power to make a decision about the classification of the appellant'.

116 As set out above, the Statutory Officers Policy had no determinative effect at law in respect of the appellant's circumstances, because it only applies on its terms to re-employment of statutory officers to the public service. Thus, at the time of the application of the Statutory Officers Policy a statutory officer would have no employing authority other than the statutory office. The right the statutory officer would have is a right of return to the public service such as provided for in s 180(3) of the CCC Act. The policy does not apply to an employee who had in the past been a statutory officer who has been re-employed into the public service.

117 Pursuant to s 29(1)(h) of the PSM Act, it is the function of a chief executive officer to classify and determine the remuneration of employees and their offices, posts or positions in a department. This is not the function of the Public Sector Commissioner. Although the function is to be in 'accordance with' 'such classification systems and procedures', a classification procedure could not derogate from the express statutory function placed on a chief executive officer under s 29(1)(h) of the PSM Act to classify an employee and their office, post or position. To do so would raise a jurisdictional error. The grant of authority to

make a 'decision' about the classification in accordance with a classification system and procedure vests solely in the chief executive officer. Whilst the grant of power given under s 29(1)(h) of the PSM Act is subject to the provisions of the PSM Act, and any other written law relating to the respondent's department, there was no provision in the PSM Act prior to the coming into operation of pt 2 div 1 of the *Public Sector Reform Act 2010* (WA) on 1 December 2010 that limited the exercise of that power by the chief executive officer other than to ensure compliance with approved classification systems and procedures. To the extent that s 29(1)(h)(ii) of the PSM Act requires a chief executive officer to classify an employee and their office, post or position and to vary any classification in accordance with such classification systems and procedures that are in place, there was no discretion vested in the chief executive officer to disregard the classification systems and procedures that applied to an employee or class of employee.

118 Despite the valiant submission made on behalf of the appellant about the power contained in s 29(1)(h) of the PSM Act, when the express words of that provision are analysed it is notable that the power vested in a chief executive officer under that provision is not to classify or vary the classification of an employee in the absence of the classification of his or her office, post or position. Section 29(1)(h) of the PSM Act empowers a chief executive officer to classify or vary the classification of employees and their offices, posts or positions. There appears to be no power to classify an employee in the absence of classifying his or her office, post or position. The opening words of s 29(1) of the PSM Act provides:

> Subject to this Act and to any other written law relating to his or her department or organisation, the functions of a chief executive officer or chief employee are to manage that department or organisation, and in particular —

119 Then the function of classification was set out in s 29(1)(h) of the PSM Act, as it stood prior to the coming into operation of the amendments to s 29(1)(h) of the PSM Act by the *Public Sector Reform Act* on 1 December 2010, and provided as follows:

> to classify, and determine the remuneration of, employees in that department or organisation and their offices, posts or positions, and to vary any such classification or remuneration, in accordance with —
>
> (i) the requirements of any binding award, order or industrial agreement under the *Industrial Relations Act 1979* employer-employee agreement under Part VID of the *Industrial Relations Act 1979*; and
>
> (ii) such classification systems and procedures, if any, as are approved in respect of those employees or any class of those employees;

120 This power is to be contrasted with the power of an employing authority under s 36(1) of the PSM Act which provided at the relevant time:

> (1) Subject to subsection (2), the employing authority of a department or organisation may, in relation to the department or organisation —
>
> (a) determine organisational structures and arrangements;
>
> (b) create, transfer or abolish offices; and
>
> (c) in accordance with approved procedures classify, or alter the classification of, offices other than offices included in the Special Division of the Public Service under section 38.

121 The power under s 29(1)(h) of the PSM Act was also different to the power in s 64(3) of the PSM Act which enables the appointment of a person as a public service officer as a permanent officer or for a fixed term without appointing a person to fill a vacancy in an office, post or position.

122 The appellant's argument that the respondent had the power to review classification or vary the classification of the appellant, inherently relies upon a construction of s 29(1)(h) of the PSM Act that the respondent as a chief executive officer has the power to classify an employee in the absence of reviewing the classification of the office, post or position held by that officer. To read this provision in this way requires that the word 'and' when it first appears in that sub-section to be read disjunctively, rather than conjunctively. Justice Murray in ***Yougarla v Western Australia*** (1998) 146 FLR 128 explained the circumstances when 'and' should be interpreted disjunctively (143):

> [W]here the process of statutory interpretation dictates that the proper construction of a provision requires it, the courts will, on occasions, if it can be done without undue violence, hold that the word 'and' is used in a section disjunctively, rather than conjunctively. The text Pearce & Geddes, *Statutory Interpretation in Australia*, 4th ed (1996) par 2.15, gives examples of the sorts of situations in which that may be done. The first is where the court is persuaded that the legislature meant to use the word 'or' but in fact used the word 'and'. …
>
> The second type of case where 'and' may be read as 'or' is where it may be argued to be used correctly to accumulate a series of cases or classes of case to which the operative part of a section is applied. To say that something may be done in cases 1, 2, 3 and 4 may, in the context, amount to the statement that the thing may be done in any one of those cases. That is more like the argument for the defendants in this case, but if that is to be done, it remains the case that it is a matter of ascertaining the correct construction of the section.
>
> I accept that in that regard the construction which would promote the purpose or object underlying the enactment of the law will be preferred …

123 When regard is had to the subject matter, purpose, scope and of s 29(1)(h) s 36(1) and s 64(3) of the PSM Act the word 'and' as it first appears in s 29(1)(h) of the PSM Act is to be read conjunctively. This is also so when regard is had to the words of s 29(1)(h) of the PSM Act itself. The function is to classify employees and 'their' offices, posts and positions. The function is not to classify employees, offices, posts and positions in a department or organisation. The function of a chief executive officer to classify offices, posts and positions separate from the classification of an employee is found in s 36(1)(c) of the PSM Act. It is apparent, however, that the second 'and' in s 29(1)(h) of the PSM Act is to be read disjunctively as it allows the classification and the variation of the classification of employees and their offices, posts and positions.

124 The appellant's argument that the respondent improperly delegated his power to classify the appellant under s 29(1)(h) of the PSM Act is in my respectful opinion flawed. The role of the Public Sector Commissioner under the Statutory Officers Policy could not involve the exercise of a power by the respondent under s 29(1)(h) of the PSM Act. This is because s 29(1)(h) of the PSM Act only applies to the classification of an employee in the department or organisation of the chief executive officer who employs the employee at the time the decision is made. The Statutory Officers Policy contemplates that the employee is to be re-employed in the public service and not in the statutory organisation, that is, the employee in question is to be employed in another organisation as a public service officer.

125 For these reasons, the respondent had no power to classify or vary the classification of the appellant through the application of the Statutory Officers Policy. However, the respondent had the power under s 29(1)(h) of the PSM Act to classify employees and their positions in his department, where the pre-conditions for the exercise of that power are met.

126 If it is accepted that at law the Public Sector Commissioner had no statutory power to classify the appellant in these circumstances, can it be said that the respondent made a decision on 23 August 2010 not to vary the classification of the appellant, through the application of the Statutory Officers Policy. Leaving aside the application of the Statutory Officers Policy at law, could it be said that by adopting the purported 'decision' of the Public Sector Commissioner to refuse to classify the appellant at level 9, the respondent made a decision to refuse to vary the classification of the appellant.

127 It is argued on behalf of the respondent that as a chief executive officer he could not classify the appellant as an officer beyond level 8, as s 29(1)(h) of the PSM Act required the classification or variation of a classification to be undertaken in accordance with approved procedures and Approved Procedure 1 and Approved Procedure 2 only permit chief executive officers to classify an employee to level 8 (exhibit F and exhibit L). The appellant says that Approved Procedure 1 has no application to his classification as Approved Procedure 1 only deals with the classification of offices and does not generally deal with the classification of officers except where an officer occupies an office that is reclassified.

128 The material provisions of Approved Procedure 1 at the time the appellant's classification was considered in 2010 provided:

Introduction: This Approved Procedure relates to the functions of Chief Executive Officers (CEOs) or other employing authorities as provided for in sections 29(1)(h)(ii), 36(1)(c), 41(a)(i), 44(3)(b), 53(3)(a) and 64(2)(a) of the Public Sector Management Act 1994 (PSM Act).

This Approved Procedure applies to those agencies forming part of the Public Service as defined in Part 3 section 34(a)-(c) of the PSM Act, as follows:

- departments;
- SES organisations, insofar as any posts in them, or persons employed in them, or both, belong to the Senior Executive Service; and
- agencies that employ persons under Part 3 of the PSM Act.

Objective: To provide for a classification determination system and procedures which are in accordance with the principles set out in sections 7 and 8 of the PSM.

Definitions

Broadbanding: A system of job classification that recognises the broad underlying similarities in work value that exist between jobs.

Job classification: The assigned classification level allocated to a job according to the relative worth of that job in comparison with like positions.

Job evaluation: The process of systematically and objectively assessing jobs to determine to what extent critical factors, such as skills, knowledge, competencies, etc, are required, and considering those factors provided in this procedure, so that a job is appropriately classified.

Job evaluation tool: The job evaluation tool that is to be used for positions within the public service (with the exception of specified calling positions) is as follows:

Levels 1 – 8:	BI/PERS is the approved job evaluation tool, unless otherwise determined by the Public Sector Commission (PSC).
Level 9 and above:	as determined by the PSC.

Approved System And Procedures	
Authority of CEOs (or other relevant employing authority):	In exercising their functions under section 29(1)(h)(ii) and section 36(1)(c) of the PSM Act, CEOs or other relevant employing authorities have the authority to determine the classification of jobs up to and including Level 8.
Authority of the Public Sector Commission:	The PSC will assess and determine the classification of all Public Service jobs above Level 8, with the exception of positions the subject of a specified calling. Employing authorities shall forward all proposals for the creation, variation and/or reclassification of positions and the payment of temporary special allowances above Level 8 to the PSC for assessment and endorsement. SES jobs above Level 8 will be treated in accordance Approved Procedure 2. Proposals must be prepared in accordance with, and satisfy, the requirements of the 'Framework for Executive Classifications'.
Broadbanded classification system:	The broadbanded classification system, incorporating Levels 1 to 9 and Class 1 to 4, is the approved classification system for the Public Service and must be retained unless an agency operates another classification system approved under section 3(2) of the PSM Act. The classification system used by the Salaries and Allowances Tribunal (SAT) for the holders of offices in the Special Division of the Public Service is approved for use for CEO positions that have been removed from the SAT's jurisdiction, provided the SAT determined classification at the time of removal is not varied.
Work value:	The classification of a job must be based on work value.
Factors in determining classification:	Determination of the classification of a job shall have regard to the following factors: • the value of the work performed; • the responsibilities and skills required; • comparisons of the work requirements of the job with jobs (internal and external) having similar duties, responsibility and skill requirements; • the structural relationships of the jobs; and • the indicative results of the approved job evaluation tool.
Industrial and workplace agreements:	Industrial agreements and workplace agreements may provide for the supplementation or variation of the remuneration received by an officer, but cannot change the determined classification of a job.
Reclassification of jobs:	The classification of an existing job shall be altered only when the changed value of the work performed is significant and warrants the establishment of a new classification.
Reclassification of the substantive holder of a reclassified job:	Whilst noting that it is the job that is reclassified not an officer, CEOs or other relevant employing authorities may approve the reclassification of the substantive occupant of a job, subject to compliance with Clause 8(1)(b) and (c) of the PSM Act, and provided that the officer has been in the position and undertaking the higher level duties that warranted reclassification of the position, for a "continuous period" of 12 months. A continuous period, as referred to above, may include normal and/or reasonable periods of leave (i.e.: sick leave and annual leave).

129 Approved Procedure 2 provides for the classification of positions above level 8 by the Public Sector Commissioner. This procedure deals principally with the creation of positions in the SES.

130 It is common ground that the process outlined in Approved Procedure 1 and Approved Procedure 2 had no application to circumstances of the review of the appellant's classification. Having reviewed the provisions of Approved Procedure 1 and Approved Procedure 2, I agree that neither of these procedures could have been applied to the appellant's circumstances as both procedures only contemplate a classification review of a public service officer where the officer concerned is undertaking a position that has been reclassified. The appellant regrettably 'occupies' a position at level 7 on an unattached list. It is a position that is not attached to duties and thus is without work value. If no work value could be assessed then the appellant's classification could not be reviewed under Approved Procedure 1. In addition, when Approved Procedure 1 and Approved Procedure 2 are read carefully it is clear that each of these procedures do not vest in the Public Sector Commission the decision to classify an employee to a level 8 and above, but simply vest in the Public Sector Commission the classification of positions above level 8.

131 The question then arises whether Approved Procedure 1 and Approved Procedure 2 constitute the only circumstances that the classification of the appellant could be reviewed. Outside the procedure set by Approved Procedure 1 and Approved Procedure 2 could the respondent classify the appellant at a higher level in the absence of assigning a higher classification to the position he is assigned to?

132 The classification system in Approved Procedure 1 and Approved Procedure 2 is broadbanding. Broadbanding creates levels of classification in the public service that carries with each level an obligation to carry out tasks that are broadly comparable from one job to another. Consequently, under Approved Procedure 1 it is the job or duties of an office, post or position that are classified and an occupant of a position can only attain a higher level of classification if they have performed the duties of a reclassified position for a specified period of time. This system enables mobility of public service officers and flexibility for their employing authorities.

133 Mr Conran as a chief executive officer and employing authority of the appellant cannot create an office outside Approved Procedure 1 and Approved Procedure 2: s 29(1)(h) and s 36 of the PSM Act. In my opinion, he also could not classify the appellant unless it was done so in accordance with those procedures, or any other approved classification system or procedure. Also, Approved Procedure 1 reflects the pre-condition in s 29(1)(h) of the PSM Act in that there is no capacity for a chief executive officer to classify an officer or vary the classification of an officer without varying the classification of their office, post or position.

134 If there were no approved classification systems or procedures in respect of employees who are public service officers or the class of employee to which the appellant belongs, then the respondent would have had an unfettered power under s 29(1)(h) of the PSM Act to determine the classification and the office, post or position of the appellant. As a public service officer the appellant is part of a class of employees that Approved Procedure 1 and Approved Procedure 2 apply. He was not, however, eligible for review of his classification under Approved Procedure 1 as he does not hold a position with work value. Nor could his classification be reviewed pursuant to Approved Procedure 2, as that procedure deals with the classification of positions in the SES.

135 Although the respondent and the Public Sector Commissioner agreed to review the classification of the appellant by applying the Statutory Officers Policy, they had no express power to do so and in doing so they acted in excess of jurisdiction. When this principle is accepted, the question whether the respondent made a 'decision' within the meaning of s 80I(1)(a) of the Act becomes immaterial, as the Public Service Appeal Board cannot 'adjust' a decision made by an employing authority when there was no power to make a decision that is sought to be reviewed.

136 In light of this finding, it is not necessary to deal with the merits of the appellant's claim for classification at level 9. Notwithstanding this finding, given that the majority of the evidence and submissions made in this case went to the merits of the classification process, I intend to make some brief observations about the process that was followed and about the adequacy of the review of the appellant's classification by the classification panel.

(b) The nature of the appeal

137 Whilst it is not strictly necessary to deal with the other jurisdictional arguments raised on behalf of the respondent, as the issues were comprehensively argued, I make the following brief observations.

I do not agree this appeal raises a matter in relation to the interpretation of any provision of the PSM Act concerning the salary of the appellant as a condition of service, within the meaning of s 80I(1)(a) of the Act. Firstly, s 80I(1)(a) provides the Board with jurisdiction to hear and determine a matter that is:

(a) against a decision of an employing authority;

(b) in relation to an interpretation of any provision of the PSM Act, concerning the conditions of service (other than salaries and allowances) of public service officers.

The decision must be in relation to an interpretation of a provision of the PSM Act concerning conditions of service. In this matter, the appeal is in relation to s 29(1)(h) of the PSM Act which is a provision empowering a chief executive officer to classify or vary the classification or remuneration of an employee and their offices, posts or positions. What is squarely raised is the interpretation of the power to classify or vary the classification of the appellant. This appeal is not in substance about what salary that is to attach to his classification. Whilst, the consequence of a change in classification often carries with it a change in salary, it does not necessarily follow that will occur. For example, a position may be reclassified to a lower level, but the salary of the holder of the position may be maintained at the higher level by salary maintenance.

138 Whilst the appeal is about the appellant's classification, it also raises an interpretation of the power of a chief executive officer to classify or vary the classification of all public service officers and their offices, posts or positions pursuant to s 29(1)(h) of the PSM Act.

139 Also, whilst the appeal also concerns the application of s 180 of the CCC Act and a review of the merits of the appellant's claim for classification at level 9, that does not mean that the Public Service Appeal Board does not have jurisdiction to hear and determine this appeal. Jurisdiction under s 80I(1)(a) of the Act, is conferred in respect of an appeal 'in relation to' an interpretation of any provision of the PSM Act, concerning conditions of service (other than salaries and allowances) of public service officers. The jurisdiction conferred by this provision is not declaratory. This is reflected by the power in s 80I(1) to adjust all such matters as referred to in paragraph (a) of s 80I(1). The use of the words 'in relation to' confers on the Board a wide power to hear and determine an appeal against a defined decision: the prepositional phrase 'in relation to' is indefinite. Subject to any contrary indication derived from its context or history it requires no more than a relationship, whether direct or indirect between two subject matters: ***O'Grady v The Northern Queensland Company Limited*** (1990) 169 CLR 356 (McHugh J). The power to review under s 80I(1)(a) is not to simply consider whether the decision is to be adjusted on grounds that solely raise an issue of interpretation. For jurisdiction to lie under s 80I(1)(a) there must simply be a real and not hypothetical relationship between an issue raised in the decision that is a question of an interpretation of a provision of the

PSM Act and the conditions of service (other than salaries and allowances) of public service officers. The requirement for a connection is also raised specifically by the use of the word 'concerning' in s 80I(1)(a). In this appeal, the facts disclose there is a connection between the purported 'decision' not to classify and a question of interpretation whether the respondent as a chief executive officer acting under s 29(1)(h) of the PSM Act has the power to classify the appellant or any other public service officer through the application of the Statutory Officers Policy.

140 As this appeal is not about the salary or title allocated to the office occupied by the appellant, the jurisdiction of the Public Service Arbitrator in s 80E(2)(a) of the Act is not raised, as s 80E(2)(a) deals with a claim for salary that attaches to an office, not the salary that attaches to person as a personal classification. In ***Director General of Health v Health Services Union of Western Australia (Union of Workers)*** [2011] WAIRC 00332; (2011) 91 WAIG 865, I made the following observation as obiter dicta [83]:

> Section 80E(2) of the Act makes it clear the jurisdiction under s 80E(2)(a) of the Act includes jurisdiction to deal with a claim in respect of the salary or range of salary allocated to an office occupied by a government officer. However, it is apparent that s 80E(2)(a) of the Act is not concerned with the salary that attaches to the person who holds an office but to the office. Section 80E(1)(a) of the Act contains a distinction between what may be colloquially described as a job (an office) and the person who holds that job (an officer). This distinction is found not only in s 80E(1)(a) of the Act but in other provisions of the Act and the *Public Sector Management Act 1984* (WA): (see, for example, s 80I(1)(b) and s 80I(1)(c) of the Act).

141 For these reasons, I am of the opinion that these jurisdictional issues are not made out.

The classification process

(a) Veracity of the evidence given by the witnesses

142 Whilst there are some differences in the recollection of the appellant, Mr Moore and Mr Conran as to some parts of the conversation the appellant had with Mr Conran at the meeting on 6 May 2009, these differences in recollection are minor and are not material to the determination of this appeal.

143 I generally found the evidence given by the appellant to be reliable as the majority of his evidence is set out in various emails, letters and other documents which contemporaneously record relevant matters and issues raised by him. I do not, however, accept his evidence that when he met with the assessment panel on 25 February 2010, he was told by the panel members that they knew nothing about his application and they had not read it. This evidence is contrary to the evidence given by Mr Pittock, Ms Andrews and Mr Mercadante. Mr Pittock gave evidence that they told the appellant they had read his application but had not commenced the assessment process. Mr Mercadante said that he told the appellant that they had yet to commence the assessment process which would commence following his address to the panel. Ms Andrews met with the appellant on two occasions prior to the meeting with the panel. She also engaged in a number of email conversations with the appellant about his submission and had asked him for a more detailed version of his CV. In addition, Ms Andrew's evidence that she had read the appellant's application prior to the panel meeting with the appellant, is supported by an email attached to her witness statement which was sent to the appellant on 30 November 2009, in which she said in response to an email from the appellant asking if the information he had provided was sufficiently detailed: 'your submission looks ok to me but it will be up to the panel to review and ask for further information if they need it' (exhibit D, KA 05). For these reasons, I prefer the evidence given by Mr Pittock, Ms Andrews and Mr Mercadante to the evidence of the appellant on this issue. Notwithstanding this finding, for reasons that follow, it seems Ms Andrews' analysis of the appellant's submission may not have been more than cursory.

144 Having considered the evidence given by each of the panel members, it is clear that each member of the panel has extensive experience in the classification of offices, posts and positions. Although the classification of an individual office holder as a personal classification is an exercise that does not arise very often because of the structure of the classification systems that prevails in the public service and in the wide public sector, the exercise of assessing a personal classification in this matter required an assessment of historically available offices, posts and positions which is a substantial part of the process contemplated in the Statutory Officers Policy. Consequently, I am satisfied that each of the members of the classification panel were qualified to undertake the task of assessing an appropriate classification of the appellant.

145 The only real issue raised about the credibility of the evidence given by Mr Volaric was about a document prepared in response to a request made under the *Freedom of Information Act 1992* (WA) to the Public Service Commissioner (the FOI request). A schedule was prepared by Mr Volaric in response to the FOI request that listed five draft panel assessment reports one of which was Item 6 – 'Review panel draft CCC' (exhibit 1 – GJR 62). It was argued on behalf of the appellant that an inference could be drawn from the schedule that a copy of a draft of the panel's report was sent to the CCC. This inference, however, is contrary to the evidence given by Mr Volaric who testified that immediately prior to giving evidence he had reviewed the FOI request file and found that the description given to Item 6 in the schedule was incorrect and misleading as the document sent to the CCC was in fact a copy of a draft of the Statutory Officers Policy (ts 140). When the appellant's counsel called for the document that had been sent to the CCC to be produced to the Board, Mr Volaric stated he had no object to the production of the document. However, counsel for the appellant did not pursue the production of the document. In these circumstances, it is not open to the appellant to pursue the drawing of an inference that Mr Volaric's explanation was not credible. In any event, there is no evidence before the Board that the report of the panel did not accurately reflect the recommendation of the panel and the matters they say they considered.

(b) Was the process procedurally fair through the involvement of Mr Volaric?

146 If the decision made by the respondent on 23 August 2010 was reviewable as a decision made under s 80I(1)(a) of the Act, it would be necessary to consider whether there was an apprehension of bias that affected the decision made by the respondent through the involvement of Mr Volaric.

147 In the *Judicial Review of Administrative Action* (4th ed, 2009) the learned authors, Aronson, Dyer and Groves, point out the importance of appearances is a central principle of our legal system that the law be applied and executed without fear, favour or prejudice. In particular, they aptly observe [9.05]:

> Neutrality, and the public and political confidence which that engenders, are regarded as essential to the successful and proper operations of the public service, the tribunal system and the judiciary. There are several reasons for this, which may be broken down broadly into those which are instrumental, and those which are not. Neutrality serves the instrumental goals of promoting accuracy of fact finding, and of enhancing the quality of policy formulation and of policy application. People adversely affected by a decision are also more likely to accept it if they entertain no doubts as to its maker's neutrality. Neutrality, therefore, helps reduce enforcement costs in the decision-making process. The bias rule also serves the non-instrumental values of treating the parties with equal respect and dignity, promoting the public's participation in decision-making processes which affect them individually, and enhancing the institutional legitimacy of the relevant government agencies. (footnotes omitted)

148 Impartiality is required of not only of a decision-maker but the process by which he or she makes that determination. The test for apprehended bias is satisfied where the circumstance would give a fair minded person a reasonable apprehension or suspicion that a decision-maker is not impartial or has prejudiced a matter. The question is one of possibility (real and not remote): ***Ebner v Official Trustee*** [2000] HCA 63; (2000) 205 CLR 337 [7], (Gleeson CJ, McHugh, Gummow and Hayne JJ). This requires a connection between the source of the alleged bias and the resulting apprehension of bias in the decision.

149 It is argued by the appellant the decision-maker was the respondent. It is also argued that the source of the alleged bias was the input of Mr Volaric into the decision-making process. For a an inference to be drawn that there was a real possibility the respondent as the decision-maker was not impartial or has prejudiced the matter, there must be evidence that there was a degree of influence exerted by Mr Volaric on the decision-maker. A similar issue was raised in ***Hot Holdings Pty Ltd v Creasy*** [2002] HCA 51; (2002) 210 CLR 438. In that matter two public service officers who prepared a draft minute reflecting a warden's recommendation designed to assist the Minister to decide the award of a mining licence could have been said to have an interest in the outcome of the application. One officer owned shares in a company that had an interest in the licence if granted and the other had a son who owned shares in the same company. The evidence disclosed that the two officers had taken part in the process at the periphery of giving advice to the Minister. However, after the draft minute was prepared they played no further part in forming the decision and the document underwent considerable change before it went to the Director-General of the department. It was also material that the final document that went to the Minister simply contained a recommendation. After considering these facts, the majority of the High Court rejected the claim that there was a reasonable apprehension of bias in the decision of the Minister. As McHugh J relevantly pointed out [72]:

> A court will not conclude that there was a reasonable apprehension of bias merely because a person with an interest in the decision played a part in advising the decision-maker. The focus must be on the nature of the adviser's interest, the part that person played in the decision-making process and the degree of independence observed by the decision-maker in making the decision. If there is a real and not a remote possibility that a Minister has not brought an independent mind to making his or her decision, the role and interest in the outcome of his or her officers may result in a finding of reasonable apprehension of bias. It would do so in the present case, for example, if either Mr Phillips or Mr Miasi were biased or their circumstances gave rise to an apprehension of bias and either of them had influenced the Minister's decision. Thus, the role played by an adviser is a critical factor in determining whether the interest of an adviser in the outcome of a decision taints the decision with bias or a reasonable apprehension of bias.

150 In this case, the part that Mr Volaric played was also peripheral. He facilitated the convening of a panel to assess the appellant's classification and suggested to Mr Pittock that he undertake research of the availability of level 9 positions. After the panel made its assessment he made enquiries of Mr Pittock of how the decision was reached by the panel and he made some grammatical and style changes to the panel's report that went to the Public Sector Commissioner. There is, however, no evidence that he asserted any influence over the panel members or had any input into the recommendation they made to the Public Sector Commissioner. The evidence at the highest is that Mr Volaric would have intervened to influence the decision of the assessment panel if he disagreed with the recommendation the panel had put forward. Nor is there any reliable evidence before the Board that a draft of the panel report was sent to the CCC.

151 There is also no evidence that Mr Volaric asserted any influence over the Public Sector Commissioner or the respondent. The only evidence before the Board is that the Public Sector Commissioner considered the recommendation made by the panel and accepted that recommendation. In turn the respondent accepted the Public Sector Commissioner's view. In these circumstances, a claim of bias on the part of the decision-maker cannot be made out.

(c) Did the classification process adequately review all relevant matters?

152 Firstly, it is not open for the appellant to criticise the review panel for not considering level 8 positions. The appellant made it very clear to the panel that he was seeking to be classified at level 9 or above.

153 Secondly, it matters not whether the review panel considered they embarked on an exercise to review the appellant's classification or to vary his classification as the appellant held the classification of level 7.3 in the public service prior to his appointment to the CCC. Also at the time of the review in 2010 he held that level of classification.

154 A decision had been made to afford the appellant an opportunity to review his classification in accordance with the Statutory Officers Policy. Clearly if his classification was to be reviewed it was the only policy that could have been used to review the appellant's classification, as it reflects the provisions of s 180(3) of the CCC Act and the findings made by Commissioner Scott. The only basis the appellant could rely upon to have his classification reviewed was through the operation of s 180(3) of the CCC Act. This review was carried out in the sense of what could otherwise be described as voluntary, as there is no obligation at law on the Public Sector Commissioner or the respondent to provide a review of the

appellant's classification. However, having embarked upon the review, the review should have been conducted so far as possible in accordance with the Statutory Officers Policy.

155 As the assessment essentially arose out of the application of s 180(3) of the CCC Act, the only basis on which the appellant's classification could have been assessed is through the application of the Statutory Officers Policy which accurately reflects the following matters that Commissioner Scott in her supplementary reasons in PSACR 27 of 2006 ((2008) 88 WAIG 662 [23]) said should be objectively assessed:

(a) The availability of positions within the public service at the equivalent level of classification and above as the officer occupied immediately prior to appointment under s 179 of the CCC Act;

(b) The nature of those positions;

(c) The experience, skills and qualifications required of those positions and the experience, skills and qualifications of the officer concerned.

156 In this matter an objective assessment of the appellant's circumstances required an assessment of the duties carried out and skills acquired by the appellant in the positions he held prior to his appointment to the CCC and at the CCC. One matter of importance is that he had not carried out the duties of any level 9 position in Western Australia prior to his appointment at the CCC. Also his work post the CCC would only be relevant if the duties of the work carried out by him at ECU involved him acquiring skills, experience or qualifications at a level higher than he substantively held at level 7 and where those skills, experience or qualifications could be utilised in positions that were historically or currently available in the public service at the level sought by him.

157 As Commissioner Scott relevantly observed in her first reasons for decision given on 20 March 2008 that if an officer developed special skills or experience at a much higher level at the CCC, but there are no positions at all or no positions available, which match those particular higher level skills and experience, one would not expect the officer to be appointed to a position at the higher level ((2008) 88 WAIG 265 [67]).

158 Whilst I agree with the submission made on behalf of the respondent that the members of the panel were more than qualified to undertake the task of reviewing the appellant's classification, Ms Andrews' recollection of the process applied by the panel was vague and in part, unsatisfactory. It seems she did not properly engage in a discussion with the appellant in any meaningful way as to what was required in a proper assessment of his classification. Nor does it seem that she made anything other than a cursory pre-assessment. Prior to the appellant's submission being forwarded to the Public Sector Commissioner's office, it was her role to assess the appellant's submission and to advise him whether any further information should be provided or whether the submission adequately addressed the issues the panel was to consider. In the appellant's submission he gave the name of his supervisor at the CCC as a referee. If Ms Andrews had reviewed the appellant's submission properly she would have been aware that the person named had been the appellant's supervisor. Although the assessment panel took the view that it would assume the appellant had continuously performed the full duties and responsibilities of the higher level positions at the CCC, the fact that Ms Andrews did not take any steps to examine the identity of this person named in the referee list shows that she did not pay sufficient attention to the matters set out in his submission. This information may have been of assistance, as the first dot point in cl 4.3 of the Statutory Officers Policy requires a preliminary analysis of an application prior to consideration of a panel. It is contemplated in that paragraph that an initial assessment was to be undertaken by officers of the Public Sector Commission and the assessment may involve interviews with an applicant and his or her statutory office supervisor. Whilst the policy provides this analysis is to be carried out by officers of the Public Sector Commission, Ms Andrews conducted the pre-assessment of the adequacy of the appellant's submission.

159 The pivotal task that was to be undertaken by the assessment panel was to analyse the work undertaken by the appellant at the CCC, prior to the CCC and to assess the availability of vacant positions within the public service in a reasonably historical period. Available positions are those that the appellant had the skills and relevant current experience to perform. This task is inherent in the declaration made by Commissioner Scott and is provided for in cl 3 and cl 4.3 of the Statutory Officers Policy. Under cl 4.3, making an analysis of the availability of level 9 positions in the public service was a task to be undertaken by Mr Pittock as an officer of the DPC. As required by the policy, he generated a historical list of available level 9 positions that had been vacant. Unfortunately he did not retain a copy of that list. This has not enabled any independent review of whether the list contained any level 9 positions which could be said to be 'available' within the meaning of the Statutory Officers Policy, nor to allow an assessment of whether the panel applied a proper process of assessment. As Mr Volaric properly pointed out, that list should have been retained to be considered in the event of a request for a review of the decision.

160 In addition, the list of positions considered by the panel should have been disclosed to the appellant. In the making of administrative decisions which affect rights, interests and legitimate expectations, there is a duty to act fairly, in the sense of according procedural fairness: ***Kioa v West*** (1985) 159 CLR 550 (584) (Mason J); (609 - 611) (Brennan J). Procedural fairness requires that adverse information that is credible, relevant and significant to the decision should be disclosed to a party whose interest might be adversely affected by the exercise of power: ***Kioa*** (629) (Brennan J). Credible, relevant and significant information is information that cannot be dismissed from further consideration by the decision-maker before making the decision: ***Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*** [2005] HCA 72; (2005) 225 CLR 88 [17] (the Court).

161 In the report of the panel accepted by the Public Sector Commissioner the panel assessed the placement options for the appellant at level 9 as low. This finding was based, at least in part, by a review of a historical list of positions generated by Mr Pittock. It is clear from the evidence given by Mr Pittock and Mr Mercadante that they gave significant weight to the information contained in the list. Where credible, relevant and significant information is to be relied upon by an administrative decision-maker, that information, or the substance of that information should be disclosed to the person whose interest might be affected and give him an opportunity to respond to the information prior to making a decision: ***Applicant VEAL of 2002*** [18] – [19] (the Court).

162 If the information contained in the list was publicly available on the Jobs Board internet site (jobs.wa.gov.au) the panel should have informed the appellant that:

(a) it intended to review all level 9 positions within a specified period;

(b) that he could access the information that they intended to consider through that website; and

(c) if he wished to do so he could make a submission to the panel about any of the vacant positions that were currently available or had been available in the nominated historical period.

163 The task of assessing available level 9 positions did not, however, lie solely with the members of the assessment panel, it also lay with the appellant. It should have been clear to the appellant from the reasons for decision of Commissioner Scott in (2008) 88 WAIG 281 [67] that what was meant by 'available positions' were positions that had been recently vacant or currently vacant that required the skills or experience he had gained or utilised at the CCC. In the Statutory Officers Policy this is referred to in cl 3(c) as the transferability of skills, experience and qualifications. Pursuant to cl 4.2 of the Statutory Officers Policy he was required in his submission to address matters that may affect the assessment of the value of work undertaken at the CCC in relation to comparable classified public service positions. The appellant did not do that. His submission contained little information about the value of work carried out by him at the CCC in the Class 1 and level 9 positions. An assessment of work value requires an analysis of scope and complexity of duties performed and reporting relationships. Where the work performed is at senior level such as level 9 or above, an analysis of management duties and skills, policy development and delivery of strategic planning attained in the positions should also be analysed. Nor did his submission contain any analysis of the work he performed at the CCC in relation to any available level 9 positions. The appellant put forward four generic prison superintendent positions and one director of corporate services position. However, he did not put forward to the panel any assessment of the duties, skills and requirements of these positions by relating the requirements set out in the two JDFs of these positions to the skills, experience and qualifications he had obtained whilst performing the higher level of work at the CCC. Nor did he put forward any analysis of his work at ECU that directly related to the requirements of those JDFs. Unfortunately the appellant formed the view that such an assessment was not necessary as he was of the opinion that all that was required was an assessment of his skills, experience and qualifications and that Commissioner Scott's order had the effect that there was no requirement to compare his former positions with any other position in the public service. It is also unfortunate that when the appellant conveyed this opinion to Ms Andrews in a covering letter addressed to the respondent dated 9 November 2009 and in an email to her on 27 December 2009, that Ms Andrews did not take any steps to inform the appellant that his opinion was incorrect. She simply told him in an email on 29 December 2009 that the Statutory Officers Policy was being used as a guide. The appellant also laboured under a false presumption that prima facie he was entitled to a level 9 classification because he had been performing duties at level 9 or better.

164 In making the required assessment, except for making contact with the appellant's supervisor at the CCC, I agree in this matter it was not necessary to speak to any of the appellant's referees. I do, however, agree that the Statutory Officers Policy contemplates that the appellant's 'home agency' would have been the agency he was employed in prior to his employment at the CCC and not DPC.

165 For these reasons, I am of the opinion that the process adopted by the assessment panel was procedurally unfair as the historical list of positions relied upon by the panel to make their assessment was not disclosed to the appellant. I am also of the opinion that the appellant's submission was, in any event, deficient as it contained little information which could be relied upon to assess the transferability of the appellant's skills to the level 9 positions nominated by him as positions he says he was qualified to hold.

Conclusion

166 Whilst I have found the process adopted in the review of the classification of the appellant to be procedurally unfair, as the review undertaken was voluntary in the sense that there was no power or right vested in the appellant at law to require the respondent to review his classification, or any power or duty vested in the respondent to classify or vary the classification of the appellant, I am of the opinion that the appeal must be dismissed.

167 At the heart of the appellant's appeal is the level of classification afforded to him on his return to the public service from the CCC. Yet the time for challenging the level of classification provided to the appellant on his return to the public service pursuant to s 180(3) of the CCC Act was when the level 7.3 position was offered to him or taken up by him in early 2007. Unfortunately that decision was not directly challenged by the appellant or the organisation that represented him at that time. As a consequence the appellant cannot now seek to have that decision reviewed.

168 For these reasons, I am of the opinion that an order should be made to dismiss the appeal.

MR B DODDS:

169 I have read a draft of the reasons for decision of Smith AP. I agree with those reasons and the order proposed.

MR K CHINNERY:

170 I have read a draft of the reasons for decision of Smith AP. I agree with those reasons and the order proposed.

2011 WAIRC 00950

APPEAL AGAINST THE DECISION MADE ON 23 AUGUST 2010 RELATING TO NON IMPLEMENTATION OF RE CLASSIFICATION AS DETERMINED

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GLENN ROSS
	APPELLANT
	-v-
	MR PETER CONRAN, DIRECTOR GENERAL
	DEPT OF THE PREMIER AND CABINET
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	THE HONOURABLE J H SMITH, ACTING PRESIDENT - CHAIRMAN
	MR B DODDS - BOARD MEMBER
	MR K CHINNERY - BOARD MEMBER
DATE	TUESDAY, 11 OCTOBER 2011
FILE NO	PSAB 18 OF 2010
CITATION NO.	2011 WAIRC 00950

Result	Appeal dismissed
Appearances	
Appellant	Ms P J Giles (of counsel)
Respondent	Mr R J Andretich (of counsel)

Order

This matter having come on for hearing before the Public Service Appeal Board on Monday, 23 May 2011, Tuesday, 24 May 2011, Wednesday, 25 May 2011 and Tuesday, 28 June 2011, and having heard Ms P J Giles (of counsel) on behalf of the appellant, and Mr R J Andretich (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 11 October 2011, the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT the appeal be and is hereby dismissed.

(Sgd.) THE HONOURABLE J H SMITH,
Acting President,
[L.S.] On behalf of the Public Service Appeal Board

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2011 WAIRC 00978

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	DANE PRIDMORE
	APPLICANT
	-v-
	SAFE & SOUND LABOUR HIRE PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 31 OCTOBER 2011
FILE NO/S	OSHT 24 OF 2009
CITATION NO.	2011 WAIRC 00978

Result	Order issued
Representation	
Applicant	Mr S Millman
Respondent	Ms L Gibbs (of counsel)

Order

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

AND WHEREAS the Tribunal convened conferences on 17 February 2010 and 18 March 2010 for the purpose of conciliation between the parties;

AND WHEREAS on 10 October 2011 a Notice of Discontinuance was filed by the agent for the applicant;

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.

2011 WAIRC 00985

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TONY BAINBRIDGE AND OTHERS
	APPLICANTS
	-v-
	SAFE AND SOUND LABOUR HIRE PTY LTD AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 31 OCTOBER 2011
FILE NO/S	OSHT 3 OF 2010, OSHT 4 OF 2010, OSHT 8 OF 2010, OSHT 9 OF 2010, OSHT 10 OF 2010, OSHT 11 OF 2010, OSHT 13 OF 2010, OSHT 14 OF 2010, OSHT 15 OF 2010, OSHT 18 OF 2010, OSHT 19 OF 2010, OSHT 20 OF 2010, OSHT 27 OF 2010, OSHT 28 OF 2010, OSHT 29 OF 2010, OSHT 30 OF 2010, OSHT 31 OF 2010, OSHT 33 OF 2010, OSHT 35 OF 2010, OSHT 38 OF 2010, OSHT 42 OF 2010, OSHT 44 OF 2010, OSHT 87 OF 2010, OSHT 88 OF 2010, OSHT 89 OF 2010, OSHT 91 OF 2010, OSHT 92 OF 2010, OSHT 94 OF 2010, OSHT 96 OF 2010, OSHT 102 OF 2010, OSHT 106 OF 2010
CITATION NO.	2011 WAIRC 00985

Result	Supplementary order issued
Representation	
Applicant	No appearance
Respondent	No appearance

Supplementary Order

WHEREAS the Occupational Safety and Health Tribunal (the Tribunal) issued orders in each of the aforementioned matters reflecting Mr T Kucera (of counsel) as having appeared on behalf of the applicants;

AND WHEREAS it was in fact Mr S Millman (of counsel) who appeared on behalf of the aforementioned applicants;

AND WHEREAS there was an agreement that each of the applications referred to be discontinued;

AND WHEREAS on 14 September 2010, the Tribunal issued a series of orders pursuant to the *Occupational Safety and Health Act 1984* discontinuing the applications by consent;

AND WHEREAS counsel for the applicants made written application that the aforementioned representation be amended in each of the applications;

AND WHEREAS no objection was received from the respondents to the issuance of a supplementary order amending representation;

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

1. THAT representation be amended in OSHT 3 OF 2010, OSHT 4 OF 2010, OSHT 8 OF 2010, OSHT 9 OF 2010, OSHT 10 OF 2010, OSHT 11 OF 2010, OSHT 13 OF 2010, OSHT 14 OF 2010, OSHT 15 OF 2010, OSHT 18 OF 2010, OSHT 19 OF 2010, OSHT 20 OF 2010, OSHT 21 OF 2010, OSHT 27 OF 2010, OSHT 28 OF 2010, OSHT 29 OF 2010, OSHT 30 OF 2010, OSHT 31 OF 2010, OSHT 33 OF 2010, OSHT 35 OF 2010, OSHT 38 OF 2010, OSHT 42 OF 2010, OSHT 44 OF 2010, OSHT 87 OF 2010, OSHT 88 OF 2010, OSHT 89 OF 2010, OSHT 91 OF 2010, OSHT 92 OF 2010, OSHT 94 OF 2010, OSHT 96 OF 2010, OSHT 102 OF 2010, OSHT 106 OF 2010 arising out of a common set of proceedings in the aforementioned applications.
2. THAT in each of those matters the name of Mr T Kucera (of counsel) be deleted and Mr S Millman (of counsel) be inserted in lieu thereof.

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

2011 WAIRC 00983

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	GRANT VEAL
	APPLICANT
	-v-
	HITACHI PLANT TECHNOLOGIES LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 31 OCTOBER 2011
FILE NO/S	OSHT 23 OF 2009
CITATION NO.	2011 WAIRC 00983

Result	Order issued
Representation	
Applicant	Mr S Millman
Respondent	Ms L Gibbs (of counsel)

Order

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

AND WHEREAS the Tribunal convened conferences on 17 February 2010 and 18 March 2010 for the purpose of conciliation between the parties;

AND WHEREAS on 10 October 2011 a Notice of Discontinuance was filed by the agent for the applicant;

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.

2011 WAIRC 00980

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	TONY WOODHEAD
	APPLICANT
	-v-
	SAFE & SOUND SCAFFOLDING PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 31 OCTOBER 2011
FILE NO/S	OSHT 25 OF 2009
CITATION NO.	2011 WAIRC 00980

Result	Order issued
Representation	
Applicant	Mr S Millman
Respondent	Ms L Gibbs (of counsel)

Order

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

AND WHEREAS the Tribunal convened conferences on 17 February 2010 and 18 March 2010 for the purpose of conciliation between the parties;

AND WHEREAS on 10 October 2011 a Notice of Discontinuance was filed by the agent for the applicant;

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.