CUMULATIVE DIGEST headings

*Denotes New Heading

Absence Without Leave

Act—Interpretation of

Allowances—See also specific heading, e.g. Isolation Allowance, Industry Allowance, Meal Money—(lncludes Special Rates and Provisions)

Annual Leave—(Includes Annual Leave Loading)

Appeal

Apprentices and Juniors

Awards—(Includes specified sub-headings, First Awards, New Awards, Area, Scope, Coverage, Cancellations, Award-Free, Respondency)

Board of Reference

Board and Lodging—(Includes Accommodation)

Bonus—(Includes Incentive Payments)

Breach of Award

Capacity to Pay—Includes Inability to Pay

Casual Work—(Includes loadings applicable to such work and nature of casual employment)

Classification—(Includes Reclassification)

Clothing—(Used when clothing is/is not provided and for clothing allowances)

Common Rule—(Used in relation to Awards being or becoming Common Rule awards)

Comparative Wage Justice—See also Nexus—(lncludes Relativities)

Compassionate Leave—(Includes Bereavement Leave)

Compensation—See also specific heading, e.g. Redundancy, Long Service Leave—(Includes compensation for unfair dismissals)

Conference—(Includes such matters as jurisdiction arising out of)

Confined Space

Consumer Price Index

Contract of Service—(Used in relation to Section 29 (2) applications)

Contract out of Award

Custom and Practice

Dangerous Work

Date of Operation—(Includes Retrospectivity, Prospectivity)

Demarcation

Dirt Money

Disabilities

Discrimination

Employee—(Used in such cases as whether person is an employee or independent contractor or agent)

Enforcement of Awards/Orders

Entry: Right of

Hours of Work

Industrial Action—(lncludes Work-to-Rule, Picketing, Stop Work Meeting, Strike, Bans, Lockouts)

Industrial Matter

Industry—(Used re questions of extent and meaning of specified industry)

Industry Allowance

Interpretation—Words and Phrases

Intervention

Isolation Allowance

Jurisdiction

Jury Service

Leave Without Pay

Living Away From Home Allowance

Long Service Leave

Managerial Prerogative

Manning

Maternity Leave

Meal Breaks

Meal Money

Misconduct

Mixed Functions—(Includes Higher Duties)

Natural Justice

Nexus

Night and Weekend Work

On Call—(Includes Stand by)

Order—(Includes Cancellation of Order)

Over Award Payment

Overtime—(Includes Call Back, Recall)

Part-Time

Penalty Rates

Piecework

Preference—(lncludes Compulsory Unionism)

Principles (Wage Fixing)

Procedural Matters (e.g. Standards of evidence)

Promotion Appeals

Public Holidays

Public Interest

Redundancy/Retrenchment—(Includes Severance Pay)

Reinstatement

Registration—See Unions

Rest Periods—(Includes Smokos)

Safety

Shift Work

Sick Leave

Standdown

Stay of Proceedings

Superannuation

Supplementary and Service Payments

Tallies

Technological Change

Termination—(Includes Dismissal, Wrongful/Unfair Dismissal)

Training

Transfer

Travelling—(Includes Travelling Allowance and Travelling Time)

Unfair Discrepancy

Unions—(Includes Direction for Observance of Rules, Registration, Rules, Enforcement of Rules, Coverage/Constitutional Coverage, Dues, Membership, Cancellations, Exemptions)

Utilisation of Contractors

Victimisation

Wages—(lncludes Catch-up Margins, Payment by Results, Piece Work, Minimum Wage)

Work Value

Worker Participation

Workers Compensation

CUMULATIVE DIGEST

MATTERS REFERRED TO IN DECISIONS OF INDUSTRIAL APPEAL COURT, INDUSTRIAL COMMISSION AND INDUSTRIAL MAGISTRATES CONTAINED IN VOL. 78 PART 1, SUB PART 10.

NOTE: [1] Denotes Industrial Appeal Court Decision [3] Denotes Commission in Court Session Decision
[2] Denotes Full Bench Decision [4] Denotes Decision of President

Page

ABSENCE WITHOUT LEAVE

Application for Compensation on the grounds of unfair dismissal—Respondent argued dismissal was due to unauthorised absence and if compensation was awarded it should be limited—Commission found Respondent had incorrectly applied policy relating to time recording and deducted pay from the Applicant—Commission found absence was directly caused by that deduction and to dismiss the applicant in those circumstances was harsh—Commission found reinstatement was impracticable, reviewed authorities and found that in assessing compensation the Commission's discretion did not equal the loss of earnings to the date of hearing plus an assessment of future loss and the Commission would take other factors into account—Granted—Mr PA Simons -v- Ismail Holdings Pty Ltd T/A Envelope Specialists—APPL 1363 of 1997—BEECH C—12/11/97—Wood and Paper Product Mfg 1058

ACT—INTERPRETATION OF

Application for orders re variation of roster-Applicant union argued that changes to rosters proposed by respondent should be cost neutral on the basis of past practice and sought a proposed roster or minimum salary—Respondent argued practice was limited to the introduction of One Man Operations, alternative claim conflicted with the paid rates award and should be tested against the Wage Fixing Principles—Commission reviewed s26A of the IR Act 1979 re evidence and workplace agreements—Commission found it was concerned at the time only with the issue of cost neutrality not the equality in the number of jobs between award and non-award employees—Commission found on evidence it was possible to draw up a roster which maintained earnings and integrated with staff schedule, that that ought occur and adjourned for the parties to confer—In Supplementary Reasons Commission found that though circumstances had changed, the Applicant was entitled to an order reflecting the Reasons for Decision—Granted with liberty to apply reserved—CONSTRUCTION, MINING, ENERGY -v- Hamersley Iron Pty Limited—APPL 929 of 1997—BEECH C—18/11/97—Metal Ore Mining 736

Application for compensation on the grounds of unfair dismissal—No appearance on behalf of Applicant—Respondent argued that matter should be dismissed for want of jurisdiction—Commission found Federal Award covered the field insofar as unfair dismissals were concerned, there was an inconsistency between State and Federal laws and the matter was beyond the Commission jurisdiction—Dismissed—Mr J Irimia -v- Swan Transit Services (South) Pty Ltd—APPL 1799 of 1997—FIELDING C—15/01/98—Road Transport 747

[1]Appeal against part decision of Commission (77 WAIG 2374 & 2778) re allegedly denied contractual entitlements—Appellant argued Commission erred in finding there was no jurisdiction to deal with the claim for superannuation payments, that there was no inconsistency between s29(1) (b)(ii) of the IRAct 1979 and the Superannuation Guarantee (Administration) Act 1992—Respondent argued that notwithstanding that it conceded that it had an arrangement to pay for the superannuation contribution, it was not a contractual entitlement, it was a statutory obligation—Full Bench reviewed authorities, Acts, s109 of the Constitution and found the amount claimed was not a contractual benefit and the SGAA and SGAC covered the field to render s29 inoperative—Dismissed—Ms EA Keane -v- Lomba Pty Ltd T/A Ian George & Co—APPL 1770 of 1997—Full Bench—SHARKEY P/COLEMAN CC/CAWLEY C.—17/02/98—Property Services 810

Applications to register agreements—Applicant Union argued s49C(2) did not prevent the registration of the agreements—Commission reviewed authorities and found that as the agreements increased the amount of contribution in certain circumstances but did not of themselves require a contribution, there was no impediment to them being registered—Granted—The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers & Other -v- P & C Industrial Installations and Maintenance Pty Ltd—AG 325,334,358,360,361,362,363,365,366,367,368,369,370 of 1997—SCOTT C.—03/02/98—General Construction 955

[2]Application to alter Organisation rules re eligibility for membership to include union employees—Applicant Union argued s55 (2)(b) of the IR Act 1979 was substantially complied with—Applicant Union further argued only 6 employees did not have a teaching qualification and it was not a distinguishing factor, there was a community of interest in the members and other organisations had similar provisions—Objector argued there would be a conflict of interest, there was an inequity in pay scales between employees and the members and employees would have an advantage at election times—Full Bench found that there was a mandatory requirement to publish a notice of the alteration sought not met and refrained from hearing the matter giving liberty to apply—Full Bench subsequently found that the procedural requirements of the IRAct had been met and there was no overlapping of membership—Majority of Full Bench found that the members felt confident that members felt confident that their interests would not be undermined, that the objections were more academic than real or held little merit—Granted and ordered accordingly—The State School Teachers Union of W.A. (Incorporated) -v- (Not applicable)—APPL 680 of 1997—Full Bench—SHARKEY P/FIELDING C/PARKS C—21/10/97—Other Services 1123

[4]Application for orders re alleged breach of organisation rules—Applicants argued that facsimiles sent out by the Respondents constituted unauthorised use of resources for the production and distribution of election material and failure of the Union President to ensure the rules were observed—Respondent argued Applicants' agent should not appear as he was not a registered agent and sought direction—President reviewed s112 of the IRAct 1979 and found that carrying on a business was not restricted to a commercial enterprise, but a person or body engaged in the activity of an industrial agent and dismissed oral application—President gave leave for counsel to appear for the Respondents and gave reasons therefore—President reviewed rules and found on evidence that the documents were not electoral material, the Union President could notify election results as CEO and no established breach of rules—Dismissed—Ms RGA Jeakings -v- The State School Teachers Union of W.A. (Incorporated)—APPL 2239,2241 of 1997—President—SHARKEY P—03/02/98—Other Services 1136

Appeal against decision of Commission (78 WAIG 506) re interpretation of distant work provisions in an award and an industrial agreement—Appellant argued Commission failed to adequately consider submissions on allowance, the difference between allowances and wages, the concept of time spent travelling be paid as wages and employees should be paid ordinary hourly rates when travelling—- Full Bench reviewed authorities and found that the payments were clearly allowances as defined, absorbed into the hourly payments; not payable under the award and that the Commission had not erred in its interpretation of the agreement—Dismissed—AUTO, FOOD, METAL, ENGIN UNION -v- Leighton Contractors Pty Ltd—APPL 55 of 1998—Full Bench —SHARKEY P/COLEMAN CC/BEECH C—23/04/98—Metal Ore Mining 1571

[2]Application for enforcement of IR Act 1979 re failure to produce time and wages records and obstruction of Industrial Inspectors—Applicant argued that a direction by the Respondent to leave the premises constituted hindering or obstruction of the industrial inspectors—Respondent argued the employee concerned had not given correct notice and he had no time to give the inspectors records for 7 years—Full Bench found on evidence that respondent was lawfully required to produce the records which were on the premises and that the breaches were proven—Full Bench subsequently considered submissions on mitigation and that the respondent had not previously offended—Full Bench found that the breaches involved quite flagrant refusals to comply with requests of public officers and a penalty near the bottom of the scale would not mark the seriousness of the breach or reflect the necessary deterrent element—Ordered Accordingly—Ms G Harris -v- Mr EO De Campo—APPL 2336 of 1997—Full Bench —SHARKEY P/COLEMAN CC/PARKS C—23/02/98—Food, Beverage and Tobacco Mfg 1578

CUMULATIVE DIGEST—*continued*

Page

ACT—INTERPRETATION OF—*continued*

[2]Application for order pursuant to s72A re exclusive union coverage of one employer—Applicant Union argued the Commission had the power to make certain orders and sought orders for secret ballots—AWU, Employer and AMMA argued interalia the application ignored the separate membership requirements of each of the employee organisations concerned the employee preference should be weighed up and there was already evidence of union numbers—Majority of Full Bench found it had not express powers to issue orders sought and it would go beyond the Commission merely informing itself—Majority Full Bench further found little relevance in balloting non-members and was not persuade the equity good conscious and substantial merit lay with the applicant—Applicant sought to withdraw application and Employer sought costs—Full bench reviewed IR Act 1979 and found the employer was not a party to t he application, there was no prescription enabling an award of costs to a person given leave to be heard under s72A and the rule generalia specialibus derogant did not apply—Full bench further found under the circumstances the employer could not criticise the applicant for a delay in reaching a decision to discontinue notify it and neither the employers or the Applicants claims were an extreme case even if they were competent—Dismissed—CONSTRUCTION, MINING, ENERGY -v- (Not applicable)—APPL 1401 of 1997—Full Bench— SHARKEY P/GREGOR C/BEECH C—24/10/97—Other Mining 1581

[2]Appeal against part of decision of Commission (78 WAIG 1058) re compensation for unfair dismissal——Appellant argued Commission failed to assess the loss suffered by him because of the dismissal, including loss of assets, and determine the amount of compensation accordingly, and sought an amount based on loss capped by the statutory limit- Full Bench reviewed authorities, the history of compensation for unfair dismissal provisions and s23A of the IRAct 1979—Full Bench found (in separate reasons) that the figure claimed was not reduced by the amount of post dismissal earnings and was therefore erroneous; that the method adopted was not at odds with the Act and the Appellant had not discharged the onus of establishing that there was a palpable error requiring intervention—— Dismissed——Mr PA Simons -v- Ismail Holdings Pty Ltd T/A Envelope Specialists——APPL 79 of 1998——Full Bench—— SHARKEY P/GREGOR C/CAWLEY C.——29/05/98——Wood and Paper Product Mfg 2332

Application to vary award re Salary Packaging—Preliminary matter re jurisdiction——Applicant Union argued clause sought was no different to the award provisions which were not totally prescriptive but provided a framework within which employers and employees could conduct their affairs—— Respondent argued parts of variations sought: did not raise an industrial matter; would be void because they were contrary to the State and Federal Superannuation Legislation and Workplace Agreement Act; and infringed section 114 of the I.R. Act 1979——Respondent further argued clause sought were matters for enterprise bargaining —PSA found fundamental question was whether salary packaging was an "industrial matter" and did not accept that the whole clause should be set aside because of matters that could be rectified individually——Adjourned——Hospital Salaried Officers Association of Western Australia (Union of Workers) -v- Royal Perth Hospital & Others——P 62 of 1994——Public Service Arbitrator——GREGOR C/GEORGE C/BEECH C——24/09/96——Health Services 2346

[4]Application to disallow Organisation Rule re political donations on the grounds that the rule was inconsistent with the IRACt 1979——Applicant argued that s97P and Part VIC served a legitimate end compatible with the notion of representative government and democratic process, and it was not probable that the implied right of equality operated at State level——Applicant argued organisations should be accountable to their members who should have a say in the use to which their political donations and levies were put——Applicant argued Organisations were the only organisations representing employees and their political expenditure should be regulated——Respondent Organisation argued that the statutory provisions were contrary or inconsistent with rights guaranteed by the Australian Constitution and to that extent were invalid or inoperative——Respondent argued the Act discriminated against Trade Unions by creating oppressive administrative barriers for the expenditure of monies on political matters ——President reviewed the Respondent's rules, authorities , the implied rights of "equality" and "freedom of communication" under the Australian Constitution' and applied the test in Lange v Australian Broadcasting Commission (1997) (145 ALR 96)——President found that the rule enabled what was forbidden by s97P(4): the crediting of monies from members subscriptions to a political fund—— President found that the provisions burdened the freedom to communicate, did more than regulate political donations and that ss97O and 97P(4), interalia, were invalid——President found it was not established that the rule was contrary or inconsistent with any Act, law, award, interalia, that was contrary to s66(2)(a)(iii) and that there was no jurisdiction or power to disallow it——Dismissed——REGISTRAR -v- COMM, ELECTRIC, ELECT, ENERGY——APPL 2194 of 1997——President——SHARKEY P——29/05/98——Other Services 2366

ALLOWANCE

Application to vary award to consent re allowances—Applicant Union claimed award should be varied to reflect CPI movements—Respondent agreed in principle but argued that the all purpose allowances were not work related allowances and should not be allowed—Commission found as application was consistent with the wage fixing principles variation be granted and argument from respondent be dismissed—Ordered Accordingly—LIQUOR & ALLIED INDUST UNION -v- Kalamunda Club (Inc)—APPL 1412,1413,1414,1415,1416 of 1992—CAWLEY C.—22/12/97—Electricity and Gas Supply 459

Conference referred re claim for temporary special allowance—Applicant Union claimed employee had continued to perform level 7 duties since abolition of the position she was acting in and sought allowance for difference between level 6 and 7—Respondent argued it had never been asked to consider a Temporary Special Allowance—PSA found duties were performed at level 7 and that the failure to follow correct procedure was not fatal—PSA reviewed Public Service Award and Work Value Changes Principle found that application of that principle supported the payment of an allowance—Granted—The Civil Service Association of Western Australia Incorporated -v- Department of Contract and Management Services—PSACR 38 of 1996;PSACR 54 of 1997—BEECH C—12/02/98—Government Administration 1069

[2]Appeal against decision of Commission (78 WAIG 506) re interpretation of distant work provisions in an award and an industrial agreement—Appellant argued Commission failed to adequately consider submissions on allowance, the difference between allowances and wages, the concept of time spent travelling be paid as wages and employees should be paid ordinary hourly rates when travelling—- Full Bench reviewed authorities and found that the payments were clearly allowances as defined, absorbed into the hourly payments; not payable under the award and that the Commission had not erred in its interpretation of the agreement—Dismissed—AUTO, FOOD, METAL, ENGIN UNION -v- Leighton Contractors Pty Ltd—APPL 55 of 1998—Full Bench —SHARKEY P/COLEMAN CC/BEECH C—23/04/98—Metal Ore Mining..... 1571

Application for allegedly denied contractual entitlements -Commission changed identification of Respondent by consent -Applicant argued he had an unwritten employment contract with the Respondent which included part-payment of telephone bills and superannuation contributions-Applicant further argued that there existed an unwritten agreement for additional duties and payment for successful occupancies-Respondent argued that the additional duties were performed from time to time as required and with a pre -agreed fee-Respondent further argued that this arrangement did not form a collateral contract to the employment contract but was an additional arrangement between the Applicant and other parties-Commission found it could give effect to those parts of the employment contract which it had found to exist between the parties-Granted in part—Mr AE Campbell-Henderson -v- Owners of Strata Plan 5767—APPL 1661 of 1997—GREGOR C—Property Services 1891

Application for allegedly denied contractual benefits -Applicant failed to attend the proceedings-Respondent argued that the Applicant had displayed complete disregard of his own application to the Commission in failing to appear or respond to communications regarding the application-Respondent further argued that the Applicant's behaviour had wasted public money and put the Respondent to considerable expense and sought costs-Commission found that Applicant treated the Commission with disdain and left it with no alternative but to dismiss the claim for want of prosecution-Commission further found that it is a matter of public interest that litigants in this jurisdiction are aware that matters need to be dealt with speedily-Dismissed and costs granted—Mr SP Gavin -v- Robert Stephen Cocking T/A Batavia Motor Inne—APPL 1783 of 1997—GREGOR C— Accommodatn, Cafes&Restaurants 1906

CUMULATIVE DIGEST—*continued*

Page

ANNUAL LEAVE

Application for unfair dismissal and allegedly denied contractual entitlements—Applicant claimed he was contractually dismissed and sought one weeks wages wrongfully deducted and pay in lieu of notice—Respondent argued that Applicant abandoned his employment—Commission found it was not necessary to determine which party terminated the contract and that one weeks notice was wrongfully deducted—Granted in Part—Mr C Pearson -v- J & R Sacca Poultry—APPL 1545 of 1997—PARKS C—01/12/97—Basic Material Wholesaling 756

Application for allegedly denied contractual entitlements re wages, commission, and prorata annual leave—Respondent argued he was entitled to 75% commission on a property sold—Respondent argued that the Commission was only 50% and that expenses to be deducted from the payments were greater than the Applicant specified—Commission found on evidence that commission was 50% and that the Applicant did not have an entitlement of prorata annual leave independently of the Minimum Conditions of Employment Act 1993—Commission further found that the contract of service did not provide for deduction from salary and wages, nor for the deduction from commission of the cost of business cards and removal of advertising signs—Granted in Part—Mr MA Abbott -v- Roy Weston Carousel Southern Realty Branch—APPL 1421 of 1997—FIELDING C—03/03/98—Property Services 1054

APPEAL

[1]Appeal against decision of Full Bench (76 WAIG 4875) re application for enforcement of orders of the Commission -Appellant argued that Full Bench erred on refusing to: admit evidence, grant an adjournment, allow amendment of particulars, which put the Appellant in a position of being unable to adduce relevant evidence and in the subsequent dismissal of the applications-IAC found that the Full Bench refusal to amend the particulars brought about an injustice to the Appellant and prevented the Appellant from having its case fairly tried-IAC found that the Full Bench failed to give weight to the absence of any prejudice to the Respondent in the event of the proposed amendments being allowed and that in the circumstances the Respondents would have had ample time in which to answer the new allegations which related to the actions of their own officials- IAC found the observance of orders of the Commission was a matter in which the community as a whole had an interest, that the discretion of the Full Bench miscarried and disclosed an error at law which led to the dismissal of the applications—Upheld and Remitted—REGISTRAR -v- CONSTRUCTION, MINING, ENERGY—IAC 20 & 21 of 1996—Industrial Appeal Court—- 14/11/97—Other Services 289

[2]Appeal against decision of Commission (77 WAIG 2006) re granted compensation for unfair dismissal claim-Appellant claimed that Commission erred in failing to adopt proper approach to assessment of compensation and ought to have awarded Applicant equivalent of 6 months remuneration-Full Bench found that Commission had erred in the exercise of discretion, in particular the principles which were applied and that as there was evidence that discretion had miscarried appeal be upheld-Ordered Accordingly—Mr JA Capewell -v- Cadbury Schweppes Australia Ltd—APPL 1364 of 1997—Full Bench—SHARKEY P/COLEMAN CC/BEECH C—Food Retailing 299

[2]Appeal against decision of Commission (77 WAIG 1748) re granted compensation on the grounds of unfair dismissal -Appellant claimed that Commission erred in failing to take into account Appellant's lost wages and had failed to correctly apply relevant principles in compensation-Full Bench found that as Commission's order for compensation did not represent a miscarriage of discretion, no ground of appeal was made out-Dismissed—Mr BR Smith -v- CDM Australia Pty Ltd—APPL 1310 of 1997—Full Bench—SHARKEY P/FIELDING C/CAWLEY C.—18/12/97—Personal & Household Good Rtlg 307

[2]Appeal against decision of Commission (77 WAIG 1996) re compensation for unfair dismissal—Appellant argued the employment was casual, therefore it was not possible to reinstate the respondent even if there was an unfair dismissal and that the termination was not at the initiative of the employer—Appellant further argued that Commission misapplied the principles of an employee changing his/her mind after a heated argument with the employer and the whole, not part, of the Respondent's social security payments should have been deducted from the amount of compensation—Respondent argued social securities payments should not have been deducted from compensation—Full Bench found that on the evidence it was open to find that there was a straight and unequivocal summary dismissal—Full Bench further found the Commission erred in deducting the social security payments, but as their was no cross appeal there was no remedy the Full Bench could provide—Dismissed—Swan Yacht Club (Inc) -v- Ms L Bramwell—APPL 1485 of 1997—Full Bench—SHARKEY P/COLEMAN CC/SCOTT C.—Sport and Recreation 579

[2]Appeal against decision of Industrial Magistrate re Breach of award—Parties submitted that Industrial Magistrates actions constituted a decision—Full Bench found that at the time the Notice of Appeal was lodged there was no decision against which to appeal within the meaning of s84 of the Industrial Relations Act 1979, and that the appeal and the applications to extend time were incompetent—Dismissed—G Parri & M Parri T/A G & M Parri -v- The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers—APPL 2041 of 1997—Full Bench—SHARKEY P/PARKS C/SCOTT C.—General Construction 586

[1]Appeal against decision of Full Bench (77 WAIG 2195) re Breach of Award—IAC found that the question of whether the employee in question was an Assistant Supervisor with in the meaning of the expression in the Award was a mixed question of fact and how—IAC found the Industrial Magistrate and Full Bench fully appreciated the distinction between assistance expected of any employee and assistance that was in the discharge of the duties and responsibilities of the particular office of supervisor—IAC found it was open on the evidence to find that the employees major and substantial employment was that of an Assistant Supervisor—Dismissed—LIQUOR, HOSPITALITY & MISC -v- Kellerberrin Care of the Aged Committee Inc t/a Dryandra Frail Aged Hostel—IAC 7 of 1997—Industrial Appeal Court—- 03/03/98—Community Services 807

[1]Appeal against part decision of Commission (77 WAIG 2374 & 2778) re allegedly denied contractual entitlements—Appellant argued Commission erred in finding there was no jurisdiction to deal with the claim for superannuation payments, that there was no inconsistency between s29(1) (b)(ii) of the IRAct 1979 and the Superannuation Guarantee (Administration) Act 1992—Respondent argued that notwithstanding that it conceded that it had an arrangement to pay for the superannuation contribution, it was not a contractual entitlement, it was a statutory obligation—Full Bench reviewed authorities, Acts, s109 of the Constitution and found the amount claimed was not a contractual benefit and the SGAA and SGAC covered the field to render s29 inoperative—Dismissed—Ms EA Keane -v- Lomba Pty Ltd T/A Ian George & Co—APPL 1770 of 1997—Full Bench—SHARKEY P/COLEMAN CC/CAWLEY C.—17/02/98—Property Services 810

[2]Appeal against decision of Industrial Magistrate (77 WAIG 2363) re order for costs—Appellant argued Industrial Magistrate was functus officio when dealing with the application for costs, that the Appellant had made no formal application and that the witnesses had given evidence as part of their duties as employees and had suffered no loss—Full Bench reviewed IRAct 1979, Industrial Magistrates Court Regulations 1980, the Justices Act 1902 and found that the hearing of the application could not be completed until the question of costs had been determined—Full Bench reviewed authorities and found no established ground to interfere with the case—Dismissed—LIQUOR, HOSPITALITY & MISC -v- Metro Meat International Limited—APPL 1657 of 1997—Full Bench—SHARKEY P/COLEMAN CC/GREGOR C—19/02/98—Food, Beverage and Tobacco Mfg 813

[1]Cross appeals against decision of Full Bench (76 WAIG 4434) re unfair dismissal—Appellant argued matter to do with the employees general suitability were not relevant to the question of impracticality of reinstatement in the particular circumstances of the case—Appellant employer argued that no order for compensation should have been made as the very generous overpayment of salary adequately compensated for any loss or injury caused by the dismissal and that the order was beyond power—IAC found that proof that a position has been abolished is at least prima facie proof that reinstatement or re-employment is impractical and that it would be for the employee to displace that conclusion—IAC further found that the amount ordered did not exceed 6 months and could not be made to do so by notionally adding it to the amount of the termination pay made voluntarily by the employer and that payment did not preclude the Commission exercising its discretion to make an award of compensation for loss or injury in a case where the dismissal was unfair—Dismissed—Mr J Gilmore -v- Cecil Bros Pty Ltd & Other—IAC 23 of 1996—Industrial Appeal Court—- 25/03/98—Personal & Household Good Rtlg 1099

CUMULATIVE DIGEST—*continued*

Page

APPEAL—*continued*

[1]Cross appeals against decision of Full Bench (76 WAIG 4434) re unfair dismissal—Appellant argued matter to do with the employees general suitability were not relevant to the question of impracticality of reinstatement in the particular circumstances of the case—Appellant employer argued that no order for compensation should have been made as the very generous overpayment of salary adequately compensated for any loss or injury caused by the dismissal and that the order was beyond power—IAC found that proof that a position has been abolished is at least prima facie proof that reinstatement or re-employment is impractical and that it would be for the employee to displace that conclusion—IAC further found that the amount ordered did not exceed 6 months and could not be made to do so by notionally adding it to the amount of the termination pay made voluntarily by the employer and that payment did not preclude the Commission exercising its discretion to make an award of compensation for loss or injury in a case where the dismissal was unfair—Dismissed—FDR Pty Ltd -v- Mr J Gilmore—IAC 22 of 1996—Industrial Appeal Court—- 25/03/98—Personal & Household Good Rtlg 1099

[2]Appeal against decision of Commission (77 WAIG 2989) re unfair dismissal claim and denied contractual entitlements—Appellant argued Commission erred in finding the employee was not constructively dismissed that it had no jurisdiction, failed to admit certain documents and sought to adduce new evidence—Appellant argued withdrawal of authority to sign cheques inhibited her employment and the conduct forced her to leave—Full Bench was not persuaded apart from financial statements that the other evidence was relevant—Full Bench found resignation followed deterioration of the relationship between the Appellant and a principal of the respondent and a breach of duty of the part of the Appellant—Full Bench further found that the withdrawal of authority to sign cheques was a proper protective measure by the Respondent, there was no dismissal and no jurisdiction to make orders—Dismissed—Ms WA Farrell -v- Harlem Enterprises Pty Ltd T/A Ace Rent A Car—APPL 1883 of 1997—Full Bench—SHARKEY P/BEECH C/SCOTT C.—11/03/98—Other Transport 1103

[2]Appeal against decision of Commission (77 WAIG 3005) re compensation for unfair dismissal—Appellant argued Commission erred in assessing compensation which resulted in a miscarriage of justice and sought orders for increased compensation or remittal—Full Bench reviewed authorities and observed that the question of loss or injury was a one of mixed law and fact and what compensation was ordered was a discretionary decision, designed to put the employee back in the situation in which s/he would have been in of not unfairly dismissed—Full Bench found Appellant had sought compensation for loss of income, it was open on the primary evidence to infer that employment would not have continued beyond a month and the discretion did not miscarry—Dismissed—Mrs J Manning -v- Huntingdale Veterinary Clinic—APPL 2193 of 1997—Full Bench—SHARKEY P/COLEMAN CC/PARKS C—18/03/98—Health Services 1107

[2]Appeal against decision of Commission (77 WAIG 3497) re contractual entitlements—Appellant argued the contract of employment denied the Respondent an entitlement to a full 40% Commission, that the contract expressly provided for a 20% commission in the circumstances and the term the Commission implied in to the contract was contrary to the principles laid down in authorities—Respondent argued there had been no referral of the sale in terms of the contract of service and that the Appellant sought to exclude the Respondent from the sale to reduce commission payable—Full Bench found question was what entitled the sales person to earn a Commission as distinct from a referral fee—Full Bench found that it was open to the Commission to find that the Respondent was the effective cause of the sale and had been denied a contractual entitlement—Dismissed—Royal International (WA) -v- Mr WTJ Valli—APPL 2206 of 1997—Full Bench—SHARKEY P/CAWLEY C./PARKS C—18/03/98—Property Services 1110

[2]Appeal against decision of Commission (77 WAIG 2787) re Contractual entitlements—Appellant argued Commission erred in finding that a contract of service existed, that the balance of a token wage and a fulltime wage was to be made up to the Respondent under the contract and misdirected itself or incorrectly weighted the evidence—Full Bench found that the argument that the evidence before the Commission at first instance should have carried the matter despite the acknowledged failings of the Respondent's witness was fatally flawed and the Appellant had not established a palpable error—Dismissed—S & M Bennett Pty Ltd T/A Rockingham Sheetmetal Works -v- Ms Y Scott—APPL 1837 of 1997—Full Bench—SHARKEY P/COLEMAN CC/CAWLEY C.—11/02/98—Metal Product Manufacturing 1115

[2]Appeal against decision of Industrial Magistrate (unreported) re failure to pay full annual leave entitlement on termination under an award—Appellant argued Industrial Magistrate was wrong to conclude that the employee was working on duty for the whole period of his shift;finding that the Lee Downs Nursing Home case could be distinguished and in calculating the sum due—Respondent argued that the employee did not reside at the premises and was on duty for the entire shift—Full Bench found that it cannot be said that a person whose place of abode is somewhere other than the workplace, who travels from his place of abode to the workplace each day, resides at the workplace during the period of the shift, even if s/he sleeps during all or part of it—Full Bench found that the employee lawfully terminated his employment, there was no cross appeal and the decision was based on the correct calculation—Dismissed—Aust Fed of TPI Ex-Serv Men -v- LIQUOR, HOSPITALITY & MISC—APPL 2360 of 1997—Full Bench—SHARKEY P/FIELDING C/SCOTT C.—25/03/98—Community Services 1119

Appeal against decision to terminate Public sector employee for shooting at students with pellets—Appellant argued that the students voiced no objections, that he was unaware of the concept of duty of care, the dismissal was procedurally unfair and denied attempting to influence a witness to an investigation—PSAB found that the absence of general instruction on the duty of care did not provide a complete excuse for the Appellants conduct—PSAB found Appellant's actions went to the very heart of the contract of service and was unable to accept that the dismissal was harsh unfair or unjust—Dismissed—Mr J Ramos -v- Education Department of Western Australia—PSAB 9 of 1997—Public Service Appeal Board—BEECH C—17/03/98—Education 1438

[2]Appeal against decision of Commission (78 WAIG 506) re interpretation of distant work provisions in an award and an industrial agreement—Appellant argued Commission failed to adequately consider submissions on allowance, the difference between allowances and wages, the concept of time spent travelling be paid as wages and employees should be paid ordinary hourly rates when travelling—- Full Bench reviewed authorities and found that the payments were clearly allowances as defined, absorbed into the hourly payments; not payable under the award and that the Commission had not erred in its interpretation of the agreement—Dismissed—AUTO, FOOD, METAL, ENGIN UNION -v- Leighton Contractors Pty Ltd—APPL 55 of 1998—Full Bench —SHARKEY P/COLEMAN CC/BEECH C—23/04/98—Metal Ore Mining..... 1571

[2]Appeals against decision of Industrial Magistrates re enforcement of IR Act 1979 remitted from Industrial Appeal Court (77WAIG1073)re costs at first instance-Appellant argued the amount might be set by reference to the Cost Scales 1991 under the Official Prosecutions (Defendants Costs) Act 1993 and the information used for assessment was vague and insufficient—Respondent argued the Industrial Magistrates' jurisdiction was not a summary jurisdiction, nor was it a matter of Defendant's costs—Full Bench reviewed authorities and found it was impractical and undesirable to give precise reasons for fixing costs and inappropriate to fix a Bill of Costs—Full Bench found the amounts fixed were just and reasonable and there was no apparent misuse of the discretion to warrant interference— Full Bench further found Appeals were not frivolous or vexatious or warranted an order for costs on appeal— Dismissed—Mr J Cain -v- Mr AG Shuttleton—DOPLR—APPL 1246,1247 of 1995—Full Bench—SHARKEY P/GREGOR C/BEECH C —09/04/98—General Construction 1575

[2]Appeal against decision of Commission (77 WAIG 1530) re denied contractual entitlements—Applications to extend time to file and serve Notice of Appeal and Appeal Books— Appellant argued that the it was not open to the Respondent to refuse the changes in work and claim unfair dismissal, the Commission erred in finding the change in the proportion of duties done by the Respondent constituted a significant change, and that the Respondent was entitled to a redundancy payment under the written contract of employment—Full Bench found that the delay in filing the appeal was minimal and the injustice if the applications to extend time were not granted were obvious—Full Bench found there was a constructive dismissal by way of the employee refusing to accept a change in employment by way of a unilateral demotion—Majority of Full Bench found that the Redundancy Payments clause on the contract meant that payments were due where a person was dismissed when the company was subject to interalia rearrangement and reconstruction as those words were understood and defined under the Corporations Law and it was not open to find that the Respondent was denied a contractual benefit to which he was entitled—Applications granted and Appeal upheld— Robowash Pty Ltd -v- Mr M Hart—APPL 1049 of 1997—Full Bench—SHARKEY P/BEECH C/PARKS C—12/11/97—Property Services 2323

CUMULATIVE DIGEST—*continued*

Page

APPEAL—*continued*

[2]Appeal against part of decision of Commission (78 WAIG 1058) re compensation for unfair dismissal—Appellant argued Commission failed to assess the loss suffered by him because of the dismissal, including loss of assets, and determine the amount of compensation accordingly, and sought an amount based on loss capped by the statutory limit- Full Bench reviewed authorities, the history of compensation for unfair dismissal provisions and s23A of the IRAct 1979—Full Bench found (in separate reasons) that the figure claimed was not reduced by the amount of post dismissal earnings and was therefore erroneous; that the method adopted was not at odds with the Act and the Appellant had not discharged the onus of establishing that there was a palpable error requiring intervention— Dismissed—Mr PA Simons -v- Ismail Holdings Pty Ltd T/A Envelope Specialists—APPL 79 of 1998—Full Bench— SHARKEY P/GREGOR C/CAWLEY C.—29/05/98—Wood and Paper Product Mfg 2332

[2]Appeal against decision of Industrial Magistrate (unreported) re striking out of complaint and application for costs—Appellants argued the Industrial Magistrate deprived them access to their rightful application for costs by striking out the complaint prior to hearing,and incorrectly interpreted the term 'frivolous and/or vexatious'—Appellant further argued IM had a conflict of interest and should not have heard the matter when remitted back to him—Respondent argued that the complaints were struck out by consent and the Appellants were bound by their case—Full Bench found that striking out was not a determination of the complaints on merit and as there was no decision finally determining the matter the appeal was incompetent—Full Bench also found that the IM was not required to disqualify himself for ostensible bias and would have erred in law had he so done—Dismissed—Ian Barrett & Tracey Barrett -v- The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers —APPL 2106 of 1997—Full Bench—SHARKEY P/COLEMAN CC/PARKS C—22/05/98—General Construction 2340

[2]Appeal against decision of Industrial Magistrate (unreported) re breach of award—Appellant argued the IM erred in finding that the employee was working "on-site" in the "construction industry" in the context of the award— Full Bench found that there was an arguable case, some explicable delay in filing and serving the notice of appeal and that the justice of the application did not require the denial of an opportunity to pursue the appeal—Full Bench further reviewed authorities and found that no grounds of appeal were made out—Dismissed and procedural orders issued—G Parri & M Parri T/A G & M Parri -v- The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers—APPL 135 of 1998—Full Bench—SHARKEY P/PARKS C/KENNER C—22/05/98—General Construction 2344

Application for compensation on grounds of unfair dismissal remitted from Full Bench re relief-Applicant argued that his efforts at mitigating loss following dismissal from employment and loss of a remuneration package required granting of greater relief-Respondent argued Applicant's submission of a false document to Commission should reflect on compensation paid-Commission found that the behaviour of the Applicant in position of a senior manager in charge of a significant budget did not suggest good prospects for continuing employment with the Respondent and compensation should reflect this fact-Dismissed—Mr JA Capewell -v- Cadbury Schweppes Pty Ltd—APPL 29 of 1996—CAWLEY C.— Food, Beverage and Tobacco Mfg 2448

AWARDS

Application to vary award to consent re allowances—applicant Union claimed award should be varied to reflect CPI movements—Respondent agreed in principle but argued that the all purpose allowances were not work related allowances and should not be allowed—Commission found as application was consistent with the wage fixing principles variation be granted and argument from respondent be dismissed—Ordered Accordingly—LIQUOR & ALLIED INDUST UNION -v- Kalamunda Club (Inc)—APPL 1412,1413,1414,1415,1416 of 1992—CAWLEY C.—22/12/97—Electricity and Gas Supply 459

Application for an interpretation of Agreement—Applicant claimed the question of provisions should be answered in the negative—Respondent argued that the interpretation should be answered in the affirmative—Commission reviewed subclause 2 Allowances of Schedule 2 of the Agreement and found the interpretation should be answered in the affirmative—Declared Accordingly—AUTO, FOOD, METAL, ENGINE UNION -v- Leighton Contractors Pty Ltd—APPL 1133 of 1997—GEORGE C—22/12/97—Metal Ore Mining 506

Application for orders re variation of roster-Applicant union argued that changes to rosters proposed by respondent should be cost neutral on the basis of past practice and sought a proposed roster or minimum salary—Respondent argued practice was limited to the introduction of One Man Operations, alternative claim conflicted with the paid rates award and should be tested against the Wage Fixing Principles—Commission reviewed s26A of the IR Act 1979 re evidence and workplace agreements—Commission found it was concerned at the time only with the issue of cost neutrality not the equality in the number of jobs between award and non-award employees—Commission found on evidence it was possible to draw up a roster which maintained earnings and integrated with staff schedule, that that ought occur and adjourned for the parties to confer—In Supplementary Reasons Commission found that though circumstances had changed, the Applicant was entitled to an order reflecting the Reasons for Decision—Granted with liberty to apply reserved—CONSTRUCTION, MINING, ENERGY -v- Hamersley Iron Pty Limited—APPL 929 of 1997—BEECH C—18/11/97—Metal Ore Mining 736

Application for compensation on the grounds of unfair dismissal—No appearance on behalf of Applicant—Respondent argued that matter should be dismissed for want of jurisdiction—Commission found Federal Award covered the field insofar as unfair dismissals were concerned, there was an inconsistency between State and Federal laws and the matter was beyond the Commission jurisdiction—Dismissed—Mr J Irimia -v- Swan Transit Services (South) Pty Ltd—APPL 1799 of 1997—FIELDING C—15/01/98—Road Transport 747

[1]Appeal against decision of Full Bench (77 WAIG 2195) re Breach of Award—IAC found that the question of whether the employee in question was an Assistant Supervisor with in the meaning of the expression in the Award was a mixed question of fact and how—IAC found the Industrial Magistrate and Full Bench fully appreciated the distinction between assistance expected of any employee and assistance that was in the discharge of the duties and responsibilities of the particular office of supervisor—IAC found it was open on the evidence to find that the employees major and substantial employment was that of an Assistant Supervisor—Dismissed—LIQUOR, HOSPITALITY & MISC -v- Kellerberrin Care of the Aged Committee Inc t/a Dryandra Frail Aged Hostel—IAC 7 of 1997—Industrial Appeal Court—- 03/03/98—Community Services 807

[3]Applications to vary awards re insertion 2 days in lieu of two public service holidays—Applicant argued the awards should be practical and reflect the existing conditions which were the safety net that applied to employees and it was not in the public interest for the respondents to arbitrarily remove existing conditions—Applicant further argued the applications merely sought to insert existing conditions that applied administratively, were inside the qualifications of the Wage Fixing Principles, there was no potential for flow-on and no cost implications—Applicant also argued the fact that the Public Sector Management Act invested power in the Governor to declare holidays did not exclude the Commission's jurisdiction—CCI argued the holidays were like overaward payments—Respondents argued the actual declaration of certain days as public holidays would ursurp the prerogative of government and Commission had no power to grant the relief sought—Respondent argued there was no standard for public service holidays in the jurisdiction and nothing of substance had been put to justify the award recognition of separate treatment for public sector employees—CICS was not persuaded that the case warranted a departure from the standard, to grant the claim would be rejecting authorative decisions of the Full Bench, the Applicants had used the 2 days as a bargaining tool in enterprise bargaining and that the 2 days were not part of the safety net—Dismissed—The Civil Service Association of Western Australia Incorporated -v- State Government Insurance Commission—P 34,35,36,37,38,39,40,41,42 of 1994—Commission in Court Session—GREGOR C/BEECH C/PARKS C—06/03/98—Government Administration 816

CUMULATIVE DIGEST—*continued*

Page

AWARDS —*continued*

Application for allegedly denied contractual entitlements -Further reasons for decision re redundancy payment upon Applicant's resignation-Applicant argued that he resigned in the belief that the 'Redeployment, Retraining and Redundancy General Order' applied to his situation -Respondent argued it valued Applicant's services and wished to retain him-Commission found that the Applicant had no formal written employment contract and any offer of severance pay to previous employees working under the relevant Award had been initiated by the Respondent -Commission further found that it was not in the public interest to require the Respondent to present its case in light of its findings-Dismissed—Mr P Fielding -v- Western Power Corporation—APPL 105 of 1997—BEECH C— Electricity and Gas Supply 1806

Application for interpretation of award re Introduction of Change and Redundancy, Employer's Duty to Notify, Employer's Duty to Discuss Change, Definte decision that the employer no longer wishes the the employee has been doing done by anyone and ordinary and customary turnover of labour—Applicant argued there was ambiguity in the provisions—Applicant argued, interalia, the interpretaton of the Grant Electrical case had resulted in the use of the concept of ordinary and customary turnover of labour to avoid obligations which would otherwise exist if that phrase was interpreted in a manner consistent with the historical development of the termination change and redundancy provisions in awards and the approach adopted in the Amscol and Countdown Stores cases—Respondent argued the proper approach to the interpretation of awards was that set out in the decision of the Full Bench at (70WAIG1287)—Respondent further argued the applicant's submissions went beyond the scope of the application and there was no specific question posed—Commission found that the applicat was inviting the Comission to review the Grant Electrical case and and it was not open for the Commissio as constituted to embark on such a course on an application under s46, answered each question invidually and gave reasons therefore—Reasons Issued—Metals and Engineering Workers' Union—Western Australian Branch -v- Cockburn Engineering W.A.—APPL 1071 of 1993—GEORGE C—21/04/98—Machinery & Equipment Mfg 1876

[3]Application to vary awards re inclusion of salary packaging provisions—Applicant Unions argued that any attempts to negotiate any kind of salary package through enterprise bargaining had been fruitless as respondent employers would not contemplate salary packaging due to a proscriptive government policy aimed at promoting workplace agreements even when employees may be employed alongside employees enjoying salary packaging—Respondents argued the claims were contrary to provisions in the IRAct 1979, the Minimum Conditions of Employment Act, the Wage Fixing Principles and had cost implications- Respondent further argued that the IRAct clearly contemplated differing conditions for employees covered under awards, enterprise agreements and workplace agreements—CICS found on evidence that salary packaging was a "fact of life' and consistent with individuals and employers negotiating at workplace level CICS however, found that the compulsory provisions sought were not consistent with that principle— In Further Reasons CICS found there was no question that an employee seeking to raise a request for salary packaging may do so through their relevant union—Granted in Part— Hospital Salaried Officers Association of Western Australia (Union of Workers) -v- Royal Perth Hospital & Others—P 62 of 1994—Commission in Court Session—GREGOR C/GEORGE C/BEECH C—13/03/98—Health Services 2346

[3]Application to vary awards re inclusion of salary packaging provisions—Applicant Unions argued that any attempts to negotiate any kind of salary package through enterprise bargaining had been fruitless as respondent employers would not contemplate salary packaging due to a proscriptive government policy aimed at promoting workplace agreements even when employees may be employed alongside employees enjoying salary packaging—Respondents argued the claims were contrary to provisions in the IRAct 1979, the Minimum Conditions of Employment Act, the Wage Fixing Principles and had cost implications- Respondent further argued that the IRAct clearly contemplated differing conditions for employees covered under awards, enterprise agreements and workplace agreements—CICS found on evidence that salary packaging was a "fact of life' and consistent with individuals and employers negotiating at workplace level CICS however, found that the compulsory provisions sought were not consistent with that principle— In Further Reasons CICS found there was no question that an employee seeking to raise a request for salary packaging may do so through their relevant union—Granted in Part— The Civil Service Association of Western Australia Incorporated -v- Commissioner, Public Service Commission & Others—P 62 of 1994;P 5,6 of 1997—Commission in Court Session—GREGOR C/GEORGE C/BEECH C—13/03/98—Health Services 2346

BONUS

Conference referred re clarification of bonus-Applicant union claimed that Respondent should not exclude employees covered under award from receiving bonus and that as the awards were Minimum Rates awards they did fit within the Wage Fixing Principles and there was nothing which prevented the Commission from awarding bonuses paid -Respondent argued that as the bonus was part of the workplace agreement relationship the Commission lacked jurisdiction and that the matter did not fit in with the Wage Fixing Principles-Commission found that as there had not been sufficient information put forward, order could not issue-Dismissed—BRICK, TILE & POTTERY UNION -v- Metro Brick Armadale—CR 235 of 1997—SCOTT C.—08/01/98—Non -Metallic Min Product Mfg 542

BREACH OF AWARD

Complaint re: Breach of Award—Complainant claimed that as required by Award defendant failed to keep time and wages records—Defendant submitted there was no case to answer and elected not to give evidence—Industrial Magistrate found an absence of clear evidence of employment of people whom the award applied and no obligation to keep time and wages records—Dismissed—The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- Barrett Pty Ltd—CP 110 of 1997—Industrial Magistrate—- 19/12/97—Construction Trade Services 735

[1]Appeal against decision of Full Bench (77 WAIG 2195) re Breach of Award—IAC found that the question of whether the employee in question was an Assistant Supervisor with in the meaning of the expression in the Award was a mixed question of fact and how—IAC found the Industrial Magistrate and Full Bench fully appreciated the distinction between assistance expected of any employee and assistance that was in the discharge of the duties and responsibilities of the particular office of supervisor—IAC found it was open on the evidence to find that the employees major and substantial employment was that of an Assistant Supervisor—Dismissed—LIQUOR, HOSPITALITY & MISC -v- Kellerberrin Care of the Aged Committee Inc t/a Dryandra Frail Aged Hostel—IAC 7 of 1997—Industrial Appeal Court—- 03/03/98—Community Services 807

[2]Appeal against decision of Industrial Magistrate (77 WAIG 2363) re order for costs—Appellant argued Industrial Magistrate was functus officio when dealing with the application for costs, that the Appellant had made no formal application and that the witnesses had given evidence as part of their duties as employees and had suffered no loss—Full Bench reviewed IRAct 1979, Industrial Magistrates Court Regulations 1980, the Justices Act 1902 and found that the hearing of the application could not be completed until the question of costs had been determined—Full Bench reviewed authorities and found no established ground to interfere with the case—Dismissed—LIQUOR, HOSPITALITY & MISC -v- Metro Meat International Limited—APPL 1657 of 1997—Full Bench—SHARKEY P/COLEMAN CC/GREGOR C—19/02/98—Food, Beverage and Tobacco Mfg 813

[2]Appeal against decision of Industrial Magistrate (unreported) re failure to pay full annual leave entitlement on termination under an award—Appellant argued Industrial Magistrate was wrong to conclude that the employee was working on duty for the whole period of his shift;finding that the Lee Downs Nursing Home case could be distinguished and in calculating the sum due—Respondent argued that the employee did not reside at the premises and was on duty for the entire shift—Full Bench found that it cannot be said that a person whose place of abode is somewhere other than the workplace, who travels from his place of abode to the workplace each day, resides at the workplace during the period of the shift, even if s/he sleeps during all or part of it—Full Bench found that the employee lawfully terminated his employment, there was no cross appeal and the decision was based on the correct calculation—Dismissed—Aust Fed of TPI Ex-Serv Men -v- LIQUOR, HOSPITALITY & MISC—APPL 2360 of 1997—Full Bench—SHARKEY P/FIELDING C/SCOTT C.—25/03/98—Community Services 1119

CUMULATIVE DIGEST—*continued*

Page

BREACH OF AWARD —*continued*

[2]Appeal against decision of Industrial Magistrate (unreported) re breach of award—Appellant argued the IM erred in finding that the employee was working "on-site" in the "construction industry" in the context of the award— Full Bench found that there was an arguable case, some explicable delay in filing and serving the notice of appeal and that the justice of the application did not require the denial of an opportunity to pursue the appeal—Full Bench further reviewed authorities and found that no grounds of appeal were made out—Dismissed and procedural orders issued—G Parri & M Parri T/A G & M Parri -v- The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers—APPL 135 of 1998—Full Bench—SHARKEY P/PARKS C/KENNER C—22/05/98—General Construction 2344

CAPACITY TO PAY

Application for allegedly denied contractual entitlements— Applicant sought order when payment was not made according to agreement—Respondent sought order not issue pending conpany restructure—Commission ordered adjournment of seven days and that the Respondent endeavour to pay Applicant in that time- Ordered accordingly—Mr LR Vickers -v- Imtech Industries Pty Ltd—APPL 2308 of 1997—BEECH C —27/05/98—Non-Metallic Min Product Mfg 2476

CASUAL WORK

Application for compensation on the grounds of unfair dismissal—Applicant claimed that dismissal was unfair as a 12 month contract had been agreed and dismissal occurred without warning or reason—Respondent argued that attempts had been made to contact Applicant, that no dismissal had occurred and current employment was offered—Commission found on evidence that as there was no dismissal, Commission lacked jurisdiction to hear matter—Dismissed—Ms O Kidd -v- United Bakeries Pty Ltd—APPL 1147 of 1997—GREGOR C—29/12/97—Food, Beverage and Tobacco Mfg 529

Application for compensation on the grounds of unfair dismissal—Applicant claimed that termination was unfair as no criticisms of work performance had been raised nor any concerns prior to termination-Respondent argued that employment was of a casual nature, that termination was within 3 month trial period and resulted from unsatisfactory work attitude-Commission found that as the employment nature was of a casual nature with weekly contracts there was no termination only an ending of a weekly contract-Dismissed—Ms A Devine -v- Sun Sai Kai—APPL 1692 of 1997—CAWLEY C.—21/01/98—Food Retailing 743

Application for reisntatment or compensation on the grounds fo unfair dismissal—Applicant argued that the dismissal was unfair because of a prior arrangement entered into with the Respondent regarding 'casual employment' and guaranteed employment—Respondent argued that there was no such undertaking and the Applicant failed to perform the duties because of a bad attitude—Commission found that the Applicant's services were terminated by the Respondent and because of the arrangements previously entered into whereby she was assured of regular part-time work and that undertaking was not fulfilled the termination was rendered unfair—Commission further found that the Applicant had a duty to mitigate her loss and to the extent that that was not exhausted, detracted from the level of compensation which would otherwise be considered—Granted—Ms M De -Abreu -v- Renoir Patisserie—APPL 1489 of 1997—COLEMAN CC—27/02/98—Food Retailing 1395

Application for compensation on the grounds of unfair dismissal—Applicant argued respondent assured reengagement on return from leave on the same basis—Respondent argued that Applicant was employed on a casual basis and no offer guaranteed on return—Commission found the Applicant was employed on a casual basis on a service of weekly contracts and there was an offer and acceptance of employment on return—Granted—Miss J Marris -v- Swan (WA) Pty Ltd T/A La Pagnotta Italian Bakery—APPL 1671 of 1997;C 376 of 1997—CAWLEY C.—06/03/97—Food, Beverage and Tobacco Mfg 1419

CLASSIFICATION

Appeal against classification—Applicant claimed that withdrawal of advice regarding reclassification's was unjust and sought order to reclassify positions—Respondent argued that PSA lacked jurisdiction to hear the matter as it was a standard under the PSM Act and that the advice given was unauthorised and not official—Commission found it lacked the jurisdiction to deal with the application—dismissed—The Civil Service Association of Western Australia Incorporated -v- Director General, Ministry of Justice—P 25 of 1997—Public Service Arbitrator—GREGOR C—24/12/97—Government Administration 548

[1]Appeal against decision of Full Bench (77 WAIG 2195) re Breach of Award—IAC found that the question of whether the employee in question was an Assistant Supervisor with in the meaning of the expression in the Award was a mixed question of fact and how—IAC found the Industrial Magistrate and Full Bench fully appreciated the distinction between assistance expected of any employee and assistance that was in the discharge of the duties and responsibilities of the particular office of supervisor—IAC found it was open on the evidence to find that the employees major and substantial employment was that of an Assistant Supervisor—Dismissed—LIQUOR, HOSPITALITY & MISC -v- Kellerberrin Care of the Aged Committee Inc t/a Dryandra Frail Aged Hostel—IAC 7 of 1997—Industrial Appeal Court—- 03/03/98—Community Service 807

COMPENSATION

[2]Appeal against decision of Commission (77 WAIG 2006) re granted compensation for unfair dismissal claim-Appellant claimed that Commission erred in failing to adopt proper approach to assessment of compensation and ought to have awarded Applicant equivalent of 6 months remuneration-Full Bench found that Commission had erred in the exercise of discretion, in particular the principles which were applied and that as there was evidence that discretion had miscarried appeal be upheld-Ordered Accordingly—Mr JA Capewell -v- Cadbury Schweppes Australia Ltd—APPL 1364 of 1997—Full Bench—SHARKEY P/COLEMAN CC/BEECH C—Food Retailing 299

[2]Appeal against decision of Commission (77 WAIG 1748) re granted compensation on the grounds of unfair dismissal -Appellant claimed that Commission erred in failing to take into account Appellant's lost wages and had failed to correctly apply relevant principles in compensation-Full Bench found that as Commission's order for compensation did not represent a miscarriage of discretion, no ground of appeal was made out-Dismissed—Mr BR Smith -v- CDM Australia Pty Ltd—APPL 1310 of 1997—Full Bench—SHARKEY P/FIELDING C/CAWLEY C.—18/12/97—Personal & Household Good Rtlg 307

Application for compensation on the grounds of unfair dismissal—Applicant claimed that as dismissal was without notice or payment and was never informed of unsatisfactory performance, termination was unfair—Respondent argued that as a series of warnings were given expressing unsatisfactory performance and no improvement resulted prior to dismissal, termination was valid—Commission found that as warnings were given employer had not abused right to dismiss—Dismissed—Ms L Bredin -v- Ansuz Unique—APPL 1353 of 1997—GREGOR C—24/12/97—Textile, Clothing, Footwear 512

Application for compensation on the grounds of unfair dismissal and allegedly denied contractual entitlements—Applicant claimed dismissal was unfair as there was intimidation to resign—Respondent argued that as termination resulted from mutual agreement no dismissal occurred—Commission found that as termination was from mutual agreement, no dismissal occurred—Dismissed—Mr C Blachut -v- Trans-Plus Pty Ltd—APPL 725 of 1997—PARKS C—23/10/97—Road Transport.. 513

Application for compensation on the grounds of unfair dismissal—Applicant claimed that dismissal was unfair as decision to leave was made under duress and was not a resignation—Respondent argued that there was no termination of employment but that the Applicant resigned both verbally and written—Commission found as the Applicant did tender a resignation there was no dismissal to be heard—Dismissed—Ms CT Dunlop -v- West Coast Fast Foods Pty Ltd (Dial-A-Snappa)—APPL 1541 of 1997—SCOTT C.—08/01/98—Accommodatn, Cafes&Restaurants 515

CUMULATIVE DIGEST—*continued*

Page

COMPENSATION—*continued*

Application for compensation on the grounds of unfair dismissal—Applicant claimed that dismissal was unfair as no notice or warnings were given and denied the accusation of stealing—Respondent argued that as the Applicant resigned there was no dismissal and Commission was without jurisdiction to hear matter—Commission found that the Applicant's attitude contributed towards the deterioration of the employment relationship and there was insufficient reason to award Respondent costs—dismissed—Mr CI Gasson -v- Locos Spanish Tapas Bar Restaurant—APPL 665 of 1997—BEECH C—16/12/97—Accommodatn, Cafes&Restaurants 521

Application for compensation on the grounds of unfair dismissal and an application that litigation was vexatious—No Appearance from Applicant—Respondent argued that both the respondent and Commission have been put to considerable expense and costs be awarded against Applicant—Commission found that litigation was vexatious and as considerable expense has been incurred, costs awarded—Application dismissed and costs awarded—Mr GM Grayson -v- PT & BD Slade—APPL 1642 of 1996—GREGOR C—27/11/97—Agriculture 523

Application of compensation on the grounds of unfair dismissal—Applicant claimed that dismissal was not warranted, that the abusive language was used was a reaction and an apology had been offered—Respondent argued that the Applicant's behaviour was abusive, rude and threatening and dismissal was warranted—Commission found that as action was a single offence and was not done in a threatening manner, it did not warrant dismissal—Granted—Mr S Kelly -v- Midex (Midland Exhaust)—APPL 1235 of 1997—BEECH C—22/12/97—Machinery & Equipment Mfg 527

Application for compensation on the grounds of unfair dismissal—Applicant claimed that dismissal was unfair as a 12 month contract had been agreed and dismissal occurred without warning or reason—Respondent argued that attempts had been made to contact Applicant, that no dismissal had occurred and current employment was offered—Commission found on evidence that as there was no dismissal, Commission lacked jurisdiction to hear matter—Dismissed—Ms O Kidd -v- United Bakeries Pty Ltd—APPL 1147 of 1997—GREGOR C—29/12/97—Food, Beverage and Tobacco Mfg 529

Application for compensation on the grounds of unfair dismissal- Applicant claimed that dismissal was unfair as termination resulted from failure to accept a lesser salary—Respondent argued that as the Applicant resigned there was no jurisdiction—Commission found that as the Applicant was dismissed through no fault and without notice it was unfair and compensation be allowed—Granted—Mr N Ludkins -v- Biologic International Limited—APPL 547 of 1997—PARKS C—03/12/97—Food, Beverage and Tobacco Mfg 530

Application for compensation on the ground of unfair dismissal and allegedly denied contractual entitlements—Applicant claimed dismissal was unfair as there was a denial of natural justice and lack of procedural fairness and that deduction of amounts without consent was also unfair—Respondent argued that dismissal was valid as the Applicant breached obligation to work in a competent manner—Commission found that there was a denial of natural justice, a lack of procedural fairness and monies deducted without consent—termination was unfair—Granted—Mr N McGuiness -v- M.G. McKay Pty Ltd—APPL 813 of 1997—SCOTT C.—15/12/97—Accommodatn, Cafes&Restaurants 532

Application for compensation on the grounds of unfair dismissal—Applicant claimed that was dismissal unfair as the respondent had no good reason for terminating the employment relationship—Respondent argued that dismissal was due to the Applicant being abusive, not following instructions and had unsuitable behaviour toward the public—Commission found that the Respondent attempted to discuss the concerns raised but due to Applicant's attitude and was not satisfied the dismissal was unfair—Dismissed—Mr A Rodwell -v- Pippa Chrystal T/A Hidden Valley Hideaway—APPL 1078 of 1997—SCOTT C.—08/01/98—Accommodatn, Cafes&Restaurants 536

Application for compensation on the grounds of unfair dismissal—Applicant claimed that termination was unfair as inability to do job was not significant as working in other areas before dismissal—Respondent argued that as the Applicant's standards propped and more time was not warranted, termination was fair—Commission found that as complaints were not valid procedure adopted was fair—Dismissed—Mr A Segon -v- Select Cleaning Services—APPL 1643 of 1997—BEECH C—23/12/97—Business Services 537

[2]Appeal against decision of Commission (77 WAIG 1996) re compensation for unfair dismissal—Appellant argued the employment was casual, therefore it was not possible to reinstate the respondent even if there was an unfair dismissal and that the termination was not at the initiative of the employer—Appellant further argued that Commission misapplied the principles of an employee changing his/her mind after a heated argument with the employer and the whole, not part, of the Respondent's social security payments should have been deducted from the amount of compensation—Respondent argued social securities payments should not have been deducted from compensation—Full Bench found that on the evidence it was open to find that there was a straight and unequivocal summary dismissal—Full Bench further found the Commission erred in deducting the social security payments, but as their was no cross appeal there was no remedy the Full Bench could provide—Dismissed—Swan Yacht Club (Inc) -v- Ms L Bramwell—APPL 1485 of 1997—Full Bench—SHARKEY P/COLEMAN CC/SCOTT C.—Sport and Recreation 579

Application for compensation on the grounds of unfair dismissal—Applicant argued that allegations given against him were untrue and the respondent had confused the duties to be performed—Respondent argued that the Applicant was on probation and dismissed because of the inability to work to the required standards and other duties were voluntary—Commission found that the allegations were false and that endorsements on employment separation certificate were wrong and designed to paint the worst possible picture of the Applicant—Granted—Mr CJ Dehaan -v- Little Angels Day Care Centre—APPL 1494 of 1997—GREGOR C—08/01/98—Community Services 740

Application for compensation on the grounds of unfair dismissal—Applicant claimed that termination was unfair as no criticisms of work performance had been raised nor any concerns prior to termination-Respondent argued that employment was of a casual nature, that termination was within 3 month trial period and resulted from unsatisfactory work attitude-Commission found that as the employment nature was of a casual nature with weekly contracts there was no termination only an ending of a weekly contract-Dismissed—Ms A Devine -v- Sun Sai Kai—APPL 1692 of 1997—CAWLEY C.—21/01/98—Food Retailing 743

Application for compensation on the grounds of unfair dismissal—No appearance on behalf of Applicant—Respondent argued that matter should be dismissed for want of jurisdiction—Commission found Federal Award covered the field insofar as unfair dismissals were concerned, there was an inconsistency between State and Federal laws and the matter was beyond the Commission jurisdiction—Dismissed—Mr J Irimia -v- Swan Transit Services (South) Pty Ltd—APPL 1799 of 1997—FIELDING C—15/01/98—Road Transport 747

Application for compensation on the grounds of unfair dismissal and allegedly denied contractual entitlements—Applicant claimed dismissal was unfair and sought compensation, holiday pay and loading, superannuation payments and payment in lieu of notice—Respondent argued that no contractual benefits due as the Applicant was summarily dismissed for gross misconduct—Commission found that respondent had cause to summarily dismiss the Applicant and no contractual entitlements due—Dismissed—Mr A Kittel -v- Alan J Marshall Pty Ltd—APPL 1092 of 1997—CAWLEY C.—16/01/98—Property Services 749

Application for misconduct/safety compensation on the grounds of unfair dismissal Applicant claimed that termination was unfair as it occurred despite his good record, the respondent took the opportunity presented by a positive drug test and the uncertainties of the mine manager's a "one off breach"—Respondent argued that termination resulted from employee declining all endeavours to resolve problems resulting from a positive routine drug test—Commission found that the Applicant had known about prohibition of drugs and that it was an implicit term of employment contract to be "drug free", and the claim was not made out—Dismissed—Mr SM Linn -v- Obion Pty Ltd Trustee For The Usukan Trust Trading As Personal Touch Caterers—APPL 1633 of 1997—CAWLEY C.—23/01/98—Business Services 751

CUMULATIVE DIGEST—*continued*

Page

COMPENSATION—*continued*

Application for reinstatement or compensation on the grounds of unfair dismissal—Applicant argued he never received formal counselling or warnings and was unaware of poor performance complaints—Respondent argued that opportunities were given to improve performance sales and rectify deficiencies—Commission found that the respondent was justified in terminating Applicant and any procedural unfairness did not render the dismissal unfair—Dismissed—Mr RB Robertson -v- Kraft Foods Ltd—APPL 1494 of 1996—GEORGE C—23/01/98—Personal & Household Good W/sg 757

Application for compensation on the grounds of unfair dismissal—Applicant claimed that termination was unfair as three warning letters had been received at one time after the date of the last warning-Respondent argued that each letter was provided soon after each warning but that copies of the first two were supplied with third warning as Applicant had lost them—Commission found that respondent had cause to terminate the employment and that it had not been demonstrated that employment was unfairly terminated—Dismissed—Mr S Ziola -v- Red Shield Industries—APPL 1818 of 1997—SCOTT C.—29/01/98—Personal & Household Good Rtlg 762

Application for reinstatement or compensation on the grounds of unfair dismissal—Applicant sought matter be arbitrated following failure of Respondent to honour agreement made at a conciliation conference before the Commission—Commission issued order that Respondent file answering statement and following its non-compliance directed the Registrar to investigate—Commission found in the circumstances if it did not issue an order in the terms of the parties agreement it called into question the value of agreements reached before the Commission, certainly in s32 conferences, that it had power to issue the order and that costs were appropriate—Granted—Ms BR Macleod -v- Paulownia Trees Pty Ltd—APPL 279 of 1997—BEECH C—07/10/97—Agriculture 1057

Application for Compensation on the grounds of unfair dismissal—Respondent argued dismissal was due to unauthorised absence and if compensation was awarded it should be limited—Commission found Respondent had incorrectly applied policy relating to time recording and deducted pay from the Applicant—Commission found absence was directly caused by that deduction and to dismiss the applicant in those circumstances was harsh—Commission found reinstatement was impracticable, reviewed authorities and found that in assessing compensation the Commission's discretion did not equal the loss of earnings to the date of hearing plus an assessment of future loss and the Commission would take other factors into account—Granted—Mr PA Simons -v- Ismail Holdings Pty Ltd T/A Envelope Specialists—APPL 1363 of 1997—BEECH C—12/11/97—Wood and Paper Product Mfg 1058

Application for reinstatement on the grounds of unfair dismissal—Applicant argued that there had been no formal warnings or advice of work aspects that needed to be addressed—Respondent argued there had been concerns about the hostel involved and its management which were partly attributable to a less than positive attitude of the applicant as Supervisor in Charge and that complaints had been received against the Applicant—Commission found that a valid reason for termination could be said to exist, however the applicant was never formally warned or told of specific aspects of her work which were required to be addressed—Commission found that the Respondent had lost all confidence in the Applicant and compensation was the appropriate alternative remedy—Granted—Ms J Watkins -v- Plantagenet Village Homes Inc—APPL 288 of 1997—GEORGE C—02/02/98—Community Services 1060

[1]Cross appeals against decision of Full Bench (76 WAIG 4434) re unfair dismissal—Appellant argued matter to do with the employees general suitability were not relevant to the question of impracticality of reinstatement in the particular circumstances of the case—Appellant employer argued that no order for compensation should have been made as the very generous overpayment of salary adequately compensated for any loss or injury caused by the dismissal and that the order was beyond power—IAC found that proof that a position has been abolished is at least prima facie proof that reinstatement or re-employment is impractical and that it would be for the employee to displace that conclusion—IAC further found that the amount ordered did not exceed 6 months and could not be made to do so by notionally adding it to the amount of the termination pay made voluntarily by the employer and that payment did not preclude the Commission exercising its discretion to make an award of compensation for loss or injury in a case where the dismissal was unfair—Dismissed—FDR Pty Ltd -v- Mr J Gilmore—IAC 22 of 1996—Industrial Appeal Court—- 25/03/98—Personal & Household Good Rtlg 1099

[1]Cross appeals against decision of Full Bench (76 WAIG 4434) re unfair dismissal—Appellant argued matter to do with the employees general suitability were not relevant to the question of impracticality of reinstatement in the particular circumstances of the case—Appellant employer argued that no order for compensation should have been made as the very generous overpayment of salary adequately compensated for any loss or injury caused by the dismissal and that the order was beyond power—IAC found that proof that a position has been abolished is at least prima facie proof that reinstatement or re-employment is impractical and that it would be for the employee to displace that conclusion—IAC further found that the amount ordered did not exceed 6 months and could not be made to do so by notionally adding it to the amount of the termination pay made voluntarily by the employer and that payment did not preclude the Commission exercising its discretion to make an award of compensation for loss or injury in a case where the dismissal was unfair—Dismissed—Mr J Gilmore -v- Cecil Bros Pty Ltd & Other—IAC 23 of 1996—Industrial Appeal Court—- 25/03/98—Personal & Household Good Rtlg 1099

[2]Appeal against decision of Commission (77 WAIG 3005) re compensation for unfair dismissal—Appellant argued Commission erred in assessing compensation which resulted in a miscarriage of justice and sought orders for increased compensation or remittal—Full Bench reviewed authorities and observed that the question of loss or injury was a one of mixed law and fact and what compensation was ordered was a discretionary decision, designed to put the employee back in the situation in which s/he would have been in of not unfairly dismissed—Full Bench found Appellant had sought compensation for loss of income, it was open on the primary evidence to infer that employment would not have continued beyond a month and the discretion did not miscarry—Dismissed—Mrs J Manning -v- Huntingdale Veterinary Clinic—APPL 2193 of 1997—Full Bench—SHARKEY P/COLEMAN CC/PARKS C—18/03/98—Health Services 1107

[2]Appeal against decision of Commission (77 WAIG 3497) re contractual entitlements—Appellant argued the contract of employment denied the Respondent an entitlement to a full 40% Commission, that the contract expressly provided for a 20% commission in the circumstances and the term the Commission implied in to the contract was contrary to the principles laid down in authorities—Respondent argued there had been no referral of the sale in terms of the contract of service and that the Appellant sought to exclude the Respondent from the sale to reduce commission payable—Full Bench found question was what entitled the sales person to earn a Commission as distinct from a referral fee—Full Bench found that it was open to the Commission to find that the Respondent was the effective cause of the sale and had been denied a contractual entitlement—Dismissed—Royal International (WA) -v- Mr WTJ Valli—APPL 2206 of 1997—Full Bench—SHARKEY P/CAWLEY C./PARKS C—18/03/98—Property Services 1110

Application for reinstatement on the grounds of unfair dismissal and allegedley denied contractual entitlements re 3 months notice and trafer of superannuation benefits—Applicant argued that the contract of employment was not a fixed term because it contained provision for termination during the probationary period and that there was therfore a dismissal—Respondent argued that the applicant was not dismissed and that employment simply ceased through the effluxion of time of an agreed probationary period—Commission found the matter of jurisdiction turned on whether there was a dismissal and the emplyment ended when the term of the contract expired—Dismissed for want of jursidiction—Mr VJ Benjamin -v- Gold Corporation—APPL 2227 of 1997—CAWLEY C.—05/03/98—Metal Ore Mining 1392

CUMULATIVE DIGEST—*continued*

Page

COMPENSATION—*continued*

Application for reisntatment or compensation on the grounds fo unfair dismissal—Applicant argued that the dismissal was unfair because of a prior arrangement entered into with the Respondent regarding 'casual employment' and guaranteed employment—Respondent argued that there was no such undertaking and the Applicant failed to perform the duties because of a bad attitude—Commission found that the Applicant's services were terminated by the Respondent and because of the arrangements previously entered into whereby she was assured of regular part-time work and that undertaking was not fulfilled the termination was rendered unfair—Commission further found that the Applicant had a duty to mitigate her loss and to the extent that that was not exhausted, detracted from the level of compensation which would otherwise be considered—Granted—Ms M De -Abreu -v- Renoir Patisserie—APPL 1489 of 1997—COLEMAN CC—27/02/98—Food Retailing 1395

Application for compensation on the grounds of unfair dismissal—Applicant argued summary dismissal was unfair because no consideration was given to his being assaulted and attempts to contact respondent—The Applicant also had an alcohol problem which affected his work and created problems and sought costs under Section 27(c) of the IR Act—Commission found that the Applicant had fabricated the events and the case was completely devoid of merit, Commission granted costs for airfares, accommodation and court attendance—Dismissed and cost awarded—Mr SP Erridge -v- Wesfarmers Energy—APPL 1592 of 1997—GREGOR C—10/03/98—Electricity and Gas Supply 1400

Application for reinstatement or compensation on the grounds of unfair dismissal—Applicant argued dismissal was unfair because Applicant requested proper wages be paid concerning superannuation and was summarily dismissed during a two week notice period—No appearance by respondent—Commission reviewed procedures, was satisfied service was made and that the Respondent did not exhibit a desire to put it's case—Commission found that dismissal was unfair and taking into account the length of employment as well as the length of employment granted compensation as reinstatement was not viable—Granted—Mr R Farrell -v- Bilbo Pty Ltd—APPL 791 of 1997—GREGOR C—10/03/98—Road Transport 1403

Application for reinstatement or compensation on the grounds of unfair dismissal—Applicant argued that the dismissal was unfair because she was ill and that she had a very good employment history—Respondent argued the Applicant did not fit in was on probation and proper notice for a casual employee under the award was given and this is correct but reward—Commission found there had been no unfairness—Dismissed to the extent that warranted intervention—Ms VR Glover -v- Muntyls—APPL 1488 of 1997—GREGOR C—17/03/98—Accommodatn, Cafes&Restaurants 1408

Application for compensation on the grounds of unfair dismissal—Applicant argued that dismissal was unfair because no formal warning of dissatisfaction with performance was given—Respondent argued that alternatives were offered the Applicant accepted demotion and then latter resigned—Commission found that the Applicant's removal from his original position constituted a dismissal and no adequate warning was given—Granted—Mr DJ Grace -v- David Evans Real Estate—APPL 1911 of 1997—BEECH C—26/02/98—Property Services 1410

Application for compensation on the ground of unfair dismissal and allegedly denied contractual entitlements—Applicant argued that dismissal was unfair because no warning regarding his work performance or attitude given—Respondent argued that the Applicant was summarily dismissed for misconduct, his rude, disrespectful attitude and was not entitled to benefits claimed—Commission found the respondent had not established gross misconduct and the dismissal was without warning or notice—Granted—Mr RJ Harvey -v- Koast Corporation—APPL 1924 of 1997—CAWLEY C.—05/02/98—Road Transport .. 1413

Application for compensation on the grounds of unfair dismissal—Applicant argued that dismissal was unfair because he was informed he was permanent and the position was later offered to someone else—Respondent argued the Applicant was informed and award the position was to be advertised each season and contract of service to come to an end. Respondent further argued that the Application was out of time—Commission found that the application was filed outside the time limit of 28 days for the right of access to the Commission—Dismissed for want of jurisdiction—Mr G Johnson -v- Malembo Pty Ltd T/A Aquilla Carting Company—APPL 1745,1882,2137,2149 of 1997—CAWLEY C.—26/02/98—Commercial Fishing . 1414

Application for compensation on the grounds of unfair dismissal and allegedly denied contractual entitlements Applicants argued that dismissal was unfair because termination came without warning and the sale of the business was a sham and a device to dismiss the Applicants—Respondent argued, Applicants were employees and were given an opportunity to purchase the business and entitlements of one employee were withheld because of refusal to sign a tax declaration form—Commission found the sale of the business was genuine and payment made was not so ungenerous to make the dismissal unfair—Commission found there was no reason to treat one differently to the others—Dismissed-Dismissed-Granted-Dismissed—Mrs YJ Liang -v- Great Evermore Pty Ltd T/A Sun Sai Kai—APPL 1392,1393,1394,1395 of 1997—FIELDING C—06/03/98—Accommodatn, Cafes&Restaurants 1416

Application for compensation on the grounds of unfair dismissal—Applicant argued respondent assured reengagement on return from leave on the same basis—Respondent argued that Applicant was employed on a casual basis and no offer guaranteed on return—Commission found the Applicant was employed on a casual basis on a service of weekly contracts and there was a offer and acceptance of employment on return—Granted—Miss J Marris -v- Swan (WA) Pty Ltd T/A La Pagnotta Italian Bakery—APPL 1671 of 1997;C 376 of 1997—CAWLEY C.—06/03/97—Food, Beverage and Tobacco Mfg..... 1419

Application for compensation on the grounds of unfair dismissal—Applicant argued that dismissal was unfair as the respondent director was allowed a personal matter to interfere and denies his work performance was lacking—Respondent argued that repeated warnings, about poor performance and failures to adhere to policy and time keeping standards were given—Commission found that warning were raised and the contract was terminated lawfully—Dismissed—Mr F Silas -v- Red Hot Design—APPL 1546 of 1997—CAWLEY C.—04/02/98—Personal & Household Good Rtlg 1424

Application for reinstatement or compensation on the grounds of unfair dismissal—Commission found that fairness required the applicant be told that unless she found a way to work with another employee her employment would be in jeopardy, that reinstatement was not practical and that fairness required 4 weeks compensation—Granted—Ms E Simpson -v- David Cowley Real Estate T/A Ray White—South Perth—APPL 1836 of 1997—BEECH C—Property Services 1425

Conference Referred re unfair dismissal claim—Applicant union argued laws of the State in relation to Redundancy applied—Respondent employer argued that discussions held during a first dismissal sufficed in terms of the Minimum Conditions of Employment Act on the second occasion—Commission found that the redundancy was valid however the manner in which the dismissal was effected was less than fair—Commission further found that the assessment of loss or injury was not restricted to lost wages and the TCR case provided a good guide—Granted—LIQUOR, HOSPITALITY & MISC -v- Congregation Of Vietnamese Buddhists In WA T/A Landsdale Multicultural Childcare—CR 329 of 1997—BEECH C—25/03/98—Community Services 1433

Application for compensation on the grounds of unfair dismissal-Applicant denied alleged theft-Respondent argued that reinstatement was impracticable and employment was casual-Commission stated that an employer was not required to prove beyond a reasonable doubt that an employee was guilty of stealing from the employer to dismiss on that ground and do so fairly: It was enough that the employer had reasonable cause to believe that the employee stole -Commission found that the Respondent employer failed to undertake an adequate investigation and did not have reasonable cause to dismiss the Applicant-Commission also found in assessing loss that although designated 'casual' the applicant clearly had an ongoing employment relationship-Granted—Ms LM Cockram -v- Kays Bag Stores (NSW) Pty Limited—APPL 1783 of 1996—PARKS C—09/05/98 —Personal & Household Good Rtlg 1894

CUMULATIVE DIGEST—*continued*

Page

COMPENSATION—*continued*

Application for compensation on the grounds of unfair dismissal- Respondent argued applicant was unreasonable and uncooperative during a rehabilitation programme following an accident at work and refused to obey a lawful instruction—Commission was satisfied that the Respondent had made serious efforts to assist the Applicant's rehabilitation—Commission noted that the Applicant's employment was terminated summarily for misconduct for wilful disobedience of reasonable and lawful instruction when given a warning that such action would result in dismissal.—Commission found such conduct warranted summary dismissal as it went the heart of the contract between the parties—Dismissed—Mr JD Cusato -v- Atlas Group Pty Ltd—APPL 1824 of 1997—SCOTT C.—17/05/98— General Construction 1898

Application for compensation on the grounds of unfair dismissal—Applicant argued that the reason for her dismissal told to her at the time was different from the reasons subsequently given in her letter of termination— Respondent argued that the Applicant had been given several verbal and written warnings that her work performance was poor and her job was in jeopardy—Commission did not find the Applicant's evidence entirely persuasive and that the grounds for claiming unfairness had not been made out— Commission further found that costs are not usually awarded in this jurisdiction and should only be awarded in an extreme case which this was not—Dismissed—Ms MT De Gois -v- Aardent Dental Centre (Juliann Management Pty Ltd)— APPL 2243 of 1997—BEECH C—Health Services 1902

Application for compensation on the grounds of unfair dismissal-Applicant argued that the Respondent expected and required its employees to work "overtime" without pay which he considered unreasonable-Applicant further argued that a failure by the Respondent to provide a written employment contract caused his dissatisfaction-Respondent argued that the Applicant had expressed unhappiness with his employment and had understood that to mean that the Applicant wished to leave work-Commission found that the Applicant was the architect of his own misfortune and that he had terminated his own services-Granted in part—Mr MT Ibrahim -v- Fine Style Design Studio Pty Ltd—APPL 1790 of 1997—PARKS C— Textile, Clothing, Footwear 1909

Application for compensation on the grounds of unfair dismissal-Applicant argued that the downsizing of the Respondent business was an excuse to terminate the Applicant's employment as other employees were brought in to complete work the Applicant had started-Respondent argued that the Applicant's competence to complete the work was in dispute-Commission found that at least part of the Respondent's reasons for selecting the Applicant for termination were associated with his views of the Applicant on a personal level-Granted—Mr DJ Maher -v- Francis Robert Ridgwell T/A The Cork Expert—APPL 1846 of 1997— SCOTT C.—Personal & Household Good Rtlg 1911

[2]Appeal against part of decision of Commission (78 WAIG 1058) re compensation for unfair dismissal—Appellant argued Commission failed to assess the loss suffered by him because of the dismissal, including loss of assets, and determine the amount of compensation accordingly, and sought an amount based on loss capped by the statutory limit- Full Bench reviewed authorities, the history of compensation for unfair dismissal provisions and s23A of the IRAct 1979—Full Bench found (in separate reasons) that the figure claimed was not reduced by the amount of post dismissal earnings and was therefore erroneous; that the method adopted was not at odds with the Act and the Appellant had not discharged the onus of establishing that there was a palpable error requiring intervention— Dismissed—Mr PA Simons -v- Ismail Holdings Pty Ltd T/A Envelope Specialists—APPL 79 of 1998—Full Bench— SHARKEY P/GREGOR C/CAWLEY C.—29/05/98—Wood and Paper Product Mfg..... 2332

Application for compensation on grounds of unfair dismissal remitted from Full Bench re relief-Applicant argued that his efforts at mitigating loss following dismissal from employment and loss of a remuneration package required granting of greater relief-Respondent argued Applicant's submission of a false document to Commission should reflect on compensation paid-Commission found that the behaviour of the Applicant in position of a senior manager in charge of a significant budget did not suggest good prospects for continuing employment with the Respondent and compensation should reflect this fact-Dismissed—Mr JA Capewell -v- Cadbury Schweppes Pty Ltd—APPL 29 of 1996—CAWLEY C.— Food, Beverage and Tobacco Mfg 2448

Application re alleged unfair dismissal—Applicant argued there had been no warnings nor an opportunity to improve his performance, that another two sales representatives, whose sales performances were also below the standard required, were only warned and that he was not aware that his termination was being contemplated—Respondent argued a term of the Applicant's employment was an understanding that if he failed to make the sales target in three successive months, his employment status could be reviewed and that he had, over a five month period consistently failed to meet the monthly sales budget—Commission found the term of the contract of employment did not say that a sales representative would be dismissed for failing to reach the sales targets but that the employment would be "reviewed"—Commission reinstatement impractical and even though the applicant had not lost income it did not mean he had not suffered loss or injury—Granted—Mr GP Collier -v- Police & Nurses Real Estate—APPL 2216 of 1997—BEECH C—20/05/98—Property Services..... 2449

CONFERENCE

Conference referred for alleged accusations and warnings—Applicant claimed as accusations were not properly investigated they were invalid and that warnings be accordingly removed from personnel file—Respondent argued that Applicant's actions were reasonable for the two written warnings to have been issued—Commission found that the written warnings given were to be seen as written warnings—Dismissed—The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- Robe River Iron Associates—CR 63 of 1997—BEECH C—18/12/97—Metal Ore Mining 540

Conference referred re clarification of bonus-Applicant union claimed that Respondent should not exclude employees covered under award from receiving bonus and that as the awards were Minimum Rates awards they did fit within the Wage Fixing Principles and there was nothing which prevented the Commission from awarding bonuses paid -Respondent argued that as the bonus was part of the workplace agreement relationship the Commission lacked jurisdiction and that the matter did not fit in with the Wage Fixing Principles-Commission found that as there had not been sufficient information put forward, order could not issue-Dismissed—BRICK, TILE & POTTERY UNION -v- Metro Brick Armadale—CR 235 of 1997—SCOTT C.—08/01/98—Non -Metallic Min Product Mfg..... 542

Addendum for costs against the Applicant—Applicant claimed the original application was not of frivolous or vexatious nature and claim should not be granted—Respondent argued that as costs were incurred for preparation, court time and travel, these be compensated—Commission found that although there was a need for the witness , no evidence produced to support the claim for costs—Dismissed—Western Australian Police Union of Workers -v- Hon Minister for Police—CR 148 of 1997—GEORGE C—12/12/97—Government Administration 545

Conference referred re unfair dismissal claim and claim for order that dismissed employee not be banned from Respondent's premises—Applicant Union argued worker was not given sufficient information of the material which the Respondent had, in sufficient time to respond and the decision was hasty—Applicant argued the ban was a continuation of the penalty of loss of employment and would affect the workers livelihood—Respondent argued order sought was too widely framed, there could be good reasons to refuse entry, there was no utility in the order and no power under S23A of the IRAct 1979—Commission found on evidence the possibility of a ground to justify the summary dismissal by virtue of the discovery of material on the worker's property and against the unfair dismissal claim—Commission found no link between the worker's offences and his employment and that it did not seem fair that the worker lose his then present employment because of the ban, and the parties agreed the Respondent should reserve the right to refuse entry for the same reasons as any other employee—Granted in part—The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- WMC Resources Ltd—CR 405 of 1996—BEECH C—10/02/98—Metal Ore Mining 1065

CUMULATIVE DIGEST—*continued*

Page

CONFERENCE—*continued*

Conference referred—Applicant union sought to withdraw application, argued that the RCB had power to discontinue proceedings and that an application for discovery of documents be discontinued as a consequence of the finalisation of the substantive matter—Respondent argued a question of jurisdiction had been raised in relation to the application for discovery and that the RCB must deal with that before exercising power to resolve the dispute—RCB found it was not appropriate for the matter to proceed and, after reviewing s27 of the IRAct 1979, the appropriate course was to dismiss the matters—Dismissed for want of prosecution—West Australian Railways Officers' Union -v- Western Australian Government Railways Commission—RCBC 1 of 1997—Railways Classification Board—SCOTT C.—19/02/98—Rail Transport 1072

Application for allegedly denied contractual benefits -Applicant failed to attend the proceedings-Respondent argued that the Applicant had displayed complete disregard of his own application to the Commission in failing to appear or respond to communications regarding the application-Respondent further argued that the Applicant's behaviour had wasted public money and put the Respondent to considerable expense and sought costs-Commission found that Applicant treated the Commission with disdain and left it with no alternative but to dismiss the claim for want of prosecution-Commission further found that it is a matter of public interest that litigants in this jurisdiction are aware that matters need to be dealt with speedily-Dismissed and costs granted—Mr SP Gavin -v- Robert Stephen Cocking T/A Batavia Motor Inne—APPL 1783 of 1997—GREGOR C— Accommodatn, Cafes&Restaurants 1906

Application for compensation on the grounds of unfair dismissal-Applicant argued that she had been constructively dismissed by requesting a reference for a job application which was assumed by the Respondent to be an indication of the Applicant seeking to leave her present employment -Respondent argued that they had been aware of the need for sustainable grounds for termination-Commission found that there was nothing in the evidence which would suggest that the Respondent tried to contrive a dismissal from the Applicant-Commission further found the application incompetent because it was out of time-Dismissed—Ms JSE Yeap -v- Chunagon Co Ltd T/A Chunagon Japanese Restaurant— APPL 808 of 1997—GREGOR C—Accommodatn, Cafes&Restaurants 1917

Application for reinstatement or compensation on the grounds of unfair dismissal—Applicant argued that the dismissal was unfair because the reason for the dismissal was threatened legal action by a former customer of the Respondent regarding the Applicant attempting to return a pen he had found in a motor vehicle in the course of his duties—Commission found that the real reason was that the Applicant was given a written warning to stop writing to or contacting the former customer or an employee of another business and the conduct continued—Commission found it was not in the public interest for the application to go beyond the conference stage—Dismissed—Mr M Cooper -v- FMC Wholesale—APPL 520 of 1998—BEECH C—27/05/98— Personal & Household Good W/sg 2451

CONSUMER PRICE INDEX

Application to vary award to consent re allowances—applicant Union claimed award should be varied to reflect CPI movements—Respondent agreed in principle but argued that the all purpose allowances were not work related allowances and should not be allowed—Commission found as application was consistent with the wage fixing principles variation be granted and argument from respondent be dismissed—Ordered Accordingly—LIQUOR & ALLIED INDUST UNION -v- Kalamunda Club (Inc)—APPL 1412,1413,1414,1415,1416 of 1992—CAWLEY C.—22/12/97—Electricity and Gas Supply 459

CONTRACT OF SERVICE

Application for allegedly denied contractual entitlements—Applicant claimed payment of full wages and payment in lieu of notice were due under employment contract—Respondent argued no discussion or arrangement to payment in lieu of notice was undertaken prior to commencement—Commission found that an under payment of benefits had occurred and ordered payment—Granted—Mr CI Day -v- Marleys Transport—APPL 411 of 1997—PARKS C—22/10/97—Road Transport 511

Application for compensation on the grounds of unfair dismissal and allegedly denied contractual entitlements—Applicant claimed dismissal was unfair as there was intimidation to resign—Respondent argued that as termination resulted from mutual agreement no dismissal occurred—Commission found that as termination was from mutual agreement, no dismissal occurred—Dismissed—Mr C Blachut -v- Trans-Plus Pty Ltd—APPL 725 of 1997—PARKS C—23/10/97—Road Transport .. 513

Application for allegedly denied contractual entitlements -Applicant claimed that application should proceed if Respondent went into liquidation and could give no explanation as to why a number of Respondents were named and served-Respondent argued that as no competent declaration of service was performed, the application was flawed-Commission found that as application was filed and variously served it was flawed and prevented it proceeding -Dismissed for want of reasonable diligence in compliance with the Act and relevant regulations—Ms C Firriolo -v- Allspray Equipment Pty Ltd—APPL 1594,1823 of 1997—CAWLEY C.—05/12/97—Water Supply Sewerage & Drain 518

Application for allegedly denied contractual entitlements—Applicant claimed that within the relevant period the employer-employee relationship changed and there was an unpaid benefit as a result of subsequent work—Respondent argued that there was a principal-contractor employment relationship and a contract for services not an employer/employee relationship—Commission found that as there was a contract for services and not that of an employee-employer relationship. It could not deal with the matter—Dismissed for want of jurisdiction—Mr AS Furey -v- Mr G Moran—APPL 1124 of 1997—CAWLEY C.—12/12/97—Construction Trade Services 520

Application for unfair dismissal and allegedly denied contractual entitlements—Applicant claimed dismissal was unfair and wages and notice period were not paid—No appearance from Respondent—Commission found that the Applicant was entitled to be paid the benefits claimed—Granted—Mr D Harper -v- Wingstar Holdings Pty Ltd—APPL 1359 of 1997—SCOTT C.—17/12/97—Business Services 524

Application for allegedly denied contractual entitlements—Applicant claimed unpaid entitlements of airfares, relocation expenses, payment for days worked and outstanding annual leave—Respondent argued that entitlements had been paid and denied the claim—Commission found that the claim had not been made out—Dismissed—Mr GJP Johannes -v- Sedco Forex International Drilling Inc—APPL 1519 of 1997—BEECH C—12/12/97—Oil and Gas Extraction 525

Application for compensation on the ground of unfair dismissal and allegedly denied contractual entitlements—Applicant claimed dismissal was unfair as there was a denial of natural justice and lack of procedural fairness and that deduction of amounts without consent was also unfair—Respondent argued that dismissal was valid as the Applicant breached obligation to work in a competent manner—Commission found that there was a denial of natural justice, a lack of procedural fairness and monies deducted without consent—termination was unfair—Granted—Mr N McGuiness -v- M.G. McKay Pty Ltd—APPL 813 of 1997—SCOTT C.—15/12/97—Accommodatn, Cafes&Restaurants 532

Application for compensation on the grounds of unfair dismissal and outstanding contractual entitlements -Applicant claimed that termination two weeks after giving notice was unfair as it resulted from reporting unsafe work practices to Worksafe-Respondent argued that termination resulted from Applicant's disruptive behaviour and attitude to work during the notice period and found that Applicant's recourse to Worksafe over safety issues was unacceptable -Commission found that Applicant's actions in contacting Worksafe were mischievous and that as attitude and performance had declined during notice period, termination was not unfair—Dismissed—Mr MW John -v- Outback Accessories—APPL 1530 of 1997—COLEMAN CC—20/01/98—Metal Product Manufacturing 748

Application for compensation on the grounds of unfair dismissal and allegedly denied contractual entitlements—Applicant claimed dismissal was unfair and sought compensation, holiday pay and loading, superannuation payments and payment in lieu of notice—Respondent argued that no contractual benefits due as the Applicant was summarily dismissed for gross misconduct—Commission found that respondent had cause to summarily dismiss the Applicant and no contractual entitlements due—Dismissed—Mr A Kittel -v- Alan J Marshall Pty Ltd—APPL 1092 of 1997—CAWLEY C.—16/01/98—Property Services 749

CUMULATIVE DIGEST—*continued*

Page

CONTRACT OF SERVICE—*continued*

Application for allegedly denied contractual entitlements—Applicant claimed that an amount was deducted from the final remuneration payment without authority and unlawfully and dispute resolution clause in Work Place Agreement allowed Commission to deal with claim—Respondent argued that it was entitled to recoup payments made to training courses and the Commission lacked jurisdiction to deal with a registered Workplace Agreement—Commission found there was no jurisdiction to enquires and deal with the registered Workplace Agreement—Commission found there was no jurisdiction to enquire and deal with the registered Workplace Agreement—Dismissed for want of jurisdiction—Mr MD Morgan -v- Keyros Pty Ltd T/as Port Hedland Security—APPL 731,1835 of 1997—CAWLEY C.—24/12/97—Other Services 753

Application for unfair dismissal and allegedly denied contractual entitlements—Applicant claimed he was contractually dismissed and sought one weeks wages wrongfully deducted and pay in lieu of notice—Respondent argued that Applicant abandoned his employment—Commission found it was not necessary to determine which party terminated the contract and that one weeks notice was wrongfully deducted—Granted in Part—Mr C Pearson -v- J & R Sacca Poultry—APPL 1545 of 1997—PARKS C—01/12/97—Basic Material Wholesaling 756

[1]Appeal against part decision of Commission (77 WAIG 2374 & 2778) re allegedly denied contractual entitlements—Appellant argued Commission erred in finding there was no jurisdiction to deal with the claim for superannuation payments, that there was no inconsistency between s29(1) (b)(ii) of the IRAct 1979 and the Superannuation Guarantee (Administration) Act 1992—Respondent argued that notwithstanding that it conceded that it had an arrangement to pay for the superannuation contribution, it was not a contractual entitlement, it was a statutory obligation—Full Bench reviewed authorities, Acts, s109 of the Constitution and found the amount claimed was not a contractual benefit and the SGAA and SGAC covered the field to render s29 inoperative—Dismissed—Ms EA Keane -v- Lomba Pty Ltd T/A Ian George & Co—APPL 1770 of 1997—Full Bench—SHARKEY P/COLEMAN CC/CAWLEY C.—17/02/98—Property Services 810

Application for allegedly denied contractual entitlements re wages, commission, and prorata annual leave—Respondent argued he was entitled to 75% commission on a property sold—Respondent argued that the Commission was only 50% and that expenses to be deducted from the payments were greater than the Applicant specified—Commission found on evidence that commission was 50% and that the Applicant did not have an entitlement of prorata annual leave independently of the Minimum Conditions of Employment Act 1993—Commission further found that the contract of service did not provide for deduction from salary and wages, nor for the deduction from commission of the cost of business cards and removal of advertising signs—Granted in Part—Mr MA Abbott -v- Roy Weston Carousel Southern Realty Branch—APPL 1421 of 1997—FIELDING C—03/03/98—Property Services 1054

[2]Appeal against decision of Commission (77 WAIG 2989) re unfair dismissal claim and denied contractual entitlements—Appellant argued Commission erred in finding the employee was not constructively dismissed that it had no jurisdiction, failed to admit certain documents and sought to adduce new evidence—Appellant argued withdrawal of authority to sign cheques inhibited her employment and the conduct forced her to leave—Full Bench was not persuaded apart from financial statements that the other evidence was relevant—Full Bench found resignation followed deterioration of the relationship between the Appellant and a principal of the respondent and a breach of duty of the part of the Appellant—Full Bench further found that the withdrawal of authority to sign cheques was a proper protective measure by the Respondent, there was no dismissal and no jurisdiction to make orders—Dismissed—Ms WA Farrell -v- Harlem Enterprises Pty Ltd T/A Ace Rent A Car—APPL 1883 of 1997—Full Bench—SHARKEY P/BEECH C/SCOTT C.—11/03/98—Other Transport 1103

[2]Appeal against decision of Commission (77 WAIG 3497) re contractual entitlements—Appellant argued the contract of employment denied the Respondent an entitlement to a full 40% Commission, that the contract expressly provided for a 20% commission in the circumstances and the term the Commission implied in to the contract was contrary to the principles laid down in authorities—Respondent argued there had been no referral of the sale in terms of the contract of service and that the Appellant sought to exclude the Respondent from the sale to reduce commission payable—Full Bench found question was what entitled the sales person to earn a Commission as distinct from a referral fee—Full Bench found that it was open to the Commission to find that the Respondent was the effective cause of the sale and had been denied a contractual entitlement—Dismissed—Royal International (WA) -v- Mr WTJ Valli—APPL 2206 of 1997—Full Bench—SHARKEY P/CAWLEY C./PARKS C—18/03/98—Property Services 1110

[2]Appeal against decision of Commission (77 WAIG 2787) re Contractual entitlements—Appellant argued Commission erred in finding that a contract of service existed, that the balance of a token wage and a fulltime wage was to be made up to the Respondent under the contract and misdirected itself or incorrectly weighted the evidence—Full Bench found that the argument that the evidence before the Commission at first instance should have carried the matter despite the acknowledged failings of the Respondent's witness was fatally flawed and the Appellant had not established a palpable error—Dismissed—S & M Bennett Pty Ltd T/A Rockingham Sheetmetal Works -v- Ms Y Scott—APPL 1837 of 1997—Full Bench—SHARKEY P/COLEMAN CC/CAWLEY C.—11/02/98—Metal Product Manufacturing 1115

Application for reisntatment or compensation on the grounds fo unfair dismissal—Applicant argued that the dismissal was unfair because of a prior arrangement entered into with the Respondent regarding 'casual employment' and guaranteed employment—Respondent argued that there was no such undertaking and the Applicant failed to perform the duties because of a bad attitude—Commission found that the Applicant's services were terminated by the Respondent and because of the arrangements previously entered into whereby she was assured of regular part-time work and that undertaking was not fulfilled the termination was rendered unfair—Commission further found that the Applicant had a duty to mitigate her loss and to the extent that that was not exhausted, detracted from the level of compensation which would otherwise be considered—Granted—Ms M De -Abreu -v- Renoir Patisserie—APPL 1489 of 1997—COLEMAN CC—27/02/98—Food Retailing 1395

Application for allegedly denied contractual entitlements—Applicant sought the dismissal of application on the grounds that there was no evidence of a contract between the Applicant and the Respondent—Dismissed—Mr BM Diamond -v- Brandon Greyling—APPL 728,1164 of 1997—FIELDING C—27/03/98—Personal & Household Good W/sg 1397

Application for allegedly contractual entitlements—Applicant argued he was reengaged by the Respondent on previous terms and sought unpaid wages, annual leave and two week's pay in lieu of notice—Respondent argued no repayment was discussed and work was voluntary—Commission sought on evidence Applicant spent some time looking after the affairs of the Respondent's operations as an act of grace as the company was in financial difficulties and that the Applicant was entitled to what the respondent admitted is due and owing to the Applicant—Granted in part—Mr BM Diamond -v- Tmia Pty Ltd t/a Modernair—APPL 728,1164 of 1997—FIELDING C—27/03/98—Personal & Household Good W/sg 1398

Application for allegedly denied contractual entitlements—Applicant claimed balance of wages, annual leave, superannuation and vehicle reimbursements were due—Respondent argued that no employee-employer contract of service existed and if it did there were no entitlements due—Commission found that the Applicant was an employee and the Applicant breached the contract by failing to give due notice of termination which gave right to the Respondent to withhold equivalent wages—Mr CI Firns -v- Braeside Enterprises Pty Ltd T/A Mt Gibson Emu Farm—APPL 1112 of 1997—CAWLEY C.—09/03/98—Agriculture 1404

Application for compensation on the ground of unfair dismissal and allegedly denied contractual entitlements—Applicant argued that dismissal was unfair because no warning regarding his work performance or attitude given—Respondent argued that the Applicant was summarily dismissed for misconduct, his rude, disrespectful attitude and was not entitled to benefits claimed—Commission found the respondent had not established gross misconduct and the dismissal was without warning or notice—Granted—Mr RJ Harvey -v- Koast Corporation—APPL 1924 of 1997—CAWLEY C.—05/02/98—Road Transport .. 1413

CUMULATIVE DIGEST—*continued*

Page

CONTRACT OF SERVICE—*continued*

Application for compensation on the grounds of unfair dismissal and allegedly denied contractual entitlements Applicants argued that dismissal was unfair because termination came without warning and the sale of the business was a sham and a device to dismiss the Applicants—Respondent argued, Applicants were employees and were given an opportunity to purchase the business and entitlements of one employee were withheld because of refusal to sign a tax declaration form—Commission found the sale of the business was genuine and payment made was not so ungenerous to make the dismissal unfair—Commission found there was no reason to treat one differently to the others—Dismissed-Dismissed-Granted-Dismissed—Mr JQ Zhou -v- Great Evermore Pty Ltd T/A Sun Sai Kai—APPL 1392,1393,1394,1395 of 1997—FIELDING C—06/03/98—Accommodatn, Cafes&Restaurants 1416

Application for compensation on the grounds of unfair dismissal—Applicant argued respondent assured reengagement on return from leave on the same basis—Respondent argued that Applicant was employed on a casual basis and no offer guaranteed on return—Commission found the Applicant was employed on a casual basis on a service of weekly contracts and there was a offer and acceptance of employment on return—Granted—Miss J Marris -v- Swan (WA) Pty Ltd T/A La Pagnotta Italian Bakery—APPL 1671 of 1997;C 376 of 1997—CAWLEY C.—06/03/97—Food, Beverage and Tobacco Mfg..... 1419

Application for reinstatement or compensation on the grounds of unfair dismissal and allegedly denied contractual entitlements—Applicant sought to amend named respondents in application—Respondent argued that the Respondent had not been the employer and that what the applicant sought was to redirect the application and thereby commence the action against entirely different parties—Commission found that it was not open to it to strike out the cited respondent and cite in its place a different legal persona—Dismissed—Mr H Posch -v- De Campo Bakery Holdings Pty Ltd—APPL 1789 of 1997—PARKS C—26/02/98—Food, Beverage and Tobacco Mfg 1423

Application for allegedly denied contractual entitlements -Commission changed identification of Respondent by consent -Applicant argued he had an unwritten employment contract with the Respondent which included part-payment of telephone bills and superannuation contributions-Applicant further argued that there existed an unwritten agreement for additional duties and payment for successful occupancies-Respondent argued that the additional duties were performed from time to time as required and with a pre -agreed fee-Respondent further argued that this arrangement did not form a collateral contract to the employment contract but was an additional arrangement between the Applicant and other parties-Commission found it could give effect to those parts of the employment contract which it had found to exist between the parties-Granted in part—Mr AE Campbell-Henderson -v- Owners of Strata Plan 5767—APPL 1661 of 1997—GREGOR C—Property Services 1891

Application re unfair dismissal and allegedly denied contractual entitlements-Applicant did not seek compensation for claim of unfair dismissal-Respondent failed to appear-Commission found that although the Applicant's evidence was the only evidence presented the Applicant was a most truthful person under oath-Commission further found that the claim for allegedly denied contractual entitlements fell under three headings-Granted —Mr MJ Carberry -v- TDK Carting Contractors—APPL 2366 of 1997—BEECH C—Road Transport 1892

Application for allegedly denied contractual entitlements -Further reasons for decision re redundancy payment upon Applicant's resignation-Applicant argued that he resigned in the belief that the 'Redeployment, Retraining and Redundancy General Order' applied to his situation -Respondent argued it valued Applicant's services and wished to retain him-Commission found that the Applicant had no formal written employment contract and any offer of severance pay to previous employees working under the relevant Award had been initiated by the Respondent -Commission further found that it was not in the public interest to require the Respondent to present its case in light of its findings-Dismissed—Mr P Fielding -v- Western Power Corporation—APPL 105 of 1997—BEECH C— Electricity and Gas Supply 1906

Application for allegedly denied contractual benefits -Applicant failed to attend the proceedings-Respondent argued that the Applicant had displayed complete disregard of his own application to the Commission in failing to appear or respond to communications regarding the application-Respondent further argued that the Applicant's behaviour had wasted public money and put the Respondent to considerable expense and sought costs-Commission found that Applicant treated the Commission with disdain and left it with no alternative but to dismiss the claim for want of prosecution-Commission further found that it is a matter of public interest that litigants in this jurisdiction are aware that matters need to be dealt with speedily-Dismissed and costs granted—Mr SP Gavin -v- Robert Stephen Cocking T/A Batavia Motor Inne—APPL 1783 of 1997—GREGOR C— Accommodatn, Cafes&Restaurants 1906

Application for compensation on the grounds of unfair dismissal and allegedly denied contractual benefits -Applicant argued that the Respondent expected and required its employees to work "overtime" without pay which he considered unreasonable-Applicant further argued that a failure by the Respondent to provide a written employment contract caused his dissatisfaction-Respondent argued the Applicant's expression of unhappiness with his job led the Respondent to understand the Applicant wished to leave -Commission found the Applicant was the architect of his own misfortune and that he had terminated his own services -Granted in part—Mr MT Ibrahim -v- Fine Style Design Studio Pty Ltd—APPL 1790 of 1997—PARKS C—Textile, Clothing, Footwear 1909

Application for allegedly denied contractual entitlements -Applicant sought leave to withdraw the claim on the day of the hearing-Respondent argued the application had been without foundation or merit-Respondent further argued that pursuant to s.27(1)(c) of the Industrial Relations Act 1979 the Commission is allowed to "simply award costs" in exceptional circumstances-Commission found that the test to be applied in awarding of costs under the Act was set out by the Full Bench (73 WAIG 26,@ 27)-Commission further found that the Respondent did not meet the necessary criteria of "extreme cases"-Application withdrawn and costs dismissed—Mr RJ Lawson -v- Lamar Nominees Pty Ltd T/A Whyman Building Company Pty Ltd & Other—APPL 1183 of 1997 —GREGOR C—General Construction 1910

Application for compensation on the grounds of unfair dismissal-Applicant argued that the downsizing of the Respondent business was an excuse to terminate the Applicant's employment as other employees were brought in to complete work the Applicant had started-Respondent argued that the Applicant's competence to complete the work was in dispute-Commission found that at least part of the Respondent's reasons for selecting the Applicant for termination were associated with his views of the Applicant on a personal level-Granted—Mr DJ Maher -v- Francis Robert Ridgwell T/A The Cork Expert—APPL 1846 of 1997— SCOTT C.—Personal & Household Good Rtlg 1911

Application for compensation on the grounds of unfair dismissal-Applicant argued that she had been constructively dismissed by requesting a reference for a job application which was assumed by the Respondent to be an indication of the Applicant seeking to leave her present employment -Respondent argued that they had been aware of the need for sustainable grounds for termination-Commission found that there was nothing in the evidence which would suggest that the Respondent tried to contrive a dismissal from the Applicant-Commission further found the application incompetent because it was out of time-Dismissed—Ms JSE Yeap -v- Chunagon Co Ltd T/A Chunagon Japanese Restaurant— APPL 808 of 1997—GREGOR C—Accommodatn, Cafes&Restaurants 1917

[2]Appeal against decision of Commission (77 WAIG 1530) re denied contractual entitlements—Applications to extend time to file and serve Notice of Appeal and Appeal Books— Appellant argued that the it was not open to the Respondent to refuse the changes in work and claim unfair dismissal, the Commission erred in finding the change in the proportion of duties done by the Respondent constituted a significant change, and that the Respondent was entitled to a redundancy payment under the written contract of employment—Full Bench found that the delay in filing the appeal was minimal and the injustice if the applications to extend time were not granted were obvious—Full Bench found there was a constructive dismissal by way of the employee refusing to accept a change in employment by way of a unilateral demotion—Majority of Full Bench found that the Redundancy Payments clause on the contract meant that payments were due where a person was dismissed when the company was subject to interalia rearrangement and reconstruction as those words were understood and defined under the Corporations Law and it was not open to find that the Respondent was denied a contractual benefit to which he was entitled—Applications granted and Appeal upheld— Robowash Pty Ltd -v- Mr M Hart—APPL 1049 of 1997—Full Bench—SHARKEY P/BEECH C/PARKS C—12/11/97—Property Services 2323

CUMULATIVE DIGEST—*continued*

Page

CONTRACT OF SERVICE—*continued*

Application re alleged unfair dismissal—Applicant argued there had been no warnings nor an opportunity to improve his performance, that another two sales representatives, whose sales performances were also below the standard required, were only warned and that he was not aware that his termination was being contemplated—Respondent argued a term of the Applicant's employment was an understanding that if he failed to make the sales target in three successive months, his employment status could be reviewed and that he had, over a five month period consistently failed to meet the monthly sales budget—Commission found the term of the contract of employment did not say that a sales representative would be dismissed for failing to reach the sales targets but that the employment would be "reviewed"—Commission reinstatement impractical and even though the applicant had not lost income it did not mean he had not suffered loss or injury—Granted—Mr GP Collier -v- Police & Nurses Real Estate—APPL 2216 of 1997—BEECH C—20/05/98—Property Services 2449

Application for reinstatement or compensation on the grounds of unfair dismissal and allegedly denied contractual entitlements—Application not served for 5 months after filing—Commission found reasons for delay inadequate and Respondent disadvantaged—Dismissed—Mr SP Hodder -v- Marshal Hedlam—APPL 2047 of 1997—CAWLEY C.— 22/05/98—Various 2459

Application for compensation on the grounds of unfair dismissal and allegedly denied contractual entitlements— Parties agreed that a consent order should issue—Granted in part—Mr GA Hopkins -v- Wingstar Holdings Pty Ltd— APPL 2306,2375 of 1997—CAWLEY C.—07/04/97—Various 2459

Application for allegedly denied contractual entitlements re redundancy package and pay in lieu of notice—Applicant argued that the payments received were inadequate— Respondent argued matter should be dismissed pursuant to the powers in s27 of the IRAct 1979—Commission found that the negotiation of the terms to bring a contract to an end was not reviewable under s29 of the IR Act 1979 because the section applied to extant contractual benefits or the terms that could be implied into an extant contract—Commission found that the period of notice was discoverable, the Applicant had been paid in accordance with it and the application was misconceived—Dismissed—Mr NB Pickersgill -v- Charlie Carters Pty Ltd—APPL 1276 of 1997 —GREGOR C—19/05/98—Food Retailing 2462

Application for allegedly denied contractual entitlements re wages, reimbursement of expenses and order that tools be returned—Respondent did not appear—Commission found on evidence that the Applicant was engaged on a casual basis for the purposes of the IRAct 1979 and that some wages and costs had not been paid to the Applicant despite performance in accordance with the contracts—Granted—Mr SM Podolski -v- Erotika Australia—APPL 2325 of 1997— CAWLEY C.—04/05/98—Sport and Recreation 2463

Application for allegedly denied contractual entitlements re non payment of wages—Respondent did not appear— Commission found amending the named respondent did not invalid the declaration of service—Commission found on evidence that the claim was made out—Granted—Ms S Redgrave -v- Ray Kelly T/A Kelly's Retreat—APPL 1926 of 1997—CAWLEY C.—03/04/98—Personal Services 2464

Application for allegedly denied contractual entitlements re wages-Applicant argued he ceased working for the Respondent as a result of the Respondent failing to pay him in accordance with the contract-Respondent acknowledged the wage claim but it was due to the failure of creditors to meet obligations to the Respondent that there had been insufficient funds to pay the Applicant to time of hearing -Claim conceded-Granted—Mr GP Ryan -v- Night News—APPL 131 of 1998—CAWLEY C.—Motion Picture Radio & TV Serv 2465

Application re unfair dismissal and allegedly denied contractual entitlements-Applicant argued that on balance of appropriate criteria he was an employee of the Respondent-Respondent argued that the conduct of the parties all the way through the arrangement was consistent with Applicant as sub-contractor-Commission reviewed authorities and found that the conduct of the parties in some ways supported the view of Applicant as sub-contractor -Commission further found that where the conduct did not support the finding it is not sufficient to undermine the totality of the relationship-Dismissed—Mr R Valentin -v- Quadrant Holdings Pty Ltd & Others—APPL 2389 of 1997— SCOTT C.—Services to Mining 2469

Application re alleged unfair dismissal and denied contractual entitlements-Applicant argued the respondent did not give notice as to the Applicant's dismissal and owed wages for hours worked-Respondent had known of state of business-Respondent further argued that Applicant did not work the hours claimed and was not promised wages claimed-Commission found implied into contract term of one week notice-Granted in part—Mr MR Fernihough -v- Bluestream Holdings Pty Ltd T/F Zappacosta Family Trust T/A Bluestream Landscaping—APPL 1904 of 1997—GREGOR C— Business Services 2475

Application for allegedly denied contractual entitlements— Applicant sought order when payment was not made according to agreement—Respondent sought order not issue pending conpany restructure—Commission ordered adjournment of seven days and that the Respondent endeavour to pay Applicant in that time- Ordered accordingly—Mr LR Vickers -v- Imtech Industries Pty Ltd—APPL 2308 of 1997—BEECH C —27/05/98—Non-Metallic Min Product Mfg 2476

CUSTOM AND PRACTICE

Conference referred for alleged accusations and warnings—Applicant claimed as accusations were not properly investigated they were invalid and that warnings be accordingly removed from personnel file—Respondent argued that Applicant's actions were reasonable for the two written warnings to have been issued—Commission found that the written warnings given were to be seen as written warnings—Dismissed—The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- Robe River Iron Associates—CR 63 of 1997—BEECH C—18/12/97—Metal Ore Mining 540

Application for orders re variation of roster-Applicant union argued that changes to rosters proposed by respondent should be cost neutral on the basis of past practice and sought a proposed roster or minimum salary—Respondent argued practice was limited to the introduction of One Man Operations, alternative claim conflicted with the paid rates award and should be tested against the Wage Fixing Principles—Commission reviewed s26A of the IR Act 1979 re evidence and workplace agreements—Commission found it was concerned at the time only with the issue of cost neutrality not the equality in the number of jobs between award and non-award employees—Commission found on evidence it was possible to draw up a roster which maintained earnings and integrated with staff schedule, that that ought occur and adjourned for the parties to confer—In Supplementary Reasons Commission found that though circumstances had changed, the Applicant was entitled to an order reflecting the Reasons for Decision—Granted with liberty to apply reserved—CONSTRUCTION, MINING, ENERGY -v- Hamersley Iron Pty Limited—APPL 929 of 1997—BEECH C—18/11/97—Metal Ore Mining 736

DATE OF OPERATION

[3]Conference referred re claim for wage increase under enterprise bargaining—Applicant Union argued application covered low paid workers who had only Arbitrated Safety Net adjustments, met the Wage fixing Principles, prompted further bargaining and structural efficiency and that the special case was the only avenue—Respondent argued negotiations should continue , there was no substance in the argument that the respondent had not bargained in good faith and that there re should be no arbitrated wage increase as interalia it did not meet the special case criteria and was not in the public interest—CCI and Hon Minister for Labour Relations argued Commission must be satisfied no further negotiation was possible, safety net adjustments should be absorbed, efficiencies must be established and attention must be made to flow-on—TLC argued Wage Fixing Principles should not frustrate the IR Act 1979, an order would not result in an award variation and there was no formula under the principles to split rewards from productivity increases between employer, employee and the government—CICS reviewed history of negotiations and found that past productivity increase were t be taken into account, that the result of arbitration was not static, that the 2 groups of employees should be treated separately, reviewed productivity measures, that the safety net adjustment did not have to be affirmed or the MRA completed—CICS found in favour of Applicant and granted a retrospective date of operation—Granted—-LIQUOR, HOSPITALITY & MISC -v- Education Department of Western Australia—CR 168 of 1996—Commission in Court Session— COLEMAN CC/GREGOR C/BEECH C—02/04/98—Government Administration 1589

CUMULATIVE DIGEST—*continued*

Page

DISCRIMINATION

[3]Application to vary awards re inclusion of salary packaging provisions—Applicant Unions argued that any attempts to negotiate any kind of salary package through enterprise bargaining had been fruitless as respondent employers would not contemplate salary packaging due to a proscriptive government policy aimed at promoting workplace agreements even when employees may be employed alongside employees enjoying salary packaging—Respondents argued the claims were contrary to provisions in the IRAct 1979, the Minimum Conditions of Employment Act, the Wage Fixing Principles and had cost implications- Respondent further argued that the IRAct clearly contemplated differing conditions for employees covered under awards, enterprise agreements and workplace agreements—CICS found on evidence that salary packaging was a "fact of life' and consistent with individuals and employers negotiating at workplace level CICS however, found that the compulsory provisions sought were not consistent with that principle— In Further Reasons CICS found there was no question that an employee seeking to raise a request for salary packaging may do so through their relevant union—Granted in Part— Hospital Salaried Officers Association of Western Australia (Union of Workers) -v- Royal Perth Hospital & Others—P 62 of 1994—Commission in Court Session—GREGOR C/GEORGE C/BEECH C—13/03/98—Health Services 2346

[3]Application to vary awards re inclusion of salary packaging provisions—Applicant Unions argued that any attempts to negotiate any kind of salary package through enterprise bargaining had been fruitless as respondent employers would not contemplate salary packaging due to a proscriptive government policy aimed at promoting workplace agreements even when employees may be employed alongside employees enjoying salary packaging—Respondents argued the claims were contrary to provisions in the IRAct 1979, the Minimum Conditions of Employment Act, the Wage Fixing Principles and had cost implications- Respondent further argued that the IRAct clearly contemplated differing conditions for employees covered under awards, enterprise agreements and workplace agreements—CICS found on evidence that salary packaging was a "fact of life' and consistent with individuals and employers negotiating at workplace level CICS however, found that the compulsory provisions sought were not consistent with that principle— In Further Reasons CICS found there was no question that an employee seeking to raise a request for salary packaging may do so through their relevant union—Granted in Part— The Civil Service Association of Western Australia Incorporated -v- Albany Port Authority & Others—P 62 of 1994;P 5,6 of 1997—Commission in Court Session—GREGOR C/GEORGE C/BEECH C—13/03/98—Health Services 2346

[4]Application to disallow Organisation Rule re political donations on the grounds that the rule was inconsistent with the IRACt 1979—Applicant argued that s97P and Part VIC served a legitimate end compatible with the notion of representative government and democratic process, and it was not probable that the implied right of equality operated at State level—Applicant argued organisations should be accountable to their members who should have a say in the use to which their political donations and levies were put—Applicant argued Organisations were the only organisations representing employees and their political expenditure should be regulated—Respondent Organisation argued that the statutory provisions were contrary or inconsistent with rights guaranteed by the Australian Constitution and to that extent were invalid or inoperative—Respondent argued the Act discriminated against Trade Unions by creating oppressive administrative barriers for the expenditure of monies on political matters —President reviewed the Respondent's rules, authorities , the implied rights of "equality" and "freedom of communication" under the Australian Constitution' and applied the test in Lange v Australian Broadcasting Commission (1997) (145 ALR 96)—President found that the rule enabled what was forbidden by s97P(4): the crediting of monies from members subscriptions to a political fund— President found that the provisions burdened the freedom to communicate, did more than regulate political donations and that ss97O and 97P(4), interalia, were invalid—President found it was not established that the rule was contrary or inconsistent with any Act, law, award, interalia, that was contrary to s66(2)(a)(iii) and that there was no jurisdiction or power to disallow it—Dismissed— REGISTRAR -v- COMM, ELECTRIC, ELECT, ENERGY—APPL 2194 of 1997—President—SHARKEY P—29/05/98—Other Services..... 2366

EMPLOYEE

Application re unfair dismissal and allegedly denied contractual entitlements-Applicant argued that on balance of appropriate criteria he was an employee of the Respondent-Respondent argued that the conduct of the parties all the way through the arrangement was consistent with Applicant as sub-contractor-Commission reviewed authorities and found that the conduct of the parties in some ways supported the view of Applicant as sub-contractor -Commission further found that where the conduct did not support the finding it is not sufficient to undermine the totality of the relationship-Dismissed—Mr R Valentin -v- Quadrant Holdings Pty Ltd & Others—APPL 2389 of 1997— SCOTT C.—Services to Mining 2469

ENFORCEMENT OF AWARDS/ORDERS

[2]Appeal against decision of Industrial Magistrate (unreported) re striking out of complaint and application for costs—Appellants argued the Industrial Magistrate deprived them access to their rightful application for costs by striking out the complaint prior to hearing,and incorrectly interpreted the term 'frivolous and/or vexatious'—Appellant further argued IM had a conflict of interest and should not have heard the matter when remitted back to him—Respondent argued that the complaints were struck out by consent and the Appellants were bound by their case—Full Bench found that striking out was not a determination of the complaints on merit and as there was no decision finally determining the matter the appeal was incompetent—Full Bench also found that the IM was not required to disqualify himself for ostensible bias and would have erred in law had he so done—Dismissed—Ian Barrett & Tracey Barrett -v- The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers —APPL 2106 of 1997—Full Bench—SHARKEY P/COLEMAN CC/PARKS C—22/05/98—General Construction 2340

[2]Appeal against decision of Industrial Magistrate (unreported) re breach of award—Appellant argued the IM erred in finding that the employee was working "on-site" in the "construction industry" in the context of the award— Full Bench found that there was an arguable case, some explicable delay in filing and serving the notice of appeal and that the justice of the application did not require the denial of an opportunity to pursue the appeal—Full Bench further reviewed authorities and found that no grounds of appeal were made out—Dismissed and procedural orders issued—G Parri & M Parri T/A G & M Parri -v- The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers—APPL 135 of 1998—Full Bench—SHARKEY P/PARKS C/KENNER C—22/05/98—General Construction..... 2344

EMPLOYEE

Application for allegedly denied contractual entitlements—Applicant claimed that within the relevant period the employer-employee relationship changed and there was an unpaid benefit as a result of subsequent work—Respondent argued that there was a principal-contractor employment relationship and a contract for services not an employer/employee relationship—Commission found that as there was a contract for services and not that of an employee-employer relationship. It could not deal with the matter—Dismissed for want of jurisdiction—Mr AS Furey -v- Mr G Moran—APPL 1124 of 1997—CAWLEY C.—12/12/97—Construction Trade Services..... 520

Application for allegedly denied contractual entitlements—Applicant claimed balance of wages, annual leave, superannuation and vehicle reimbursements were due—Respondent argued that no employee-employer contract of service existed and if it did there were no entitlements due—Commission found that the Applicant was an employee and the Applicant breached the contract by failing to give due notice of termination which gave right to the Respondent to withhold equivalent wages—Mr CI Firns -v- Braeside Enterprises Pty Ltd T/A Mt Gibson Emu Farm—APPL 1112 of 1997—CAWLEY C.—09/03/98—Agriculture 1404

CUMULATIVE DIGEST—*continued*

Page

ENFORCEMENT OF AWARDS/ORDERS

[1]Appeal against decision of Full Bench (76 WAIG 4875) re application for enforcement of orders of the Commission -Appellant argued that Full Bench erred on refusing to: admit evidence, grant an adjournment, allow amendment of particulars, which put the Appellant in a position of being unable to adduce relevant evidence and in the subsequent dismissal of the applications-IAC found that the Full Bench refusal to amend the particulars brought about an injustice to the Appellant and prevented the Appellant from having its case fairly tried-IAC found that the Full Bench failed to give weight to the absence of any prejudice to the Respondent in the event of the proposed amendments being allowed and that in the circumstances the Respondents would have had ample time in which to answer the new allegations which related to the actions of their own officials- IAC found the observance of orders of the Commission was a matter in which the community as a whole had an interest, that the discretion of the Full Bench miscarried and disclosed an error at law which led to the dismissal of the applications—Upheld and Remitted—REGISTRAR -v- AUTO, FOOD, METAL, ENGIN UNION—IAC 20 & 21 of 1996—Industrial Appeal Court—- 14/11/97—Other Services 289

[2]Appeal against decision of Industrial Magistrate re Breach of award—Parties submitted that Industrial Magistrates actions constituted a decision—Full Bench found that at the time the Notice of Appeal was lodged there was no decision against which to appeal within the meaning of s84 of the Industrial Relations Act 1979, and that the appeal and the applications to extend time were incompetent—Dismissed—G Parri & M Parri T/A G & M Parri -v- The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers—APPL 2041 of 1997—Full Bench—SHARKEY P/PARKS C/SCOTT C.—General Construction 586

Complaint re: Breach of Award—Complainant claimed that as required by Award defendant failed to keep time and wages records—Defendant submitted there was no case to answer and elected not to give evidence—Industrial Magistrate found an absence of clear evidence of employment of people whom the award applied and no obligation to keep time and wages records—Dismissed—The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers -v- Barrett Pty Ltd—CP 110 of 1997—Industrial Magistrate—- 19/12/97—Construction Trade Services..... 735

[1]Appeal against decision of Full Bench (77 WAIG 2195) re Breach of Award—IAC found that the question of whether the employee in question was an Assistant Supervisor with in the meaning of the expression in the Award was a mixed question of fact and how—IAC found the Industrial Magistrate and Full Bench fully appreciated the distinction between assistance expected of any employee and assistance that was in the discharge of the duties and responsibilities of the particular office of supervisor—IAC found it was open on the evidence to find that the employees major and substantial employment was that of an Assistant Supervisor—Dismissed—LIQUOR, HOSPITALITY & MISC -v- Kellerberrin Care of the Aged Committee Inc t/a Dryandra Frail Aged Hostel—IAC 7 of 1997—Industrial Appeal Court—- 03/03/98—Community Services..... 807

[2]Appeal against decision of Industrial Magistrate (77 WAIG 2363) re order for costs—Appellant argued Industrial Magistrate was functus officio when dealing with the application for costs, that the Appellant had made no formal application and that the witnesses had given evidence as part of their duties as employees and had suffered no loss—Full Bench reviewed IRAct 1979, Industrial Magistrates Court Regulations 1980, the Justices Act 1902 and found that the hearing of the application could not be completed until the question of costs had been determined—Full Bench reviewed authorities and found no established ground to interfere with the case—Dismissed—LIQUOR, HOSPITALITY & MISC -v- Metro Meat International Limited—APPL 1657 of 1997—Full Bench—SHARKEY P/COLEMAN CC/GREGOR C—19/02/98—Food, Beverage and Tobacco Mfg 813

[2]Appeal against decision of Industrial Magistrate (unreported) re failure to pay full annual leave entitlement on termination under an award—Appellant argued Industrial Magistrate was wrong to conclude that the employee was working on duty for the whole period of his shift;finding that the Lee Downs Nursing Home case could be distinguished and in calculating the sum due—Respondent argued that the employee did not reside at the premises and was on duty for the entire shift—Full Bench found that it cannot be said that a person whose place of abode is somewhere other than the workplace, who travels from his place of abode to the workplace each day, resides at the workplace during the period of the shift, even if s/he sleeps during all or part of it—Full Bench found that the employee lawfully terminated his employment, there was no cross appeal and the decision was based on the correct calculation—Dismissed—Aust Fed of TPI Ex-Serv Men -v- LIQUOR, HOSPITALITY & MISC—APPL 2360 of 1997—Full Bench—SHARKEY P/FIELDING C/SCOTT C.—25/03/98—Community Services 1119

[2]Application for enforcement of IR Act 1979 re failure to produce time and wages records and obstruction of Industrial Inspectors—Applicant argued that a direction by the Respondent to leave the premises constituted hindering or obstruction of the industrial inspectors— Respondent argued the employee concerned had not given correct notice and he had no time to give the inspectors records for 7 years—Full Bench found on evidence that respondent was lawfully required to produce the records which were on the premises and that the breaches were proven—Full Bench subsequently considered submissions on mitigation and that the respondent had not previously offended—Full Bench found that the breaches involved quite flagrant refusals to comply with requests of public officers and a penalty near the bottom of the scale would not mark the seriousness of the breach or reflect the necessary deterrent element—Ordered Accordingly—Ms G Harris -v- Mr EO De Campo—APPL 2336 of 1997—Full Bench —SHARKEY P/COLEMAN CC/PARKS C—23/02/98—Food, Beverage and Tobacco Mfg..... 1578

ENTRY: RIGHT OF

[2]Application for enforcement of IR Act 1979 re failure to produce time and wages records and obstruction of Industrial Inspectors—Applicant argued that a direction by the Respondent to leave the premises constituted hindering or obstruction of the industrial inspectors— Respondent argued the employee concerned had not given correct notice and he had no time to give the inspectors records for 7 years—Full Bench found on evidence that respondent was lawfully required to produce the records which were on the premises and that the breaches were proven—Full Bench subsequently considered submissions on mitigation and that the respondent had not previously offended—Full Bench found that the breaches involved quite flagrant refusals to comply with requests of public officers and a penalty near the bottom of the scale would not mark the seriousness of the breach or reflect the necessary deterrent element—Ordered Accordingly—Ms G Harris -v- Mr EO De Campo—APPL 2336 of 1997—Full Bench —SHARKEY P/COLEMAN CC/PARKS C—23/02/98—Food, Beverage and Tobacco Mfg 1578

HOURS OF WORK

Application for orders re variation of roster-Applicant union argued that changes to rosters proposed by respondent should be cost neutral on the basis of past practice and sought a proposed roster or minimum salary—Respondent argued practice was limited to the introduction of One Man Operations, alternative claim conflicted with the paid rates award and should be tested against the Wage Fixing Principles—Commission reviewed s26A of the IR Act 1979 re evidence and workplace agreements—Commission found it was concerned at the time only with the issue of cost neutrality not the equality in the number of jobs between award and non-award employees—Commission found on evidence it was possible to draw up a roster which maintained earnings and integrated with staff schedule, that that ought occur and adjourned for the parties to confer—In Supplementary Reasons Commission found that though circumstances had changed, the Applicant was entitled to an order reflecting the Reasons for Decision—Granted with liberty to apply reserved—CONSTRUCTION, MINING, ENERGY -v- Hamersley Iron Pty Limited—APPL 929 of 1997—BEECH C—18/11/97—Metal Ore Mining 736

Application for compensation on the grounds of unfair dismissal-Applicant argued that the Respondent expected and required its employees to work "overtime" without pay which he considered unreasonable-Applicant further argued that a failure by the Respondent to provide a written employment contract caused his dissatisfaction-Respondent argued that the Applicant had expressed unhappiness with his employment and had understood that to mean that the Applicant wished to leave work-Commission found that the Applicant was the architect of his own misfortune and that he had terminated his own services-Granted in part—Mr MT Ibrahim -v- Fine Style Design Studio Pty Ltd—APPL 1790 of 1997—PARKS C— Textile, Clothing, Footwear 1909

CUMULATIVE DIGEST—*continued*

Page

INDUSTRIAL ACTION

[1]Appeal against decision of Full Bench (76 WAIG 4875) re application for enforcement of orders of the Commission -Appellant argued that Full Bench erred on refusing to: admit evidence, grant an adjournment, allow amendment of particulars, which put the Appellant in a position of being unable to adduce relevant evidence and in the subsequent dismissal of the applications-IAC found that the Full Bench refusal to amend the particulars brought about an injustice to the Appellant and prevented the Appellant from having its case fairly tried-IAC found that the Full Bench failed to give weight to the absence of any prejudice to the Respondent in the event of the proposed amendments being allowed and that in the circumstances the Respondents would have had ample time in which to answer the new allegations which related to the actions of their own officials- IAC found the observance of orders of the Commission was a matter in which the community as a whole had an interest, that the discretion of the Full Bench miscarried and disclosed an error at law which led to the dismissal of the applications—Upheld and Remitted—REGISTRAR -v- AUTO, FOOD, METAL, ENGIN UNION—IAC 20 & 21 of 1996—Industrial Appeal Court—- 14/11/97—Other Services 289

[3]Conference referred re claim for wage increase under enterprise bargaining—Applicant Union argued application covered low paid workers who had only Arbitrated Safety Net adjustments, met the Wage fixing Principles, prompted further bargaining and structural efficiency and that the special case was the only avenue—Respondent argued negotiations should continue , there was no substance in the argument that the respondent had not bargained in good faith and that there re should be no arbitrated wage increase as interalia it did not meet the special case criteria and was not in the public interest—CCI and Hon Minister for Labour Relations argued Commission must be satisfied no further negotiation was possible, safety net adjustments should be absorbed, efficiencies must be established and attention must be made to flow-on—TLC argued Wage Fixing Principles should not frustrate the IR Act 1979, an order would not result in an award variation and there was no formula under the principles to split rewards from productivity increases between employer, employee and the government—CICS reviewed history of negotiations and found that past productivity increase were t be taken into account, that the result of arbitration was not static, that the 2 groups of employees should be treated separately, reeved productivity measures, that the safety net adjustment did not have to be affirmed or the MRA completed—CICS found in favour of Applicant and granted a retrospective date of operation—Granted-—LIQUOR, HOSPITALITY & MISC -v- Education Department of Western Australia—CR 168 of 1996—Commission in Court Session— COLEMAN CC/GREGOR C/BEECH C—02/04/98—Government Administration 1589

INDUSTRY

[2]Appeal against decision of Industrial Magistrate (unreported) re breach of award—Appellant argued the IM erred in finding that the employee was working "on-site" in the "construction industry" in the context of the award— Full Bench found that there was an arguable case, some explicable delay in filing and serving the notice of appeal and that the justice of the application did not require the denial of an opportunity to pursue the appeal—Full Bench further reviewed authorities and found that no grounds of appeal were made out—Dismissed and procedural orders issued—G Parri & M Parri T/A G & M Parri -v- The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers—APPL 135 of 1998—Full Bench—SHARKEY P/PARKS C/KENNER C—22/05/98—General Construction 2344

INTERPRETATION-WORDS & PHRASES

Application for an interpretation of Agreement—Applicant claimed the question of provisions should be answered in the negative—Respondent argued that the interpretation should be answered in the affirmative—Commission reviewed subclause 2 Allowances of Schedule 2 of the Agreement and found the interpretation should be answered in the affirmative—Declared Accordingly—AUTO, FOOD, METAL, ENGIN UNION -v- Leighton Contractors Pty Ltd—APPL 1133 of 1997—GEORGE C—22/12/97—Metal Ore Mining 506

[1]Appeal against decision of Full Bench (77 WAIG 2195) re Breach of Award—IAC found that the question of whether the employee in question was an Assistant Supervisor with in the meaning of the expression in the Award was a mixed question of fact and how—IAC found the Industrial Magistrate and Full Bench fully appreciated the distinction between assistance expected of any employee and assistance that was in the discharge of the duties and responsibilities of the particular office of supervisor—IAC found it was open on the evidence to find that the employees major and substantial employment was that of an Assistant Supervisor—Dismissed—LIQUOR, HOSPITALITY & MISC -v- Kellerberrin Care of the Aged Committee Inc t/a Dryandra Frail Aged Hostel—IAC 7 of 1997—Industrial Appeal Court—- 03/03/98—Community Services 807

[2]Appeal against decision of Commission (77 WAIG 3497) re contractual entitlements—Appellant argued the contract of employment denied the Respondent an entitlement to a full 40% Commission, that the contract expressly provided for a 20% commission in the circumstances and the term the Commission implied in to the contract was contrary to the principles laid down in authorities—Respondent argued there had been no referral of the sale in terms of the contract of service and that the Appellant sought to exclude the Respondent from the sale to reduce commission payable—Full Bench found question was what entitled the sales person to earn a Commission as distinct from a referral fee—Full Bench found that it was open to the Commission to find that the Respondent was the effective cause of the sale and had been denied a contractual entitlement—Dismissed—Royal International (WA) -v- Mr WTJ Valli—APPL 2206 of 1997—Full Bench—SHARKEY P/CAWLEY C./PARKS C—18/03/98—Property Services 1110

[2]Appeal against decision of Commission (78 WAIG 506) re interpretation of distant work provisions in an award and an industrial agreement—Appellant argued Commission failed to adequately consider submissions on allowance, the difference between allowances and wages, the concept of time spent travelling be paid as wages and employees should be paid ordinary hourly rates when travelling—- Full Bench reviewed authorities and found that the payments were clearly allowances as defined, absorbed into the hourly payments; not payable under the award and that the Commission had not erred in its interpretation of the agreement—Dismissed—AUTO, FOOD, METAL, ENGIN UNION -v- Leighton Contractors Pty Ltd—APPL 55 of 1998—Full Bench —SHARKEY P/COLEMAN CC/BEECH C—23/04/98—Metal Ore Mining 1571

Application for interpretation of award re Introduction of Change and Redundancy, Employer's Duty to Notify, Employer's Duty to Discuss Change, Definte decision that the employer no longer wishes the the employee has been doing done by anyone and ordinary and customary turnover of labour—Applicant argued there was ambiguity in the provisions—Applicant argued, interalia, the interpretaton of the Grant Electrical case had resulted in the use of the concept of ordinary and customary turnover of labour to avoid obligations which would otherwise exist if that phrase was interpreted in a manner consistent with the historical development of the termination change and redundancy provisions in awards and the approach adopted in the Amscol and Countdown Stores cases—Respondent argued the proper approach to the interpretation of awards was that set out in the decision of the Full Bench at (70WAIG1287)—Respondent further argued the applicant's submissions went beyond the scope of the application and there was no specific question posed—Commission found that the applicat was inviting the Comission to review the Grant Electrical case and and it was not open for the Commissio as constituted to embark on such a course on an application under s46, answered each question invidually and gave reasons therefore—Reasons Issued—Metals and Engineering Workers' Union—Western Australian Branch -v- Cockburn Engineering W.A.—APPL 1071 of 1993—GEORGE C—21/04/98—Machinery & Equipment Mfg 1876

CUMULATIVE DIGEST—*continued*

Page

INTERPRETATION-WORDS & PHRASES—*continued*

[2]Appeal against decision of Commission (77 WAIG 1530) re denied contractual entitlements—Applications to extend time to file and serve Notice of Appeal and Appeal Books— Appellant argued that the it was not open to the Respondent to refuse the changes in work and claim unfair dismissal, the Commission erred in finding the change in the proportion of duties done by the Respondent constituted a significant change, and that the Respondent was entitled to a redundancy payment under the written contract of employment—Full Bench found that the delay in filing the appeal was minimal and the injustice if the applications to extend time were not granted were obvious—Full Bench found there was a constructive dismissal by way of the employee refusing to accept a change in employment by way of a unilateral demotion—Majority of Full Bench found that the Redundancy Payments clause on the contract meant that payments were due where a person was dismissed when the company was subject to interalia rearrangement and reconstruction as those words were understood and defined under the Corporations Law and it was not open to find that the Respondent was denied a contractual benefit to which he was entitled—Applications granted and Appeal upheld— Robowash Pty Ltd -v- Mr M Hart—APPL 1049 of 1997—Full Bench—SHARKEY P/BEECH C/PARKS C—12/11/97—Property Services 2323

[2]Appeal against decision of Industrial Magistrate (unreported) re breach of award—Appellant argued the IM erred in finding that the employee was working "on-site" in the "construction industry" in the context of the award— Full Bench found that there was an arguable case, some explicable delay in filing and serving the notice of appeal and that the justice of the application did not require the denial of an opportunity to pursue the appeal—Full Bench further reviewed authorities and found that no grounds of appeal were made out—Dismissed and procedural orders issued—G Parri & M Parri T/A G & M Parri -v- The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers—APPL 135 of 1998—Full Bench—SHARKEY P/PARKS C/KENNER C—22/05/98—General Construction 2344

Application to vary award re Salary Packaging—Preliminary matter re jurisdiction—Applicant Union argued clause sought was no different to the award provisions which were not totally prescriptive but provided a framework within which employers and employees could conduct their affairs— Respondent argued parts of variations sought: did not raise an industrial matter; would be void because they were contrary to the State and Federal Superannuation Legislation and Workplace Agreement Act; and infringed section 114 of the I.R. Act 1979—Respondent further argued clause sought were matters for enterprise bargaining —PSA found fundamental question was whether salary packaging was an "industrial matter" and did not accept that the whole clause should be set aside because of matters that could be rectified individually—Adjourned— Hospital Salaried Officers Association of Western Australia (Union of Workers) -v- Royal Perth Hospital & Others—P 62 of 1994—Public Service Arbitrator—GREGOR C/GEORGE C/BEECH C—24/09/96—Health Services 2346

[4]Application for orders re breach of union rules concerning referendum and expenditure on legal costs—Applicant argued that a referendum was not conducted in accordance with the procedures in mandatory rules—President found that for each complaint there was not a breach or it was not said to hinder or affect the full and free recording of results or been likely to effect a different result— President found some accounts in excess of the stipulated limit and directed that they be put to the general committee of the organisation to decide upon in accordance with the rules—Granted in part—Mr AP Shaw -v- The West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers—APPL 333 of 1998—President—SHARKEY P—12/05/98—Other Services 2360

JURISDICTION

[1]Appeal against decision of Full Bench (76 WAIG 4875) re application for enforcement of orders of the Commission -Appellant argued that Full Bench erred on refusing to: admit evidence, grant an adjournment, allow amendment of particulars, which put the Appellant in a position of being unable to adduce relevant evidence and in the subsequent dismissal of the applications-IAC found that the Full Bench refusal to amend the particulars brought about an injustice to the Appellant and prevented the Appellant from having its case fairly tried-IAC found that the Full Bench failed to give weight to the absence of any prejudice to the Respondent in the event of the proposed amendments being allowed and that in the circumstances the Respondents would have had ample time in which to answer the new allegations which related to the actions of their own officials- IAC found the observance of orders of the Commission was a matter in which the community as a whole had an interest, that the discretion of the Full Bench miscarried and disclosed an error at law which led to the dismissal of the applications—Upheld and Remitted—REGISTRAR -v- AUTO, FOOD, METAL, ENGIN UNION—IAC 20 & 21 of 1996—Industrial Appeal Court—- 14/11/97—Other Services 289

Application for allegedly denied contractual entitlements—Applicant claimed that within the relevant period the employer-employee relationship changed and there was an unpaid benefit as a result of subsequent work—Respondent argued that there was a principal-contractor employment relationship and a contract for services not an employer/employee relationship—Commission found that as there was a contract for services and not that of an employee-employer relationship. It could not deal with the matter—Dismissed for want of jurisdiction—Mr AS Furey -v- Mr G Moran—APPL 1124 of 1997—CAWLEY C.—12/12/97—Construction Trade Services 520

Application for compensation on the grounds of unfair dismissal—Applicant claimed that dismissal was unfair as no notice or warnings were given and denied the accusation of stealing—Respondent argued that as the Applicant resigned there was no dismissal and Commission was without jurisdiction to hear matter—Commission found that the Applicant's attitude contributed towards the deterioration of the employment relationship and there was insufficient reason to award Respondent costs—dismissed—Mr CI Gasson -v- Locos Spanish Tapas Bar Restaurant—APPL 665 of 1997—BEECH C—16/12/97—Accommodatn, Cafes&Restaurants 521

Application for compensation on the grounds of unfair dismissal—Applicant claimed that dismissal was unfair as a 12 month contract had been agreed and dismissal occurred without warning or reason—Respondent argued that attempts had been made to contact Applicant, that no dismissal had occurred and current employment was offered—Commission found on evidence that as there was no dismissal, Commission lacked jurisdiction to hear matter—Dismissed—Ms O Kidd -v- United Bakeries Pty Ltd—APPL 1147 of 1997—GREGOR C—29/12/97—Food, Beverage and Tobacco Mfg 529

Application for compensation on the grounds of unfair dismissal- Applicant claimed that dismissal was unfair as termination resulted from failure to accept a lesser salary—Respondent argued that as the Applicant resigned there was no jurisdiction—Commission found that as the Applicant was dismissed through no fault and without notice it was unfair and compensation be allowed—Granted—Mr N Ludkins -v- Biologic International Limited—APPL 547 of 1997—PARKS C—03/12/97—Food, Beverage and Tobacco Mfg 530

Addendum for costs against the Applicant—Applicant claimed the original application was not of frivolous or vexatious nature and claim should not be granted—Respondent argued that as costs were incurred for preparation, court time and travel, these be compensated—Commission found that although there was a need for the witness , no evidence produced to support the claim for costs—Dismissed—Western Australian Police Union of Workers -v- Hon Minister for Police—CR 148 of 1997—GEORGE C—12/12/97—Government Administration 545

Appeal against classification—Applicant claimed that withdrawal of advice regarding reclassification's was unjust and sought order to reclassify positions—Respondent argued that PSA lacked jurisdiction to hear the matter as it was a standard under the PSM Act and that the advice given was unauthorised and not official—Commission found it lacked the jurisdiction to deal with the application—dismissed—The Civil Service Association of Western Australia Incorporated -v- Director General, Ministry of Justice—P 25 of 1997—Public Service Arbitrator—GREGOR C—24/12/97—Government Administration 548

Application for reinstatement or compensation on the grounds of unfair dismissal—Applicant argued that the respondent had accused him of stealing and forced him to resign—Respondent argued that the Applicant resigned during a meeting concerned with suspicions of stealing—Commission found on evidence that the Applicant decided to resign and the resignation was not a dismissal for the purposes of the Commission's jurisdiction—Dismissed for want of jurisdiction—Mr MJ Dyer -v- Solahart Industries Pty Ltd—APPL 1524 of 1997—BEECH C—19/01/98—Metal Product Manufacturing 745

CUMULATIVE DIGEST—*continued*

Page

JURISDICTION—*continued*

Application for compensation on the grounds of unfair dismissal—No appearance on behalf of Applicant—Respondent argued that matter should be dismissed for want of jurisdiction—Commission found Federal Award covered the field insofar as unfair dismissals were concerned, there was an inconsistency between State and Federal laws and the matter was beyond the Commission jurisdiction—Dismissed—Mr J Irimia -v- Swan Transit Services (South) Pty Ltd—APPL 1799 of 1997—FIELDING C—15/01/98—Road Transport 747

Application for allegedly denied contractual entitlements—Applicant claimed that an amount was deducted from the final remuneration payment without authority and unlawfully and dispute resolution clause in Work Place Agreement allowed Commission to deal with claim—Respondent argued that it was entitled to recoup payments made to training courses and the Commission lacked jurisdiction to deal with a registered Workplace Agreement—Commission found there was no jurisdiction to enquire and deal with the registered Workplace Agreement—Commission found there was no jurisdiction to enquire and deal with the registered Workplace Agreement—Dismissed for want of jurisdiction—Mr MD Morgan -v- Keyros Pty Ltd T/as Port Hedland Security—APPL 731,1835 of 1997—CAWLEY C.—24/12/97—Other Services..... 753

[1]Appeal against part decision of Commission (77 WAIG 2374 & 2778) re allegedly denied contractual entitlements—Appellant argued Commission erred in finding there was no jurisdiction to deal with the claim for superannuation payments, that there was no inconsistency between s29(1) (b)(ii) of the IRAct 1979 and the Superannuation Guarantee (Administration) Act 1992—Respondent argued that notwithstanding that it conceded that it had an arrangement to pay for the superannuation contribution, it was not a contractual entitlement, it was a statutory obligation—Full Bench reviewed authorities, Acts, s109 of the Constitution and found the amount claimed was not a contractual benefit and the SGAA and SGAC covered the field to render s29 inoperative—Dismissed—Ms EA Keane -v- Lomba Pty Ltd T/A Ian George & Co—APPL 1770 of 1997—Full Bench—SHARKEY P/COLEMAN CC/CAWLEY C.—17/02/98—Property Services..... 810

[4]Application for stay of order pending appeal to Full Bench—Parties did not object to President sitting after President raised question of possible perceptions of bias—Applicant argued there was a serious issue to be tried because of lack of jurisdiction in the Commission at first instance and that it may not be able to recover monies should the appeal be accepted—President was not persuaded that there was a serious issue to be tried, it was seven months since the application was filed and the balance of convenience lay with the Respondent—Dismissed—J & R Sacca Poultry -v- Mr C Pearson—APPL 232 of 1998—President—SHARKEY P—05/03/98—Agriculture..... 819

Conference referred re unfair dismissal claim and claim for order that dismissed employee not be banned from Respondent's premises—Applicant Union argued worker was not given sufficient information of the material which the Respondent had, in sufficient time to respond and the decision was hasty—Applicant argued the ban was a continuation of the penalty of loss of employment and would affect the workers livelihood—Respondent argued order sought was too widely framed, there could be good reasons to refuse entry, there was no utility in the order and no power under S23A of the IRAct 1979—Commission found on evidence the possibility of a ground to justify the summary dismissal by virture of the discovery of material on the worker's property and against the unfair dismissal claim—Commission found no link between the worker's offences and his employment and that it did not seem fair that the worker lose his then present employment because of the ban, and the parties agreed the Respondent should reserve the right to refuse entry for the same reasons as any other employee—Granted in part—The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- WMC Resources Ltd—CR 405 of 1996—BEECH C—10/02/98—Metal Ore Mining..... 1065

Conference referred—Applicant union sought to withdraw application, argued that the RCB had power to discontinue proceedings and that an application for discovery of documents be discontinued as a consequence of the finalisation of the substantive matter—Respondent argued a question of jurisdiction had been raised in relation to the application for discovery and that the RCB must deal with that before exercising power to resolve the dispute—RCB found it was not appropriate for the matter to proceed and, after reviewing s27 of the IRAct 1979, the appropriate course was to dismiss the matters—Dismissed for want of prosecution—West Australian Railways Officers' Union -v- Western Australian Government Railways Commission—RCBC 1 of 1997—Railways Classification Board—SCOTT C.—19/02/98—Rail Transport..... 1072

[1]Cross appeals against decision of Full Bench (76 WAIG 4434) re unfair dismissal—Appellant argued matter to do with the employees general suitability were not relevant to the question of impracticality of reinstatement in the particular circumstances of the case—Appellant employer argued that no order for compensation should have been made as the very generous overpayment of salary adequately compensated for any loss or injury caused by the dismissal and that the order was beyond power—IAC found that proof that a position has been abolished is at least prima facie proof that reinstatement or re-employment is impractical and that it would be for the employee to displace that conclusion—IAC further found that the amount ordered did not exceed 6 months and could not be made to do so by notionally adding it to the amount of the termination pay made voluntarily by the employer and that payment did not preclude the Commission exercising its discretion to make an award of compensation for loss or injury in a case where the dismissal was unfair—Dismissed—FDR Pty Ltd -v- Mr J Gilmore—IAC 22 of 1996—Industrial Appeal Court—- 25/03/98—Personal & Household Good Rtlg..... 1099

[2]Appeal against decision of Commission (77 WAIG 2989) re unfair dismissal claim and denied contractual entitlements—Appellant argued Commission erred in finding the employee was not constructively dismissed that it had no jurisdiction, failed to admit certain documents and sought to adduce new evidence—Appellant argued withdrawal of authority to sign cheques inhibited her employment and the conduct forced her to leave—Full Bench was not persuaded apart from financial statements that the other evidence was relevant—Full Bench found resignation followed deterioration of the relationship between the Appellant and a principal of the respondent and a breach of duty of the part of the Appellant—Full Bench further found that the withdrawal of authority to sign cheques was a proper protective measure by the Respondent, there was no dismissal and no jurisdiction to make orders—Dismissed—Ms WA Farrell -v- Harlem Enterprises Pty Ltd T/A Ace Rent A Car—APPL 1883 of 1997—Full Bench—SHARKEY P/BEECH C/SCOTT C.—11/03/98—Other Transport 1103

[2]Application to alter Organisation rules re eligibility for membership to include union employees—Applicant Union argued s55 (2)(b) of the IR ACt 1979 was substantially complied with—Applicant Union further argued only 6 employees did not have a teaching qualification and it was not a distinguishing factor, there was a community of interest in the members and other organisations had similar provisions—Objector argued there would be a conflict of interest, there was an inequity in pay scales between employees and the members and employees would have an advantage at election times—Full Bench found that there was a mandatory requirement to publish a notice of the alteration sought not met and refrained from hearing the matter giving liberty to apply—Full Bench subsequently found that the procedural requirements of the IRAct had been met and there was no overlapping of membership—Majority of Full Bench found that the members felt confident that members felt confident that their interests would not be undermined, that the objections were more academic than real or held little merit—Granted and ordered accordingly—The State School Teachers Union of W.A. (Incorporated) -v- (Not applicable)—APPL 680 of 1997—Full Bench—SHARKEY P/FIELDING C/PARKS C—21/10/97—Other Services 1123

[4]Application for orders re alleged breach of organisation rules—Applicants argued that facsimiles sent out by the Respondents constituted unauthorised use of resources for the production and distribution of election material and failure of the Union President to ensure the rules were observed—Respondent argued Applicants' agent should not appear as he was not a registered agent and sought direction—President reviewed s112 of the IRAct 1979 and found that carrying on a business was not restricted to a commercial enterprise, but a person or body engaged in the activity of an industrial agent and dismissed oral application—President gave leave for counsel to appear for the Respondents and gave reasons therefore—President reviewed rules and found on evidence that the documents were not electoral material, the Union President could notify election results as CEO and no established breach of rules—Dismissed—Mr TW Ward -v- The State School Teachers Union of W.A. (Incorporated)—APPL 2239,2241 of 1997—President—SHARKEY P—03/02/98—Other Services..... 1136

CUMULATIVE DIGEST—*continued*

Page

JURISDICTION—*continued*

Application for reinstatement or compensation on the grounds of unfair dismissal—Respondent argued the Applicant was still employed on the date the application was lodged and Regulation 89 re Service was breached—Commission gave opportunity for Applicant to present submissions and when none were received found that the application should clearly be struck out for want of jurisdiction further agent was unable to excuse the deliberate failure to comply with the regulations on the basis of acting on the clients wishes—Struck out for want of Jurisdiction—Ms VM Adams -v- Tiwest Pty Ltd—APPL 1908 of 1997—BEECH C—25/03/98—Wood and Paper Product Mfg..... 1391

Application for reinstatement on the grounds of unfair dismissal and allegedley denied contractual entitlements re 3 months notice and trafer of superannuation benefits—Applicant argued that the contract of employment was not a fixed term because it contained provision for termination during the probationary period and that there was therfore a dismissal—Respondent argued that the applicant was not dismissed and that employment simply ceased through the effluxion of time of an agreed probationary period—Commission found the matter of jurisdiction turned on whether there was a dismissal and the emplyment ended when the term of the contract expired—Dismissed for want of jursidiction—Mr VJ Benjamin -v- Gold Corporation—APPL 2227 of 1997—CAWLEY C.—05/03/98—Metal Ore Mining 1392

Application for allegedly denied contractual entitlements—Applicant claimed balance of wages, annual leave, superannuation and vehicle reimbursements were due—Respondent argued that no employee-employer contract of service existed and if it did there were no entitlements due—Commission found that the Applicant was an employee and the Applicant breached the contract by failing to give due notice of termination which gave right to the Respondent to withhold equivalent wages—Mr CI Firns -v- Braeside Enterprises Pty Ltd T/A Mt Gibson Emu Farm—APPL 1112 of 1997—CAWLEY C.—09/03/98—Agriculture 1404

Application for compensation on the grounds of unfair dismissal—Applicant argued that dismissal was unfair because he was informed he was permanent and the position was later offered to someone else—Respondent argued the Applicant was informed and award the position was to be advertised each season and contract of service to come to an end. Respondent further argued that the Application was out of time—Commission found that the application was filed outside the time limit of 28 days for the right of access to the Commission—Dismissed for want of jurisdiction—Mr G Johnson -v- Malembo Pty Ltd T/A Aquilla Carting Company—APPL 1745,1882,2137,2149 of 1997—CAWLEY C.—26/02/98—Commercial Fishing . 1414

Application for reinstatement or compensation on the grounds of unfair dismissal and allegedly denied contractual entitlements—Applicant sought to amend named respondents in application—Respondent argued that the Respondent had not been the employer and that what the applicant sought was to redirect the application and thereby commence the action against entirely different parties—Commission found that it was not open to it to strike out the cited respondent and cite in its place a different legal persona—Dismissed—Mr H Posch -v- De Campo Bakery Holdings Pty Ltd—APPL 1789 of 1997—PARKS C—26/02/98—Food, Beverage and Tobacco Mfg..... 1423

Interlocutory application to set aside summons to witness to person residing overseas—Witness argued Commission had no power to issue summons out of jurisdiction and the summons was a nullity—Commission found it did not have jurisdiction beyond the Western Australian border and the summons had no force or effect—Reasons only—Mr V Tranchita -v- Wavemaster International Pty Ltd—APPL 1117 of 1997—FIELDING C—12/03/98—Machinery & Equipment Mfg 1436

[2]Appeals against decision of Industrial Magistrates re enforcement of IR Act 1979 remitted from Industrial Appeal Court (77WAIG1073)re costs at first instance-Appellant argued the amount might be set by reference to the Cost Scales 1991 under the Official Prosecutions (Defendants Costs) Act 1993 and the information used for assessment was vague and insufficient—Respondent argued the Industrial Magistrates' jurisdiction was not a summary jurisdiction, nor was it a matter of Defendant's costs—Full Bench reviewed authorities and found it was impractical and undesirable to give precise reasons for fixing costs and inappropriate to fix a Bill of Costs—Full Bench found the amounts fixed were just and reasonable and there was no apparent misuse of the discretion to warrant interference— Full Bench further found Appeals were not frivolous or vexatious or warranted an order for costs on appeal— Dismissed—Mr J Cain -v- Mr AG Shuttleton—DOPLR—APPL 1246,1247 of 1995—Full Bench—SHARKEY P/GREGOR C/BEECH C —09/04/98—General Construction..... 1575

[2]Application for order pursuant to s72A re exclusive union coverage of one employer—Applicant Union argued the Commission had the power to make certain orders and sought orders for secret ballots—AWU, Employer and AMMA argued interalia the application ignored the separate membership requirements of each of the employee organisations concerned the employee preference should be weighed up and there was already evidence of union numbers—Majority of Full Bench found it had not express powers to issue orders sought and it would go beyond the Commission merely informing itself—Majority Full Bench further found little relevance in balloting non-members and was not persuade the equity good conscious and substantial merit lay with the applicant—Applicant sought to withdraw application and Employer sought costs—Full bench reviewed IR Act 1979 and found the employer was not a party to t he application, there was no prescription enabling an award of costs to a person given leave to be heard under s72A and the rule generalia specialibus derogant did not apply—Full bench further found under the circumstances the employer could not criticise the applicant for a delay in reaching a decision to discontinue notify it and neither the employers or the Applicants claims were an extreme case even if they were competent—Dismissed—CONSTRUCTION, MINING, ENERGY -v- (Not applicable)—APPL 1401 of 1997—Full Bench— SHARKEY P/GREGOR C/BEECH C—24/10/97—Other Mining 1581

Application for allegedly denied contractual entitlements -Further reasons for decision re redundancy payment upon Applicant's resignation-Applicant argued that he resigned in the belief that the 'Redeployment, Retraining and Redundancy General Order' applied to his situation -Respondent argued it valued Applicant's services and wished to retain him-Commission found that the Applicant had no formal written employment contract and any offer of severance pay to previous employees working under the relevant Award had been initiated by the Respondent -Commission further found that it was not in the public interest to require the Respondent to present its case in light of its findings-Dismissed—Mr P Fielding -v- Western Power Corporation—APPL 105 of 1997—BEECH C— Electricity and Gas Supply 1906

[2]Appeal against decision of Industrial Magistrate (unreported) re striking out of complaint and application for costs—Appellants argued the Industrial Magistrate deprived them access to their rightful application for costs by striking out the complaint prior to hearing,and incorrectly interpreted the term 'frivolous and/or vexatious'—Appellant further argued IM had a conflict of interest and should not have heard the matter when remitted back to him—Respondent argued that the complaints were struck out by consent and the Appellants were bound by their case—Full Bench found that striking out was not a determination of the complaints on merit and as there was no decision finally determining the matter the appeal was incompetent—Full Bench also found that the IM was not required to disqualify himself for ostensible bias and would have erred in law had he so done—Dismissed—Ian Barrett & Tracey Barrett -v- The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers —APPL 2106 of 1997—Full Bench—SHARKEY P/COLEMAN CC/PARKS C—22/05/98—General Construction 2340

Application to vary award re Salary Packaging—Preliminary matter re jurisdiction—Applicant Union argued clause sought was no different to the award provisions which were not totally prescriptive but provided a framework within which employers and employees could conduct their affairs— Respondent argued parts of variations sought: did not raise an industrial matter; would be void because they were contrary to the State and Federal Superannuation Legislation and Workplace Agreement Act; and infringed section 114 of the I.R. Act 1979—Respondent further argued clause sought were matters for enterprise bargaining —PSA found fundamental question was whether salary packaging was an "industrial matter" and did not accept that the whole clause should be set aside because of matters that could be rectified individually—Adjourned— Hospital Salaried Officers Association of Western Australia (Union of Workers) -v- Royal Perth Hospital & Others—P 62 of 1994—Public Service Arbitrator—GREGOR C/GEORGE C/BEECH C—24/09/96—Health Services..... 2346

CUMULATIVE DIGEST—*continued*

Page

JURISDICTION—*continued*

[4]Application to disallow Organisation Rule re political donations on the grounds that the rule was inconsistent with the IRACt 1979—Applicant argued that s97P and Part VIC served a legitimate end compatible with the notion of representative government and democratic process, and it was not probable that the implied right of equality operated at State level—Applicant argued organisations should be accountable to their members who should have a say in the use to which their political donations and levies were put—Applicant argued Organisations were the only organisations representing employees and their political expenditure should be regulated—Respondent Organisation argued that the statutory provisions were contrary or inconsistent with rights guaranteed by the Australian Constitution and to that extent were invalid or inoperative—Respondent argued the Act discriminated against Trade Unions by creating oppressive administrative barriers for the expenditure of monies on political matters —President reviewed the Respondent's rules, authorities , the implied rights of "equality" and "freedom of communication" under the Australian Constitution' and applied the test in Lange v Australian Broadcasting Commission (1997) (145 ALR 96)—President found that the rule enabled what was forbidden by s97P(4): the crediting of monies from members subscriptions to a political fund— President found that the provisions burdened the freedom to communicate, did more than regulate political donations and that ss97O and 97P(4), interalia, were invalid—President found it was not established that the rule was contrary or inconsistent with any Act, law, award, interalia, that was contrary to s66(2)(a)(iii) and that there was no jurisdiction or power to disallow it—Dismissed— REGISTRAR -v- COMM, ELECTRIC, ELECT, ENERGY—APPL 2194 of 1997—President—SHARKEY P—29/05/98—Other Services 2366

Application for compensation on the grounds of unfair dismissal—Applicant argued he only took up the security guard position after the respondent dismissed him from—Mr AR Dobbin -v- Chubb Security Australia Pty Ltd—APPL 2113 of 1997—CAWLEY C.—23/04/98—Business Services 2455

MANAGERIAL PREROGATIVE

Application for compensation on the grounds of unfair dismissal-Applicant argued that the Respondent expected and required its employees to work "overtime" without pay which he considered unreasonable-Applicant further argued that a failure by the Respondent to provide a written employment contract caused his dissatisfaction-Respondent argued that the Applicant had expressed unhappiness with his employment and had understood that to mean that the Applicant wished to leave work-Commission found that the Applicant was the architect of his own misfortune and that he had terminated his own services-Granted in part—Mr MT Ibrahim -v- Fine Style Design Studio Pty Ltd—APPL 1790 of 1997—PARKS C— Textile, Clothing, Footwear 1909

Application for compensation on the grounds of unfair dismissal-Applicant argued that the downsizing of the Respondent business was an excuse to terminate the Applicant's employment as other employees were brought in to complete work the Applicant had started-Respondent argued that the Applicant's competence to complete the work was in dispute-Commission found that at least part of the Respondent's reasons for selecting the Applicant for termination were associated with his views of the Applicant on a personal level-Granted—Mr DJ Maher -v- Francis Robert Ridgwell T/A The Cork Expert—APPL 1846 of 1997— SCOTT C.—Personal & Household Good Rtlg 1911

Application for reinstatement or compensation on the grounds of unfair dismissal-Applicant argued he was never advised that his employment would terminate once his employer began full-time work in the business-Applicant further argued that the Respondent could have organised his business in a way that could have maintained the Applicant as an employee-Respondent argued that his business was experiencing financial difficulties and he had acted in the best interests of the business-Commission found that the Applicant had not discharged the onus placed upon him to demonstrate that there should have been a different way of staffing the business which would have included retaining him-Dismissed—Mr JH Tannahill -v-Gwydion Nominees T/A Greenwood Video—APPL 2263 of 1997—SCOTT C.—Personal Services 916

Application for compensation on the grounds of unfair dismissal-Applicant argued that she had been constructively dismissed by requesting a reference for a job application which was assumed by the Respondent to be an indication of the Applicant seeking to leave her present employment -Respondent argued that they had been aware of the need for sustainable grounds for termination-Commission found that there was nothing in the evidence which would suggest that the Respondent tried to contrive a dismissal from the Applicant-Commission further found the application incompetent because it was out of time-Dismissed—Ms JSE Yeap -v- Chunagon Co Ltd T/A Chunagon Japanese Restaurant— APPL 808 of 1997—GREGOR C—Accommodatn, Cafes&Restaurants..... 1917

Conference referred re transfer of employee—Claimant Union argued the transfer of the employee was unfair harsh, unwarranted and sought reinstatement to his former position with extended tenure—Claimant Union argued that the transfer interrupted the employees career path and was not supportable on the grounds specified by the Respondent— Respondent argued it needed to solve management problems and that the transfer was not for disciplinary reasons— Commission found that although the matter could have been better managed there were insufficient grounds to intervene in the Respondent's legal right to deploy its staff in accordance with its needs—Dismissed—Western Australian Police Union of Workers -v- Hon Minister for Police—CR 53 of 1997—GEORGE C—02/02/98—Government Administration..... 2488

MISCONDUCT

Application for compensation on the grounds of unfair dismissal—Applicant argued that allegations given against him were untrue and the respondent had confused the duties to be performed—Respondent argued that the Applicant was on probation and dismissed because of the inability to work to the required standards and other duties were voluntary—Commission found that the allegations were false and that endorsements on employment separation certificate were wrong and designed to paint the worst possible picture of the Applicant—Granted—Mr CJ Dehaan -v- Little Angels Day Care Centre—APPL 1494 of 1997—GREGOR C—08/01/98—Community Services 740

Application for reinstatement or compensation on the grounds of unfair dismissal—Applicant argued that the respondent had accused him of stealing and forced him to resign—Respondent argued that the Applicant resigned during a meeting concerned with suspicions of stealing—Commission found on evidence that the Applicant decided to resign and the resignation was not a dismissal for the purposes of the Commission's jurisdiction—Dismissed for want of jurisdiction—Mr MJ Dyer -v- Solahart Industries Pty Ltd—APPL 1524 of 1997—BEECH C—19/01/98—Metal Product Manufacturing..... 745

Application for compensation on the grounds of unfair dismissal and allegedly denied contractual entitlements—Applicant claimed dismissal was unfair and sought compensation, holiday pay and loading, superannuation payments and payment in lieu of notice—Respondent argued that no contractual benefits due as the Applicant was summarily dismissed for gross misconduct—Commission found that respondent had cause to summarily dismiss the Applicant and no contractual entitlements due—Dismissed—Mr A Kittel -v- Alan J Marshall Pty Ltd—APPL 1092 of 1997—CAWLEY C.—16/01/98—Property Services..... 749

Application for Compensation on the grounds of unfair dismissal—Respondent argued dismissal was due to unauthorised absence and if compensation was awarded it should be limited—Commission found Respondent had incorrectly applied policy relating to time recording and deducted pay from the Applicant—Commission found absence was directly caused by that deduction and to dismiss the applicant in those circumstances was harsh—Commission found reinstatement was impracticable, reviewed authorities and found that in assessing compensation the Commission's discretion did not equal the loss of earnings to the date of hearing plus an assessment of future loss and the Commission would take other factors into account—Granted—Mr PA Simons -v- Ismail Holdings Pty Ltd T/A Envelope Specialists—APPL 1363 of 1997—BEECH C—12/11/97—Wood and Paper Product Mfg 1058

CUMULATIVE DIGEST—*continued*

Page

MISCONDUCT—*continued*

Conference referred re unfair dismissal claim and claim for order that dismissed employee not be banned from Respondent's premises—Applicant Union argued worker was not given sufficient information of the material which the Respondent had, in sufficient time to respond and the decision was hasty—Applicant argued the ban was a continuation of the penalty of loss of employment and would affect the workers livelihood—Respondent argued order sought was too widely framed, there could be good reasons to refuse entry, there was no utility in the order and no power under S23A of the IRAct 1979—Commission found on evidence the possibility of a ground to justify the summary dismissal by virture of the discovery of material on the worker's property and against the unfair dismissal claim—Commission found no link between the worker's offences and his employment and that it did not seem fair that the worker lose his then present employment because of the ban, and the parties agreed the Respondent should reserve the right to refuse entry for the same reasons as any other employee—Granted in part—The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- WMC Resources Ltd—CR 405 of 1996—BEECH C—10/02/98—Metal Ore Mining 1065

Appeal decision to terminate Public sector employee for shooting at students with pellets—Appellant argued that the students voiced no objections, that he was unaware of the concept of duty of care, the dismissal was procedurally unfair and denied attempting to influence a witness to an investigation—PSAB found that the absence of general instruction on the duty of care did not provide a complete excuse for the Appellants conduct—PSAB found Appellant's actions went to the very heart of the contract of service and was unable to accept that the dismissal was harsh unfair or unjust—Dismissed—Mr J Ramos -v- Education Department of Western Australia—PSAB 9 of 1997—Public Service Appeal Board—BEECH C—17/03/98—Education 1438

Application for compensation on the grounds of unfair dismissal-Applicant denied alleged theft-Respondent argued that reinstatement was impracticable and employment was casual-Commission stated that an employer was not required to prove beyond a reasonable doubt that an employee was guilty of stealing from the employer to dismiss on that ground and do so fairly: It was enough that the employer had reasonable cause to believe that the employee stole -Commission found that the Respondent employer failed to undertake an adequate investigation and did not have reasonable cause to dismiss the Applicant-Commission also found in assessing loss that although designated 'casual' the applicant clearly had an ongoing employment relationship-Granted—Ms LM Cockram -v- Kays Bag Stores (NSW) Pty Limited—APPL 1783 of 1996—PARKS C—09/05/98 —Personal & Household Good Rtlg 1894

Application for compensation on the grounds of unfair dismissal- Respondent argued applicant was unreasonable and unco-operative during a rehabilitation programme following an accident at work and refused to obey a lawful instruction—Commission was satisfied that the Respondent had made serious efforts to assist the Applicant's rehabilitation—Commission noted that the Applicant's employment was terminated summarily for misconduct for wilful disobedience of reasonable and lawful instruction when given a warning that such action would result in dismissal.—Commission found such conduct warranted summary dismissal as it went the heart of the contract between the parties—Dismissed—Mr JD Cusato -v- Atlas Group Pty Ltd—APPL 1824 of 1997—SCOTT C.—17/05/98— General Construction 1898

Application for compensation on the grounds of unfair dismissal-Applicants claimed they were victims of a conspiracy and were falsely accused of theft-Respondent claimed good reason for the dismissal based primarily on closed circuit television surveillance of the Applicants' alleged misappropriation of funds--Commission found Respondent had good reason to suspect that the Applicants were involved in dishonest conduct and in such circumstances it is unrealistic to retain them in its employment-Dismissed—Mr H Morley -v- Burswood Resort Casino—APPL 356,357 of 1997—FIELDING C—Sport and Recreation 2441

Application re alleged unfair dismissal—Applicant claimed that he was forced to sign a resignation as the Respondent threatened to action a police report against him— Respondent argued the Applicant was asked to sign a resignation because if he was dismissed he might not get a security licence again and would not be able to work in the industry again—Commission found that the conduct of Applicant went to the root of his contract of employment, that the Respondent was entitled to dismiss the Applicant summarily and the lack of procedural fairness did not outweigh the factors against the Applicant—Dismissed not outweigh the factors which weigh in the balance against the Applicant—Dismissed—Mr SM Deering -v- Secureforce International Pty Ltd—APPL 1879 of 1997—GREGOR C— 29/05/98—Business Services 2452

Application for compensation on the grounds of unfair dismissal-Applicant argued that the stress caused by the termination was evidence of the impracticability of re -employment or reinstatement-Respondent argued the Applicant had been made aware of her breach of company policy and performance failures-Respondent also argued Applicant had been given the opportunity to resign to make other employment easier to gain-Commission found that although the Applicant's prospects for continuing employment were limited the dismissal was harsh or oppressive and assessed compensation accordingly-Granted— Ms J Jones -v- Naturel Skin Care Pty Ltd—APPL 1052 of 1995—COLEMAN CC—Personal & Household Good Rtlg 2460

Application for relief on the grounds of unfair dismissal and allegedly denied contractual entitlements re wages, superannuation,living expenses and annual leave—Respondent argued that the abuse of other employees and the use of obscene language by one Applicant constituted gross misconduct incompatible with the faithful performance of his obligations under the contract of employment and that the acceptance of the resignation did not condone the conduct—Respondent argued there was a difference between annual leave under the contract and paid time off— Commission found on evidence that the Respondent was entirely justified in concluding that the Applicants had resigned, it was not unreasonable that the respondent did not continue with the dismissals forthwith and the conduct of both Applicants justified summary dismissal—Commission discovered no terms of contract which gave rise to the benefits claimed—Dismissed—Mrs VG Walker -v- Baracus Pty Ltd T/A Hannan's View Motel—APPL 2103,2104 of 1997— GREGOR C—29/05/98—Accommodatn, Cafes&Restaurants 2477

NATURAL JUSTICE

[4]Application for orders re alleged breaches of organisations rules- Applicant argued that the Respondent's Emergency Committee, Union President and Disputes Resolutions Committee acted ultra vires, with mala fides and bias and denied the Applicant natural justice when dealing with requests for legal assistance from herself and another member of the union and a complaint that the applicant had obstructed a committee of the Union -Applicant alleged Disputes Resolution Committee acted on instructions of the Union President as the applicant was a political opponent-Respondent denied allegations-President in various reasons for decision issued orders and gave reasons therefor over procedural and preliminary matters including: allegations of conflict of interest of appearing and instructing solicitors and agents, the named respondents and applicants to the application, witnesses, waiver of object on the grounds of bias, amendment of particulars and service of application-President found on evidence the Emergency Committee did not act improperly, unreasonably, ultra vires or without bona fides in allocating the funds for legal assistance, nor did it misuse or misappropriate any funds in so doing—President found no evidence that the suspension of the Dispute Resolution Committee related to the Applicant and that the Union President failed to ensure that the rules were performed or complied with or that he acted to cause or procure non-compliance with them-President found that it had not been established that a power given to a person or persons by the rules was exercised without good faith and for a purpose which the power was not given-President found it was not established that equity, good conscience and substantial merits of the case lay with the applicant- Dismissed—Ms R Bannon & Other -v- The State School Teachers Union of W.A. (Incorporated) & Others—APPL 1823 of 1996—President—SHARKEY P—22/01/97—Other Services 320

CUMULATIVE DIGEST—*continued*

Page

NATURAL JUSTICE—*continued*

Application for compensation on the ground of unfair dismissal and allegedly denied contractual entitlements—Applicant claimed dismissal was unfair as there was a denial of natural justice and lack of procedural fairness and that deduction of amounts without consent was also unfair—Respondent argued that dismissal was valid as the Applicant breached obligation to work in a competent manner—Commission found that there was a denial of natural justice, a lack of procedural fairness and monies deducted without consent—termination was unfair—Granted—Mr N McGuiness -v- M.G. McKay Pty Ltd—APPL 813 of 1997—SCOTT C.—15/12/97—Accommodatn, Cafes&Restaurants 532

Appeal decision to terminate Public sector employee for shooting at students with pellets—Appellant argued that the students voiced no objections, that he was unaware of the concept of duty of care, the dismissal was procedurally unfair and denied attempting to influence a witness to an investigation—PSAB found that the absence of general instruction on the duty of care did not provide a complete excuse for the Appellants conduct—PSAB found Appellant's actions went to the very heart of the contract of service and was unable to accept that the dismissal was harsh unfair or unjust—Dismissed—Mr J Ramos -v- Education Department of Western Australia—PSAB 9 of 1997—Public Service Appeal Board—BEECH C—17/03/98—Education 1438

Application for compensation on the grounds of unfair dismissal-Applicant argued that none of the events which contributed to the decision to dismiss him were raised by the Respondent prior to the termination-Respondent argued that the Applicant had a tendency to be abusive and aggressive towards clients and suppliers and used his position in a way that was damaging to the Respondent's business-Commission found that it must consider whether, in effecting the termination, the employer had provided the employee with natural justice and in all the circumstances the dismissal was not unfair-Dismissed—Mr RAJ Cousins -v- Cannon Investments Pty T/A Travelshop—APPL 2155 of 1997— SCOTT C.—Air & Space Transport 1896

[2]Appeal against decision of Industrial Magistrate (unreported) re striking out of complaint and application for costs—Appellants argued the Industrial Magistrate deprived them access to their rightful application for costs by striking out the complaint prior to hearing,and incorrectly interpreted the term 'frivolous and/or vexatious'—Appellant further argued IM had a conflict of interest and should not have heard the matter when remitted back to him—Respondent argued that the complaints were struck out by consent and the Appellants were bound by their case—Full Bench found that striking out was not a determination of the complaints on merit and as there was no decision finally determining the matter the appeal was incompetent—Full Bench also found that the IM was not required to disqualify himself for ostensible bias and would have erred in law had he so done—Dismissed—Ian Barrett & Tracey Barrett -v- The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers —APPL 2106 of 1997—Full Bench—SHARKEY P/COLEMAN CC/PARKS C—22/05/98—General Construction 2340

ON CALL

[2]Appeal against decision of Industrial Magistrate (unreported) re failure to pay full annual leave entitlement on termination under an award—Appellant argued Industrial Magistrate was wrong to conclude that the employee was working on duty for the whole period of his shift;finding that the Lee Downs Nursing Home case could be distinguished and in calculating the sum due—Respondent argued that the employee did not reside at the premises and was on duty for the entire shift—Full Bench found that it cannot be said that a person whose place of abode is somewhere other than the workplace, who travels from his place of abode to the workplace each day, resides at the workplace during the period of the shift, even if s/he sleeps during all or part of it—Full Bench found that the employee lawfully terminated his employment, there was no cross appeal and the decision was based on the correct calculation—Dismissed—Aust Fed of TPI Ex-Serv Men -v- LIQUOR, HOSPITALITY & MISC—APPL 2360 of 1997—Full Bench—SHARKEY P/FIELDING C/SCOTT C.—25/03/98—Community Services 1119

ORDER

[1]Appeal against decision of Full Bench (76 WAIG 4875) re application for enforcement of orders of the Commission -Appellant argued that Full Bench erred on refusing to: admit evidence, grant an adjournment, allow amendment of particulars, which put the Appellant in a position of being unable to adduce relevant evidence and in the subsequent dismissal of the applications-IAC found that the Full Bench refusal to amend the particulars brought about an injustice to the Appellant and prevented the Appellant from having its case fairly tried-IAC found that the Full Bench failed to give weight to the absence of any prejudice to the Respondent in the event of the proposed amendments being allowed and that in the circumstances the Respondents would have had ample time in which to answer the new allegations which related to the actions of their own officials- IAC found the observance of orders of the Commission was a matter in which the community as a whole had an interest, that the discretion of the Full Bench miscarried and disclosed an error at law which led to the dismissal of the applications—Upheld and Remitted—REGISTRAR -v- CONSTRUCTION, MINING, ENERGY—IAC 20 & 21 of 1996—Industrial Appeal Court—- 14/11/97—Other Services 289

Conference referred re clarification of bonus-Applicant union claimed that Respondent should not exclude employees covered under award from receiving bonus and that as the awards were Minimum Rates awards they did fit within the Wage Fixing Principles and there was nothing which prevented the Commission from awarding bonuses paid -Respondent argued that as the bonus was part of the workplace agreement relationship the Commission lacked jurisdiction and that the matter did not fit in with the Wage Fixing Principles-Commission found that as there had not been sufficient information put forward, order could not issue-Dismissed—BRICK, TILE & POTTERY UNION -v- Metro Brick Armadale—CR 235 of 1997—SCOTT C.—08/01/98—Non -Metallic Min Product Mfg 542

Conference referred re unfair dismissal claim and claim for order that dismissed employee not be banned from Respondent's premises—Applicant Union argued worker was not given sufficient information of the material which the Respondent had, in sufficient time to respond and the decision was hasty—Applicant argued the ban was a continuation of the penalty of loss of employment and would affect the workers livelihood—Respondent argued order sought was too widely framed, there could be good reasons to refuse entry, there was no utility in the order and no power under S23A of the IRAct 1979—Commission found on evidence the possibility of a ground to justify the summary dismissal by virture of the discovery of material on the worker's property and against the unfair dismissal claim—Commission found no link between the worker's offences and his employment and that it did not seem fair that the worker lose his then present employment because of the ban, and the parties agreed the Respondent should reserve the right to refuse entry for the same reasons as any other employee—Granted in part—The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- WMC Resources Ltd—CR 405 of 1996—BEECH C—10/02/98—Metal Ore Mining 1065

[2]Application for order pursuant to s72A re exclusive union coverage of one employer—Applicant Union argued the Commission had the power to make certain orders and sought orders for secret ballots—AWU, Employer and AMMA argued interalia the application ignored the separate membership requirements of each of the employee organisations concerned the employee preference should be weighed up and there was already evidence of union numbers—Majority of Full Bench found it had not express powers to issue orders sought and it would go beyond the Commission merely informing itself—Majority Full Bench further found little relevance in balloting non-members and was not persuade the equity good conscious and substantial merit lay with the applicant—Applicant sought to withdraw application and Employer sought costs—Full bench reviewed IR Act 1979 and found the employer was not a party to t he application, there was no prescription enabling an award of costs to a person given leave to be heard under s72A and the rule generalia specialibus derogant did not apply—Full bench further found under the circumstances the employer could not criticise the applicant for a delay in reaching a decision to discontinue notify it and neither the employers or the Applicants claims were an extreme case even if they were competent—Dismissed—CONSTRUCTION, MINING, ENERGY -v- (Not applicable)—APPL 1401 of 1997—Full Bench— SHARKEY P/GREGOR C/BEECH C—24/10/97—Other Mining 1581

CUMULATIVE DIGEST—*continued*

Page

OVERTIME

Conference referred re dispute over insertion of overtime clause and application of arbitrated safety net wage increase in Fly in /Fly out Award—Applicant Union argued that employees worked shifts and take time away from site on a fixed schedule and that it was not possible for any small amount of overtime to be provided for in conjunction with annual leave unless taken in blocks of a week—Respondent argued it had no requirement for Hot Seat change over for employees covered by the award and that the reintroduction of overtime would reintroduce inefficiencies removed by the flyin flyout arrangements—Commission found likelihood of overtime was not sufficient to warrant variation of the award and that the arbitrated safety net adjustments were to be absorbed—Dismissed—The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- Newcrest Mining Ltd—CR 310 of 1997—SCOTT C.—Metal Ore Mining..... 1431

PRINCIPLES

Application to vary award to consent re allowances—applicant Union claimed award should be varied to reflect CPI movements—Respondent agreed in principle but argued that the all purpose allowances were not work related allowances and should not be allowed—Commission found as application was consistent with the wage fixing principles variation be granted and argument from respondent be dismissed—Ordered Accordingly—LIQUOR & ALLIED INDUST UNION -v- Kalamunda Club (Inc)—APPL 1412,1413,1414,1415,1416 of 1992—CAWLEY C.—22/12/97—Electricity and Gas Supply 459

Conference referred re clarification of bonus-Applicant union claimed that Respondent should not exclude employees covered under award from receiving bonus and that as the awards were Minimum Rates awards they did fit within the Wage Fixing Principles and there was nothing which prevented the Commission from awarding bonuses paid -Respondent argued that as the bonus was part of the workplace agreement relationship the Commission lacked jurisdiction and that the matter did not fit in with the Wage Fixing Principles-Commission found that as there had not been sufficient information put forward, order could not issue-Dismissed—BRICK, TILE & POTTERY UNION -v- Metro Brick Armadale—CR 235 of 1997—SCOTT C.—08/01/98—Non -Metallic Min Product Mfg 542

Application for orders re variation of roster-Applicant union argued that changes to rosters proposed by respondent should be cost neutral on the basis of past practice and sought a proposed roster or minimum salary—Respondent argued practice was limited to the introduction of One Man Operations, alternative claim conflicted with the paid rates award and should be tested against the Wage Fixing Principles—Commission reviewed s26A of the IR Act 1979 re evidence and workplace agreements—Commission found it was concerned at the time only with the issue of cost neutrality not the equality in the number of jobs between award and non-award employees—Commission found on evidence it was possible to draw up a roster which maintained earnings and integrated with staff schedule, that that ought occur and adjourned for the parties to confer—In Supplementary Reasons Commission found that though circumstances had changed, the Applicant was entitled to an order reflecting the Reasons for Decision—Granted with liberty to apply reserved—CONSTRUCTION, MINING, ENERGY -v- Hamersley Iron Pty Limited—APPL 929 of 1997—BEECH C—18/11/97—Metal Ore Mining 736

Conference referred re dispute over insertion of overtime clause and application of arbitrated safety net wage increase in Fly in /Fly out Award—Applicant Union argued that employees worked shifts and take time away from site on a fixed schedule and that it was not possible for any small amount of overtime to be provided for in conjunction with annual leave unless taken in blocks of a week—Respondent argued it had no requirement for Hot Seat change over for employees covered by the award and that the reintroduction of overtime would reintroduce inefficiencies removed by the flyin flyout arrangements—Commission found likelihood of overtime was not sufficient to warrant variation of the award and that the arbitrated safety net adjustments were to be absorbed—Dismissed—The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- Newcrest Mining Ltd—CR 310 of 1997—SCOTT C.—Metal Ore Mining 1431

[3]Conference referred re claim for wage increase under enterprise bargaining—Applicant Union argued application covered low paid workers who had only Arbitrated Safety Net adjustments, met the Wage fixing Pineapples, prompted further bargaining and structural efficiency and that the special case was the only avenue—respondent argued negotiations should continue , there was no substance in the argument that the respondent had not bargained in good faith and that there re should be no arbitrated wage increase as interalia it did not meet the special case criteria and was not in the public interest—CCI and Hon Minister for Labour Relations argued Commission must be satisfied no further negotiation was possible, safety net adjustments should be absorbed, efficiencies must be established and attention must be made to flow-on—TLC argued Wage Fixing Principles should not frustrate the IR Act 1979, an order would not result in an award variation and there was no formula under the principles to split rewards from productivity increases between employer, employee and the government—CICS reviewed history of negotiations and found that past productivity increase were t be taken into account, that the result of arbitration was not static, that the 2 groups of employees should be treated separately, reeved productivity measures, that the safety net adjustment did not have to be affirmed or the MRA completed—CICS found in favour of Applicant and granted a retrospective date of operation—Granted—LIQUOR, HOSPITALITY & MISC -v- Education Department of Western Australia—CR 168 of 1996—Commission in Court Session— COLEMAN CC/GREGOR C/BEECH C—02/04/98—Government Administration 1589

[3]Application to vary awards re inclusion of salary packaging provisions—Applicant Unions argued that any attempts to negotiate any kind of salary package through enterprise bargaining had been fruitless as respondent employers would not contemplate salary packaging due to a proscriptive government policy aimed at promoting workplace agreements even when employees may be employed alongside employees enjoying salary packaging—Respondents argued the claims were contrary to provisions in the IRAct 1979, the Minimum Conditions of Employment Act, the Wage Fixing Principles and had cost implications- Respondent further argued that the IRAct clearly contemplated differing conditions for employees covered under awards, enterprise agreements and workplace agreements—CICS found on evidence that salary packaging was a "fact of life' and consistent with individuals and employers negotiating at workplace level CICS however, found that the compulsory provisions sought were not consistent with that principle— In Further Reasons CICS found there was no question that an employee seeking to raise a request for salary packaging may do so through their relevant union—Granted in Part— The Civil Service Association of Western Australia Incorporated -v- Albany Port Authority & Others—P 62 of 1994;P 5,6 of 1997—Commission in Court Session—GREGOR C/GEORGE C/BEECH C—13/03/98—Health Services 2346

PROCEDURAL MATTERS

[1]Appeal against decision of Full Bench (76 WAIG 4875) re application for enforcement of orders of the Commission -Appellant argued that Full Bench erred on refusing to: admit evidence, grant an adjournment, allow amendment of particulars, which put the Appellant in a position of being unable to adduce relevant evidence and in the subsequent dismissal of the applications-IAC found that the Full Bench refusal to amend the particulars brought about an injustice to the Appellant and prevented the Appellant from having its case fairly tried-IAC found that the Full Bench failed to give weight to the absence of any prejudice to the Respondent in the event of the proposed amendments being allowed and that in the circumstances the Respondents would have had ample time in which to answer the new allegations which related to the actions of their own officials- IAC found the observance of orders of the Commission was a matter in which the community as a whole had an interest, that the discretion of the Full Bench miscarried and disclosed an error at law which led to the dismissal of the applications—Upheld and Remitted—REGISTRAR -v- CONSTRUCTION, MINING, ENERGY—IAC 20 & 21 of 1996—Industrial Appeal Court—- 14/11/97—Other Services..... 289

CUMULATIVE DIGEST—*continued*

Page

PROCEDURAL MATTERS—*continued*

[4]Application for orders re alleged breaches of organisations rules- Applicant argued that the Respondent's Emergency Committee, Union President and Disputes Resolutions Committee acted ultra vires, with mala fides and bias and denied the Applicant natural justice when dealing with requests for legal assistance from herself and another member of the union and a complaint that the applicant had obstructed a committee of the Union -Applicant alleged Disputes Resolution Committee acted on instructions of the Union President as the applicant was a political opponent-Respondent denied allegations-President in various reasons for decision issued orders and gave reasons therefor over procedural and preliminary matters including: allegations of conflict of interest of appearing and instructing solicitors and agents, the named respondents and applicants to the application, witnesses, waiver of object on the grounds of bias, amendment of particulars and service of application-President found on evidence the Emergency Committee did not act improperly, unreasonably, ultra vires or without bona fides in allocating the funds for legal assistance, nor did it misuse or misappropriate any funds in so doing—President found no evidence that the suspension of the Dispute Resolution Committee related to the Applicant and that the Union President failed to ensure that the rules were performed or complied with or that he acted to cause or procure non-compliance with them-President found that it had not been established that a power given to a person or persons by the rules was exercised without good faith and for a purpose which the power was not given-President found it was not established that equity, good conscience and substantial merits of the case lay with the applicant- Dismissed—Ms R Bannon & Other -v- The State School Teachers Union of W.A. (Incorporated) & Others—APPL 1823 of 1996—President—SHARKEY P—22/01/97—Other Services 320

[2]Appeal against decision of Industrial Magistrate (77 WAIG 2363) re order for costs—Appellant argued Industrial Magistrate was functus officio when dealing with the application for costs, that the Appellant had made no formal application and that the witnesses had given evidence as part of their duties as employees and had suffered no loss—Full Bench reviewed IRAct 1979, Industrial Magistrates Court Regulations 1980, the Justices Act 1902 and found that the hearing of the application could not be completed until the question of costs had been determined—Full Bench reviewed authorities and found no established ground to interfere with the case—Dismissed—LIQUOR, HOSPITALITY & MISC -v- Metro Meat International Limited—APPL 1657 of 1997—Full Bench—SHARKEY P/COLEMAN CC/GREGOR C—19/02/98—Food, Beverage and Tobacco Mfg 813

Application for reinstatement or compensation on the grounds of unfair dismissal—Applicant did not appear—Respondent applied for costs—Applicant argued non -appearance was due to a death in the family—Commission reviewed the procedural history, submissions, authorities, ss 27 & 26 of the IRAct 1979 and found it was necessary to strike a balance between discouraging an Applicant from pursuing a legitimate claim and a situation where a Respondent was put to unnecessary costs because the Applicant neither attended or advised of the inability to attend or any other associated difficulties with prosecuting the case until offered the opportunity to comment on an application for costs—Ordered accordingly—Mr N Diedrichs -v- Construction Anchoring Systems—APPL 1540 of 1997—SCOTT C.—13/02/98—Construction Trade Services 1055

Application for reinstatement or compensation on the grounds of unfair dismissal—Applicant sought matter be arbitrated following failure of Respondent to honour agreement made at a conciliation conference before the Commission—Commission issued order that Respondent file answering statement and following its non-compliance directed the Registrar to investigate—Commission found in the circumstances if it did not issue an order in the terms of the parties agreement it called into question the value of agreements reached before the Commission, certainly in s32 conferences, that it had power to issue the order and that costs were appropriate—Granted—Ms BR Macleod -v- Paulownia Trees Pty Ltd—APPL 279 of 1997—BEECH C—07/10/97—Agriculture 1057

Conference referred—Applicant union sought to withdraw application, argued that the RCB had power to discontinue proceedings and that an application for discovery of documents be discontinued as a consequence of the finalisation of the substantive matter—Respondent argued a question of jurisdiction had been raised in relation to the application for discovery and that the RCB must deal with that before exercising power to resolve the dispute—RCB found it was not appropriate for the matter to proceed and, after reviewing s27 of the IRAct 1979, the appropriate course was to dismiss the matters—Dismissed for want of prosecution—West Australian Railways Officers' Union -v- Western Australian Government Railways Commission—RCBC 1 of 1997—Railways Classification Board—SCOTT C.—19/02/98—Rail Transport 1072

[2]Appeal against decision of Industrial Magistrate (77 WAIG 2363) re order for costs—Appellant argued Industrial Magistrate was functus officio when dealing with the application for costs, that the Appellant had made no formal application and that the witnesses had given evidence as part of their duties as employees and had suffered no loss—Full Bench reviewed IRAct 1979, Industrial Magistrates Court Regulations 1980, the Justices Act 1902 and found that the hearing of the application could not be completed until the question of costs had been determined—Full Bench reviewed authorities and found no established ground to interfere with the case—Dismissed—LIQUOR, HOSPITALITY & MISC -v- Metro Meat International Limited—APPL 1657 of 1997—Full Bench—SHARKEY P/COLEMAN CC/GREGOR C—19/02/98—Food, Beverage and Tobacco Mfg 813

Application for reinstatement or compensation on the grounds of unfair dismissal—Applicant did not appear—Respondent applied for costs—Applicant argued non -appearance was due to a death in the family—Commission reviewed the procedural history, submissions, authorities, ss 27 & 26 of the IRAct 1979 and found it was necessary to strike a balance between discouraging an Applicant from pursuing a legitimate claim and a situation where a Respondent was put to unnecessary costs because the Applicant neither attended or advised of the inability to attend or any other associated difficulties with prosecuting the case until offered the opportunity to comment on an application for costs—Ordered accordingly—Mr N Diedrichs -v- Construction Anchoring Systems—APPL 1540 of 1997—SCOTT C.—13/02/98—Construction Trade Services 1055

Application for reinstatement or compensation on the grounds of unfair dismissal—Applicant sought matter be arbitrated following failure of Respondent to honour agreement made at a conciliation conference before the Commission—Commission issued order that Respondent file answering statement and following its non-compliance directed the Registrar to investigate—Commission found in the circumstances if it did not issue an order in the terms of the parties agreement it called into question the value of agreements reached before the Commission, certainly in s32 conferences, that it had power to issue the order and that costs were appropriate—Granted—Ms BR Macleod -v- Paulownia Trees Pty Ltd—APPL 279 of 1997—BEECH C—07/10/97—Agriculture 1057

Conference referred—Applicant union sought to withdraw application, argued that the RCB had power to discontinue proceedings and that an application for discovery of documents be discontinued as a consequence of the finalisation of the substantive matter—Respondent argued a question of jurisdiction had been raised in relation to the application for discovery and that the RCB must deal with that before exercising power to resolve the dispute—RCB found it was not appropriate for the matter to proceed and, after reviewing s27 of the IRAct 1979, the appropriate course was to dismiss the matters—Dismissed for want of prosecution—West Australian Railways Officers' Union -v- Western Australian Government Railways Commission—RCBC 1 of 1997—Railways Classification Board—SCOTT C.—19/02/98—Rail Transport 1072

[1]Cross appeals against decision of Full Bench (76 WAIG 4434) re unfair dismissal—Appellant argued matter to do with the employees general suitability were not relevant to the question of impracticality of reinstatement in the particular circumstances of the case—Appellant employer argued that no order for compensation should have been made as the very generous overpayment of salary adequately compensated for any loss or injury caused by the dismissal and that the order was beyond power—IAC found that proof that a position has been abolished is at least prima facie proof that reinstatement or re-employment is impractical and that it would be for the employee to displace that conclusion—IAC further found that the amount ordered did not exceed 6 months and could not be made to do so by notionally adding it to the amount of the termination pay made voluntarily by the employer and that payment did not preclude the Commission exercising its discretion to make an award of compensation for loss or injury in a case where the dismissal was unfair—Dismissed—Mr J Gilmore -v- Cecil Bros Pty Ltd & Other—IAC 23 of 1996—Industrial Appeal Court—- 25/03/98—Personal & Household Good Rtlg 1099

CUMULATIVE DIGEST—*continued*

Page

PROCEDURAL MATTERS—*continued*

[2]Appeal against decision of Commission (77 WAIG 2989) re unfair dismissal claim and denied contractual entitlements—Appellant argued Commission erred in finding the employee was not constructively dismissed that it had no jurisdiction, failed to admit certain documents and sought to adduce new evidence—Appellant argued withdrawal of authority to sign cheques inhibited her employment and the conduct forced her to leave—Full Bench was not persuaded apart from financial statements that the other evidence was relevant—Full Bench found resignation followed deterioration of the relationship between the Appellant and a principal of the respondent and a breach of duty of the part of the Appellant—Full Bench further found that the withdrawal of authority to sign cheques was a proper protective measure by the Respondent, there was no dismissal and no jurisdiction to make orders—Dismissed—Ms WA Farrell -v- Harlem Enterprises Pty Ltd T/A Ace Rent A Car—APPL 1883 of 1997—Full Bench—SHARKEY P/BEECH C/SCOTT C.—11/03/98—Other Transport 1103

[4]Application for orders re alleged breach of Organisation rules—Applicant argued that flaws in an appointment process for organiser positions breached rules and sought interim order and orders prohibiting the Respondent Union from making the appointments and for the positions to be readvertised—Respondent argued there was a quorum at the relevant committee meeting—President found no substantial case to be tried and there would be a detrimental effect on the persons appointed and the Respondent if interim orders were issued—President found an omission subsequently remedied when discovered even after the application was filed was sufficient to find that the Respondent's President and Executive did not fail to ensure that the rules were complied with and the Respondent's President was entitled to decide to write letters to successful applicants—President made procedural direction and orders and gave reasons therefor Witness expenses and appearances—Ordered accordingly and Dismissed—Ms RGA Jeakings -v- The State School Teachers Union of W.A. (Incorporated)—APPL 2111 of 1997—President—SHARKEY P—26/03/98—Other Services 1131

[4]Application for orders re alleged breach of organisation rules—Applicants argued that facsimiles sent out by the Respondents constituted unauthorised use of resources for the production and distribution of election material and failure of the Union President to ensure the rules were observed—Respondent argued Applicants' agent should not appear as he was not a registered agent and sought direction—President reviewed s112 of the IRAct 1979 and found that carrying on a business was not restricted to a commercial enterprise, but a person or body engaged in the activity of an industrial agent and dismissed oral application—President gave leave for counsel to appear for the Respondents and gave reasons therefore—President reviewed rules and found on evidence that the documents were not electoral material, the Union President could notify election results as CEO and no established breach of rules—Dismissed—Mr TW Ward -v- The State School Teachers Union of W.A. (Incorporated)—APPL 2239,2241 of 1997—President—SHARKEY P—03/02/98—Other Services..... 1136

Application for reinstatement or compensation on the grounds of unfair dismissal—Respondent argued the Applicant was still employed on the date the application was lodged and Regulation 89 re Service was breached—Commission gave opportunity for Applicant to present submissions and when none were received found that the application should clearly be struck out for want of jurisdiction further agent was unable to excuse the deliberate failure to comply with the regulations on the basis of acting on the clients wishes—Struck out for want of Jurisdiction—Ms VM Adams -v- Tiwest Pty Ltd—APPL 1908 of 1997—BEECH C—25/03/98—Wood and Paper Product Mfg..... 1391

Application for compensation on the grounds of unfair dismissal—Applicant argued summary dismissal was unfair because no consideration was given to his being assaulted and attempts to contact respondent—The Applicant also had an alcohol problem which affected his work and created problems and sought costs under Section 27(c) of the IR Act—Commission found that the Applicant had fabricated the events and the case was completely devoid of merit, Commission granted costs for airfares, accommodation and court attendance—Dismissed and cost awarded—Mr SP Erridge -v- Wesfarmers Energy—APPL 1592 of 1997—GREGOR C—10/03/98—Electricity and Gas Supply 1400

Application for reinstatement or compensation on the grounds of unfair dismissal—Applicant argued dismissal was unfair because Applicant requested proper wages be paid concerning superannuation and was summarily dismissed during a two week notice period—No appearance by respondent—Commission reviewed procedures, was satisfied service was made and that the Respondent did not exhibit a desire to put it's case—Commission found that dismissal was unfair and taking into account the length of employment as well as the length of employment granted compensation as reinstatement was not viable—Granted—Mr R Farrell -v- Bilbo Pty Ltd—APPL 791 of 1997—GREGOR C—10/03/98—Road Transport 1403

Application for reinstatement or compensation on the grounds of unfair dismissal—Applicant argued dismissal as unfair because his work performance was satisfactory and it was wrong for the Applicant to be selected for redundancy, further the Applicant argued that he was on workers compensation—Respondent argued that for financial reasons and unsatisfactory work performance the Applicant was made redundant—Commission found that dismissal was unfair because employees work performance did not justify his selection for redundancy—Granted—Mr MG Pacey -v- Modular Masonry—APPL 1468 of 1997—BEECH C—13/02/98—General Construction 1421

Application for reinstatement or compensation on the grounds of unfair dismissal and allegedly denied contractual entitlements—Applicant sought to amend named respondents in application—Respondent argued that the Respondent had not been the employer and that what the applicant sought was to redirect the application and thereby commence the action against entirely different parties—Commission found that it was not open to it to strike out the cited respondent and cite in its place a different legal persona—Dismissed—Mr H Posch -v- De Campo Bakery Holdings Pty Ltd—APPL 1789 of 1997—PARKS C—26/02/98—Food, Beverage and Tobacco Mfg 1423

Conference Referred re unfair dismissal claim—Applicant union argued laws of the State in relation to Redundancy applied—Respondent employer argued that discussions held during a first dismissal sufficed in terms of the Minimum Conditions of Employment Act on the second occasion—Commission found that the redundancy was valid however the manner in which the dismissal was effected was less than fair—Commission further found that the assessment of loss or injury was not restricted to lost wages and the TCR case provided a good guide—Granted—LIQUOR, HOSPITALITY & MISC -v- Congregation Of Vietnamese Buddhists In WA T/A Landsdale Multicultural Childcare—CR 329 of 1997—BEECH C—25/03/98—Community Services 1433

Interlocutory application to set aside summons to witness to person residing overseas—Witness argued Commission had no power to issue summons out of jurisdiction and the summons was a nullity—Commission found it did not have jurisdiction beyond the Western Australian border and the summons had no force or effect—Reasons only—Mr V Tranchita -v- Wavemaster International Pty Ltd—APPL 1117 of 1997—FIELDING C—12/03/98—Machinery & Equipment Mfg 1436

[2]Appeals against decision of Industrial Magistrates re enforcement of IR Act 1979 remitted from Industrial Appeal Court (77WAIG1073)re costs at first instance-Appellant argued the amount might be set by reference to the Cost Scales 1991 under the Official Prosecutions (Defendants Costs) Act 1993 and the information used for assessment was vague and insufficient—Respondent argued the Industrial Magistrates' jurisdiction was not a summary jurisdiction, nor was it a matter of Defendant's costs—Full Bench reviewed authorities and found it was impractical and undesirable to give precise reasons for fixing costs and inappropriate to fix a Bill of Costs—Full Bench found the amounts fixed were just and reasonable and there was no apparent misuse of the discretion to warrant interference— Full Bench further found Appeals were not frivolous or vexatious or warranted an order for costs on appeal— Dismissed—Mr J Cain -v- Mr AG Shuttleton—DOPLR—APPL 1246,1247 of 1995—Full Bench—SHARKEY P/GREGOR C/BEECH C —09/04/98—General Construction 1575

CUMULATIVE DIGEST—*continued*

Page

PROCEDURAL MATTERS—*continued*

[2]Application for order pursuant to s72A re exclusive union coverage of one employer—Applicant Union argued the Commission had the power to make certain orders and sought orders for secret ballots—AWU, Employer and AMMA argued interalia the application ignored the separate membership requirements of each of the employee organisations concerned the employee preference should be weighed up and there was already evidence of union numbers—Majority of Full Bench found it had not express powers to issue orders sought and it would go beyond the Commission merely informing itself—Majority Full Bench further found little relevance in balloting non-members and was not persuade the equity good conscious and substantial merit lay with the applicant—Applicant sought to withdraw application and Employer sought costs—Full bench reviewed IR Act 1979 and found the employer was not a party to t he application, there was no prescription enabling an award of costs to a person given leave to be heard under s72A and the rule generalia specialibus derogant did not apply—Full bench further found under the circumstances the employer could not criticise the applicant for a delay in reaching a decision to discontinue notify it and neither the employers or the Applicants claims were an extreme case even if they were competent—Dismissed - CONSTRUCTION, MINING, ENERGY -v- (Not applicable)—APPL 1401 of 1997—Full Bench— SHARKEY P/GREGOR C/BEECH C—24/10/97—Other Mining 1581

Application for allegedly denied contractual entitlements -Commission changed identification of Respondent by consent -Applicant argued he had an unwritten employment contract with the Respondent which included part-payment of telephone bills and superannuation contributions-Applicant further argued that there existed an unwritten agreement for additional duties and payment for successful occupancies-Respondent argued that the additional duties were performed from time to time as required and with a pre -agreed fee-Respondent further argued that this arrangement did not form a collateral contract to the employment contract but was an additional arrangement between the Applicant and other parties-Commission found it could give effect to those parts of the employment contract which it had found to exist between the parties-Granted in part—Mr AE Campbell-Henderson -v- Owners of Strata Plan 5767—APPL 1661 of 1997—GREGOR C—Property Services 1891

Application re unfair dismissal and allegedly denied contractual entitlements-Applicant did not seek compensation for claim of unfair dismissal-Respondent failed to appear-Commission found that although the Applicant's evidence was the only evidence presented the Applicant was a most truthful person under oath-Commission further found that the claim for allegedly denied contractual entitlements fell under three headings-Granted —Mr MJ Carberry -v- TDK Carting Contractors—APPL 2366 of 1997—BEECH C—Road Transport 1892

Application for compensation on the grounds of unfair dismissal-Applicant denied alleged theft-Respondent argued that reinstatement was impracticable and employment was casual-Commission stated that an employer was not required to prove beyond a reasonable doubt that an employee was guilty of stealing from the employer to dismiss on that ground and do so fairly: It was enough that the employer had reasonable cause to believe that the employee stole -Commission found that the Respondent employer failed to undertake an adequate investigation and did not have reasonable cause to dismiss the Applicant-Commission also found in assessing loss that although designated 'casual' the applicant clearly had an ongoing employment relationship-Granted—Ms LM Cockram -v- Kays Bag Stores (NSW) Pty Limited—APPL 1783 of 1996—PARKS C—09/05/98 —Personal & Household Good Rtlg 1894

Application for compensation on the grounds of unfair dismissal—Applicant argued that the reason for her dismissal told to her at the time was different from the reasons subsequently given in her letter of termination— Respondent argued that the Applicant had been given several verbal and written warnings that her work performance was poor and her job was in jeopardy—Commission did not find the Applicant's evidence entirely persuasive and that the grounds for claiming unfairness had not been made out— Commission further found that costs are not usually awarded in this jurisdiction and should only be awarded in an extreme case which this was not—Dismissed—Ms MT De Gois -v- Aardent Dental Centre (Juliann Management Pty Ltd)— APPL 2243 of 1997—BEECH C—Health Services 1902

Application for allegedly denied contractual benefits -Applicant failed to attend the proceedings-Respondent argued that the Applicant had displayed complete disregard of his own application to the Commission in failing to appear or respond to communications regarding the application-Respondent further argued that the Applicant's behaviour had wasted public money and put the Respondent to considerable expense and sought costs-Commission found that Applicant treated the Commission with disdain and left it with no alternative but to dismiss the claim for want of prosecution-Commission further found that it is a matter of public interest that litigants in this jurisdiction are aware that matters need to be dealt with speedily-Dismissed and costs granted—Mr SP Gavin -v- Robert Stephen Cocking T/A Batavia Motor Inne—APPL 1783 of 1997—GREGOR C— Accommodatn, Cafes&Restaurants 1906

Application for allegedly denied contractual entitlements -Applicant sought leave to withdraw the claim on the day of the hearing-Respondent argued the application had been without foundation or merit-Respondent further argued that pursuant to s.27(1)(c) of the Industrial Relations Act 1979 the Commission is allowed to "simply award costs" in exceptional circumstances-Commission found that the test to be applied in awarding of costs under the Act was set out by the Full Bench (73 WAIG 26,@ 27)-Commission further found that the Respondent did not meet the necessary criteria of "extreme cases"-Application withdrawn and costs dismissed—Mr RJ Lawson -v- Lamar Nominees Pty Ltd T/A Whyman Building Company Pty Ltd & Other—APPL 1183 of 1997 —GREGOR C—General Construction 1910

Application for compensation on the grounds of unfair dismissal-Applicant argued that she had been constructively dismissed by requesting a reference for a job application which was assumed by the Respondent to be an indication of the Applicant seeking to leave her present employment -Respondent argued that they had been aware of the need for sustainable grounds for termination-Commission found that there was nothing in the evidence which would suggest that the Respondent tried to contrive a dismissal from the Applicant-Commission further found the application incompetent because it was out of time-Dismissed—Ms JSE Yeap -v- Chunagon Co Ltd T/A Chunagon Japanese Restaurant— APPL 808 of 1997—GREGOR C—Accommodatn, Cafes&Restaurants 1917

PUBLIC HOLIDAYS

[3]Applications to vary awards re insertion 2 days in lieu of two public service holidays—Applicant argued the awards should be practical and reflect the existing conditions which were the safety net that applied to employees and it was not in the public interest for the respondents to arbitrarily remove existing conditions—Applicant further argued the applications merely sought to insert existing conditions that applied administratively, were inside the qualifications of the Wage Fixing Principles, there was no potential for flow-on and no cost implications—Applicant also argued the fact that the Public Sector Management Act invested power in the Governor to declare holidays did not exclude the Commission's jurisdiction—CCI argued the holidays were like overaward payments—Respondents argued the actual declaration of certain days as public holidays would ursurp the prerogative of government and Commission had no power to grant the relief sought—Respondent argued there was no standard for public service holidays in the jurisdiction and nothing of substance had been put to justify the award recognition of separate treatment for public sector employees—CICS was not persuaded that the case warranted a departure from the standard, to grant the claim would be rejecting authorative decisions of the Full Bench, the Applicants had used the 2 days as a bargaining tool in enterprise bargaining and that the 2 days were not part of the safety net—Dismissed—The Civil Service Association of Western Australia Incorporated -v- Public Service Commission—P 34,35,36,37,38,39,40,41,42 of 1994—Commission in Court Session—GREGOR C/BEECH C/PARKS C—06/03/98—Government Administration 816

CUMULATIVE DIGEST—*continued*

Page

PUBLIC INTEREST

[3]Applications to vary awards re insertion 2 days in lieu of two public service holidays—Applicant argued the awards should be practical and reflect the existing conditions which were the safety net that applied to employees and it was not in the public interest for the respondents to arbitrarily remove existing conditions—Applicant further argued the applications merely sought to insert existing conditions that applied administratively, were inside the qualifications of the Wage Fixing Principles, there was no potential for flow-on and no cost implications—Applicant also argued the fact that the Public Sector Management Act invested power in the Governor to declare holidays did not exclude the Commission's jurisdiction—CCI argued the holidays were like overaward payments—Respondents argued the actual declaration of certain days as public holidays would ursurp the prerogative of government and Commission had no power to grant the relief sought—Respondent argued there was no standard for public service holidays in the jurisdiction and nothing of substance had been put to justify the award recognition of separate treatment for public sector employees—CICS was not persuaded that the case warranted a departure from the standard, to grant the claim would be rejecting authorative decisions of the Full Bench, the Applicants had used the 2 days as a bargaining tool in enterprise bargaining and that the 2 days were not part of the safety net—Dismissed—The Civil Service Association of Western Australia Incorporated -v- Agriculture Protection Board—P 34,35,36,37,38,39,40,41,42 of 1994—Commission in Court Session—GREGOR C/BEECH C/PARKS C—06/03/98—Government Administration 816

Application for allegedly denied contractual benefits -Applicant failed to attend the proceedings-Respondent argued that the Applicant had displayed complete disregard of his own application to the Commission in failing to appear or respond to communications regarding the application-Respondent further argued that the Applicant's behaviour had wasted public money and put the Respondent to considerable expense and sought costs-Commission found that Applicant treated the Commission with disdain and left it with no alternative but to dismiss the claim for want of prosecution-Commission further found that it is a matter of public interest that litigants in this jurisdiction are aware that matters need to be dealt with speedily-Dismissed and costs granted—Mr SP Gavin -v- Robert Stephen Cocking T/A Batavia Motor Inne—APPL 1783 of 1997—GREGOR C— Accommodatn, Cafes&Restaurants 1906

Application for compensation on the grounds of unfair dismissal-Applicant argued that the downsizing of the Respondent business was an excuse to terminate the Applicant's employment as other employees were brought in to complete work the Applicant had started-Respondent argued that the Applicant's competence to complete the work was in dispute-Commission found that at least part of the Respondent's reasons for selecting the Applicant for termination were associated with his views of the Applicant on a personal level-Granted—Mr DJ Maher -v- Francis Robert Ridgwell T/A The Cork Expert—APPL 1846 of 1997— SCOTT C.—Personal & Household Good Rtlg 1811 —Mr A Poli -v- Eagle Mining Corporation NL—APPL 2076,2077 of 1997—SCOTT C.—Other Mining 1914

Application for reinstatement or compensation on the grounds of unfair dismissal—Applicant argued that the dismissal was unfair because the reason for the dismissal was threatened legal action by a former customer of the Respondent regarding the Applicant attempting to return a pen he had found in a motor vehicle in the course of his duties—Commission found that the real reason was that the Applicant was given a written warning to stop writing to or contacting the former customer or an employee of another business and the conduct continued—Commission found it was not in the public interest for the application to go beyond the conference stage—Dismissed—Mr M Cooper -v- FMC Wholesale—APPL 520 of 1998—BEECH C—27/05/98— Personal & Household Good W/sg 2451

REDUNDANCY/RETRENCHMENT

[1]Cross appeals against decision of Full Bench (76 WAIG 4434) re unfair dismissal—Appellant argued matter to do with the employees general suitability were not relevant to the question of impracticality of reinstatement in the particular circumstances of the case—Appellant employer argued that no order for compensation should have been made as the very generous overpayment of salary adequately compensated for any loss or injury caused by the dismissal and that the order was beyond power—IAC found that proof that a position has been abolished is at least prima facie proof that reinstatement or re-employment is impractical and that it would be for the employee to displace that conclusion—IAC further found that the amount ordered did not exceed 6 months and could not be made to do so by notionally adding it to the amount of the termination pay made voluntarily by the employer and that payment did not preclude the Commission exercising its discretion to make an award of compensation for loss or injury in a case where the dismissal was unfair—Dismissed—FDR Pty Ltd -v- Mr J Gilmore—IAC 22 of 1996—Industrial Appeal Court—- 25/03/98—Personal & Household Good Rtlg 1099

Conference Referred re unfair dismissal claim—Applicant union argued laws of the State in relation to Redundancy applied—Respondent employer argued that discussions held during a first dismissal sufficed in terms of the Minimum Conditions of Employment Act on the second occasion—Commission found that the redundancy was valid however the manner in which the dismissal was effected was less than fair—Commission further found that the assessment of loss or injury was not restricted to lost wages and the TCR case provided a good guide—Granted—LIQUOR, HOSPITALITY & MISC -v- Congregation Of Vietnamese Buddhists In WA T/A Landsdale Multicultural Childcare—CR 329 of 1997—BEECH C—25/03/98—Community Services 1433

Application for allegedly denied contractual entitlements -Further reasons for decision re redundancy payment upon Applicant's resignation-Applicant argued that he resigned in the belief that the 'Redeployment, Retraining and Redundancy General Order' applied to his situation -Respondent argued it valued Applicant's services and wished to retain him-Commission found that the Applicant had no formal written employment contract and any offer of severance pay to previous employees working under the relevant Award had been initiated by the Respondent -Commission further found that it was not in the public interest to require the Respondent to present its case in light of its findings-Dismissed—Mr P Fielding -v- Western Power Corporation—APPL 105 of 1997—BEECH C— Electricity and Gas Supply 1906

Application for reinstatement or compensation on the grounds of unfair dismissal-Applicant argued he was never advised that his employment would terminate once his employer began full-time work in the business-Applicant further argued that the Respondent could have organised his business in a way that could have maintained the Applicant as an employee-Respondent argued that his business was experiencing financial difficulties and he had acted in the best interests of the business-Commission found that the Applicant had not discharged the onus placed upon him to demonstrate that there should have been a different way of staffing the business which would have included retaining him-Dismissed—Mr JH Tannahill -v- Gwydion Nominees T/A Greenwood Video—APPL 2263 of 1997—SCOTT C.—Personal Services 1917

Application for interpretation of award re Introduction of Change and Redundancy, Employer's Duty to Notify, Employer's Duty to Discuss Change, Definte decision that the employer no longer wishes the the employee has been doing done by anyone and ordinary and customary turnover of labour—Applicant argued there was ambiguity in the provisions—Applicant argued, interalia, the interpretaton of the Grant Electrical case had resulted in the use of the concept of ordinary and customary turnover of labour to avoid obligations which would otherwise exist if that phrase was interpreted in a manner consistent with the historical development of the termination change and redundancy provisions in awards and the approach adopted in the Amscol and Countdown Stores cases—Respondent argued the proper approach to the interpretation of awards was that set out in the decision of the Full Bench at (70WAIG1287)—Respondent further argued the applicant's submissions went beyond the scope of the application and there was no specific question posed—Commission found that the applicat was inviting the Comission to review the Grant Electrical case and and it was not open for the Commissio as constituted to embark on such a course on an application under s46, answered each question invidually and gave reasons therefore—Reasons Issued—Metals and Engineering Workers' Union—Western Australian Branch -v- Cockburn Engineering W.A.—APPL 1071 of 1993—GEORGE C—21/04/98—Machinery & Equipment Mfg 1876

CUMULATIVE DIGEST—*continued*

Page

REDUNDANCY/RETRENCHMENT—*continued*

[2]Appeal against decision of Commission (77 WAIG 1530) re denied contractual entitlements—Applications to extend time to file and serve Notice of Appeal and Appeal Books— Appellant argued that the it was not open to the Respondent to refuse the changes in work and claim unfair dismissal, the Commission erred in finding the change in the proportion of duties done by the Respondent constituted a significant change, and that the Respondent was entitled to a redundancy payment under the written contract of employment—Full Bench found that the delay in filing the appeal was minimal and the injustice if the applications to extend time were not granted were obvious—Full Bench found there was a constructive dismissal by way of the employee refusing to accept a change in employment by way of a unilateral demotion—Majority of Full Bench found that the Redundancy Payments clause on the contract meant that payments were due where a person was dismissed when the company was subject to interalia rearrangement and reconstruction as those words were understood and defined under the Corporations Law and it was not open to find that the Respondent was denied a contractual benefit to which he was entitled—Applications granted and Appeal upheld— Robowash Pty Ltd -v- Mr M Hart—APPL 1049 of 1997—Full Bench—SHARKEY P/BEECH C/PARKS C—12/11/97—Property Services 2323

Application for compensation on the grounds of unfair dismissal-Applicant argued he was told his services had been terminated as a cost cutting measure within the Respondent's activities and at no time was given the opportunity to discuss the decision-Respondent argued Applicant was constantly kept aware of office's deteriorating financial position-Commission found it must apply the provisions of the Act in a way which was consistent with commonsense and considerate of the practical realities of the situation-Dismissed—Mr R Bogunovich -v- Bayside Western Australia Pty Ltd—APPL 1125 of 1997—GREGOR C—Construction Trade Services 2444

Application for allegedly denied contractual entitlements re redundancy package and pay in lieu of notice—Applicant argued that the payments received were inadequate— Respondent argued matter should be dismissed pursuant to the powers in s27 of the IRAct 1979—Commission found that the negotiation of the terms to bring a contract to an end was not reviewable under s29 of the IR Act 1979 because the section applied to extant contractual benefits or the terms that could be implied into an extant contract—Commission found that the period of notice was discoverable, the Applicant had been paid in accordance with it and the application was misconceived—Dismissed—Mr NB Pickersgill -v- Charlie Carters Pty Ltd—APPL 1276 of 1997 —GREGOR C—19/05/98—Food Retailing 2462

REINSTATEMENT

Application for reinstatement or compensation on the grounds of unfair dismissal—Applicant argued he never received formal counselling or warnings and was unaware of poor performance complaints—Respondent argued that opportunities were given to improve performance sales and rectify deficiencies—Commission found that the respondent was justified in terminating Applicant and any procedural unfairness did not render the dismissal unfair—Dismissed—Mr RB Robertson -v-Kraft Foods Ltd—APPL 1494 of 1996—GEORGE C—23/01/98—Personal & Household Good W/sg 757

Application for reinstatement on the grounds of unfair dismissal—Applicant argued that the respondent failed to have reasonable regard for mitigating circumstances affecting the workplace at the relevant times including work load and availability of staff including to summarily dismiss the Applicant—Respondent argued that the Applicant failed to follow established procedures and breached policies and procedures and was grossly negligent justify instant summarily dismissal—Commission found there was no denial of procedural fairness and the Applicant's onus had not been discharged—Dismissed—Ms CJ D'Agostino -v- P & O Food Services Pty Ltd—APPL 1745,1882,2137,2149 of 1997—CAWLEY C.—26/02/98—Food Retailing..... 1393

Application for reinstatement or compensation on the grounds of unfair dismissal—Applicant argued that the dismissal was unfair because she was ill and that she had a very good employment history—Respondent argued the Applicant did not fit in was on probation and proper notice for a casual employee under the award was given and this is correct but reward—Commission found there had been no unfairness—Dismissed to the extent that warranted intervention—Ms VR Glover -v- Muntyls—APPL 1488 of 1997—GREGOR C—17/03/98—Accommodatn, Cafes&Restaurants 1408

Application for reinstatement or compensation on the grounds of unfair dismissal—Applicant argued dismissal as unfair because his work performance was satisfactory and it was wrong for the Applicant to be selected for redundancy, further the Applicant argued that he was on workers compensation—Respondent argued that for financial reasons and unsatisfactory work performance the Applicant was made redundant—Commission found that dismissal was unfair because employees work performance did not justify his selection for redundancy—Granted—Mr MG Pacey -v- Modular Masonry—APPL 1468 of 1997—BEECH C—13/02/98—General Construction 1421

SAFETY

Application for compensation on the grounds of unfair dismissal and outstanding contractual entitlements -Applicant claimed that termination two weeks after giving notice was unfair as it resulted from reporting unsafe work practices to Worksafe-Respondent argued that termination resulted from Applicant's disruptive behaviour and attitude to work during the notice period and found that Applicant's recourse to Worksafe over safety issues was unacceptable -Commission found that Applicant's actions in contacting Worksafe were mischievous and that as attitude and performance had declined during notice period, termination was not unfair—Dismissed—Mr MW John -v- Outback Accessories—APPL 1530 of 1997—COLEMAN CC—20/01/98—Metal Product Manufacturing..... 748

Conference referred re unfair dismissal claim and claim for order that dismissed employee not be banned from Respondent's premises—Applicant Union argued worker was not given sufficient information of the material which the Respondent had, in sufficient time to respond and the decision was hasty—Applicant argued the ban was a continuation of the penalty of loss of employment and would affect the workers livelihood—Respondent argued order sought was too widely framed, there could be good reasons to refuse entry, there was no utility in the order and no power under S23A of the IRAct 1979—Commission found on evidence the possibility of a ground to justify the summary dismissal by virtue of the discovery of material on the worker's property and against the unfair dismissal claim—Commission found no link between the worker's offences and his employment and that it did not seem fair that the worker lose his then present employment because of the ban, and the parties agreed the Respondent should reserve the right to refuse entry for the same reasons as any other employee—Granted in part—The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- WMC Resources Ltd—CR 405 of 1996—BEECH C—10/02/98—Metal Ore Mining 1065

Application for compensation on the grounds of unfair dismissal-Applicant argued that his dismissal was a result of a conspiracy arising from repeated requests to drive a smoke-free truck and a flawed investigation-Respondent argued it was obligated under its contracts to work in a safe way and Applicant had failed to abide by safety procedures or alter behaviour-Commission found the actions taken by Respondent indicated an employer with a thorough and well managed approach to the administration of its safety policies-Dismissed—Mr S Stekic -v- AWP Contractors Pty Ltd—APPL 2446 of 1997—GREGOR C—Road Transport 2465

SHIFT WORK

Application for orders re variation of roster-Applicant union argued that changes to rosters proposed by respondent should be cost neutral on the basis of past practice and sought a proposed roster or minimum salary—Respondent argued practice was limited to the introduction of One Man Operations, alternative claim conflicted with the paid rates award and should be tested against the Wage Fixing Principles—Commission reviewed s26A of the IR Act 1979 re evidence and workplace agreements—Commission found it was concerned at the time only with the issue of cost neutrality not the equality in the number of jobs between award and non-award employees—Commission found on evidence it was possible to draw up a roster which maintained earnings and integrated with staff schedule, that that ought occur and adjourned for the parties to confer—In Supplementary Reasons Commission found that though circumstances had changed, the Applicant was entitled to an order reflecting the Reasons for Decision—Granted with liberty to apply reserved—CONSTRUCTION, MINING, ENERGY -v- Hamersley Iron Pty Limited—APPL 929 of 1997—BEECH C—18/11/97—Metal Ore Mining 736

CUMULATIVE DIGEST—*continued*

Page

SHIFT WORK—*continued*

Conference referred re dispute over insertion of overtime clause and application of arbitrated safety net wage increase in Fly in /Fly out Award—Applicant Union argued that employees worked shifts and take time away from site on a fixed schedule and that it was not possible for any small amount of overtime to be provided for in conjunction with annual leave unless taken in blocks of a week—Respondent argued it had no requirement for Hot Seat change over for employees covered by the award and that the reintroduction of overtime would reintroduce inefficiencies removed by the flyin flyout arrangements—Commission found likelihood of overtime was not sufficient to warrant variation of the award and that the arbitrated safety net adjustments were to be absorbed—Dismissed—The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- Newcrest Mining Ltd—CR 310 of 1997—SCOTT C.—Metal Ore Mining 1431

[4]Application for stay of operation of decision of Commission re transfer of employees pending appeal to Full Bench—Applicant argued it was prepared to pay the difference in wages as if the employees were working shiftwork into a trust account pending the outcome of the appeal—Applicant further argued that it suffered due to current rosters and monies would not be recoverable if the appeal was successful—Respondent argued that there was shift work available for the employees and emphasised the provisions of the relevant award—President found that that the interests of the employees should not be subordinated to that of the Applicant and the balance of convenience did not lie with the applicant—Dismissed— Hamersley Iron Pty Limited -v- CONSTRUCTION, MINING, ENERGY —APPL 698 of 1998—President—SHARKEY P—Metal Ore Mining..... 2358

STAY OF PROCEEDINGS

[4]Application for stay of order pending appeal to Full Bench—Parties did not object to President sitting after President raised question of possible perceptions of bias—Applicant argued there was a serious issue to be tried because of lack of jurisdiction in the Commission at first instance and that it may not be able to recover monies should the appeal be accepted—President was not persuaded that there was a serious issue to be tried, it was seven months since the application was filed and the balance of convenience lay with the Respondent—Dismissed—J & R Sacca Poultry -v- Mr C Pearson—APPL 232 of 1998—President—SHARKEY P—05/03/98—Agriculture..... 819

SUPERANNUATION

[1]Appeal against part decision of Commission (77 WAIG 2374 & 2778) re allegedly denied contractual entitlements—Appellant argued Commission erred in finding there was no jurisdiction to deal with the claim for superannuation payments, that there was no inconsistency between s29(1) (b)(ii) of the IRAct 1979 and the Superannuation Guarantee (Administration) Act 1992—Respondent argued that notwithstanding that it conceded that it had an arrangement to pay for the superannuation contribution, it was not a contractual entitlement, it was a statutory obligation—Full Bench reviewed authorities, Acts, s109 of the Constitution and found the amount claimed was not a contractual benefit and the SGAA and SGAC covered the field to render s29 inoperative—Dismissed—Ms EA Keane -v- Lomba Pty Ltd T/A Ian George & Co—APPL 1770 of 1997—Full Bench—SHARKEY P/COLEMAN CC/CAWLEY C.—17/02/98—Property Services 810

Applications to register agreements—Applicant Union argued s49C(2) did not prevent the registration of the agreements—Commission reviewed authorities and found that as the agreements increased the amount of contribution in certain circumstances but did not of themselves require a contribution, there was no impediment to them being registered—Granted—The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers & Other -v- Advert Bricklaying Contractors—AG 325,334,358,360,361,362,363,365,366,367,368,369,370 of 1997—SCOTT C.—03/02/98—General Construction 955

Application for allegedly denied contractual entitlements -Commission changed identification of Respondent by consent -Applicant argued he had an unwritten employment contract with the Respondent which included part-payment of telephone bills and superannuation contributions-Applicant further argued that there existed an unwritten agreement for additional duties and payment for successful occupancies-Respondent argued that the additional duties were performed from time to time as required and with a pre -agreed fee-Respondent further argued that this arrangement did not form a collateral contract to the employment contract but was an additional arrangement between the Applicant and other parties-Commission found it could give effect to those parts of the employment contract which it had found to exist between the parties-Granted in part—Mr AE Campbell-Henderson -v- Owners of Strata Plan 5767—APPL 1661 of 1997—GREGOR C—Property Services 1891

Application for allegedly denied contractual entitlements— Applicant sought order when payment was not made according to agreement—Respondent sought order not issue pending conpany restructure—Commission ordered adjournment of seven days and that the Respondent endeavour to pay Applicant in that time- Ordered accordingly—Mr LR Vickers -v- Imtech Industries Pty Ltd—APPL 2308 of 1997—BEECH C —27/05/98—Non-Metallic Min Product Mfg 2476

TERMINATION

[2]Appeal against decision of Commission (77 WAIG 2006) re granted compensation for unfair dismissal claim-Appellant claimed that Commission erred in failing to adopt proper approach to assessment of compensation and ought to have awarded Applicant equivalent of 6 months remuneration-Full Bench found that Commission had erred in the exercise of discretion, in particular the principles which were applied and that as there was evidence that discretion had miscarried appeal be upheld-Ordered Accordingly—Mr JA Capewell -v- Cadbury Schweppes Australia Ltd—APPL 1364 of 1997—Full Bench—SHARKEY P/COLEMAN CC/BEECH C—Food Retailing..... 299

[2]Appeal against decision of Commission (77 WAIG 1748) re granted compensation on the grounds of unfair dismissal -Appellant claimed that Commission erred in failing to take into account Appellant's lost wages and had failed to correctly apply relevant principles in compensation-Full Bench found that as Commission's order for compensation did not represent a miscarriage of discretion, no ground of appeal was made out-Dismissed—Mr BR Smith -v- CDM Australia Pty Ltd—APPL 1310 of 1997—Full Bench—SHARKEY P/FIELDING C/CAWLEY C.—18/12/97—Personal & Household Good Rtlg 307

Application for allegedly denied contractual entitlements—Applicant claimed payment of full wages and payment in lieu of notice were due under employment contract—Respondent argued no discussion or arrangement to payment in lieu of notice was undertaken prior to commencement—Commission found that an under payment of benefits had occurred and ordered payment—Granted—Mr CI Day -v- Marleys Transport—APPL 411 of 1997—PARKS C—22/10/97—Road Transport..... 511

Application for compensation on the grounds of unfair dismissal—Applicant claimed that as dismissal was without notice or payment and was never informed of unsatisfactory performance, termination was unfair—Respondent argued that as a series of warnings were given expressing unsatisfactory performance and no improvement resulted prior to dismissal, termination was valid—Commission found that as warnings were given employer had not abused right to dismiss—Dismissed—Ms L Bredin -v- Ansuz Unique—APPL 1353 of 1997—GREGOR C—24/12/97—Textile, Clothing, Footwear 512

Application for compensation on the grounds of unfair dismissal and allegedly denied contractual entitlements—Applicant claimed dismissal was unfair as there was intimidation to resign—Respondent argued that as termination resulted from mutual agreement no dismissal occurred—Commission found that as termination was from mutual agreement, no dismissal occurred—Dismissed—Mr C Blachut -v- Trans-Plus Pty Ltd—APPL 725 of 1997—PARKS C—23/10/97—Road Transport.. 513

Application for compensation on the grounds of unfair dismissal—Applicant claimed that dismissal was unfair as decision to leave was made under duress and was not a resignation—Respondent argued that there was no termination of employment but that the Applicant resigned both verbally and written—Commission found as the Applicant did tender a resignation there was no dismissal to be heard—Dismissed—Ms CT Dunlop -v- West Coast Fast Foods Pty Ltd (Dial-A-Snappa)—APPL 1541 of 1997—SCOTT C.—08/01/98—Accommodatn, Cafes&Restaurants..... 515

CUMULATIVE DIGEST—*continued*

Page

TERMINATION—*continued*

Application for compensation on the grounds of unfair dismissal—Applicant claimed that dismissal was unfair as no notice or warnings were given and denied the accusation of stealing—Respondent argued that as the Applicant resigned there was no dismissal and Commission was without jurisdiction to hear matter—Commission found that the Applicant's attitude contributed towards the deterioration of the employment relationship and there was insufficient reason to award Respondent costs—dismissed—Mr CI Gasson -v- Locos Spanish Tapas Bar Restaurant—APPL 665 of 1997—BEECH C—16/12/97—Accommodatn, Cafes&Restaurants 521

Application for compensation on the grounds of unfair dismissal and an application that litigation was vexatious—No Appearance from Applicant—Respondent argued that both the respondent and Commission have been put to considerable expense and costs be awarded against Applicant—Commission found that litigation was vexatious and as considerable expense has been incurred, costs awarded—Application dismissed and costs awarded—Mr GM Grayson -v- PT & BD Slade—APPL 1642 of 1996—GREGOR C—27/11/97—Agriculture 523

Application for unfair dismissal and allegedly denied contractual entitlements—Applicant claimed dismissal was unfair and wages and notice period were not paid—No appearance from Respondent—Commission found that the Applicant was entitled to be paid the benefits claimed—Granted—Mr D Harper -v- Wingstar Holdings Pty Ltd—APPL 1359 of 1997—SCOTT C.—17/12/97—Business Services 524

Application of compensation on the grounds of unfair dismissal—Applicant claimed that dismissal was not warranted, that the abusive language was used was a reaction and an apology had been offered—Respondent argued that the Applicant's behaviour was abusive, rude and threatening and dismissal was warranted—Commission found that as action was a single offence and was not done in a threatening manner, it did not warrant dismissal—Granted—Mr S Kelly -v- Midex (Midland Exhaust)—APPL 1235 of 1997—BEECH C—22/12/97—Machinery & Equipment Mfg 527

Application for compensation on the grounds of unfair dismissal—Applicant claimed that dismissal was unfair as a 12 month contract had been agreed and dismissal occurred without warning or reason—Respondent argued that attempts had been made to contact Applicant, that no dismissal had occurred and current employment was offered—Commission found on evidence that as there was no dismissal, Commission lacked jurisdiction to hear matter—Dismissed—Ms O Kidd -v- United Bakeries Pty Ltd—APPL 1147 of 1997—GREGOR C—29/12/97—Food, Beverage and Tobacco Mfg 529

Application for compensation on the grounds of unfair dismissal- Applicant claimed that dismissal was unfair as termination resulted from failure to accept a lesser salary—Respondent argued that as the Applicant resigned there was no jurisdiction—Commission found that as the Applicant was dismissed through no fault and without notice it was unfair and compensation be allowed—Granted—Mr N Ludkins -v- Biologic International Limited—APPL 547 of 1997—PARKS C—03/12/97—Food, Beverage and Tobacco Mfg 530

Application for compensation on the ground of unfair dismissal and allegedly denied contractual entitlements—Applicant claimed dismissal was unfair as there was a denial of natural justice and lack of procedural fairness and that deduction of amounts without consent was also unfair—Respondent argued that dismissal was valid as the Applicant breached obligation to work in a competent manner—Commission found that there was a denial of natural justice, a lack of procedural fairness and monies deducted without consent—termination was unfair—Granted—Mr N McGuiness -v- M.G. McKay Pty Ltd—APPL 813 of 1997—SCOTT C.—15/12/97—Accommodatn, Cafes&Restaurants 532

Application for compensation on the grounds of unfair dismissal—Applicant claimed that was dismissal unfair as the respondent had no good reason for terminating the employment relationship—Respondent argued that dismissal was due to the Applicant being abusive, not following instructions and had unsuitable behaviour toward the public—Commission found that the Respondent attempted to discuss the concerns raised but due to Applicant's attitude and was not satisfied the dismissal was unfair—Dismissed—Mr A Rodwell -v- Pippa Chrystal T/A Hidden Valley Hideaway—APPL 1078 of 1997—SCOTT C.—08/01/98—Accommodatn, Cafes&Restaurants 536

Application for compensation on the grounds of unfair dismissal—Applicant claimed that termination was unfair as inability to do job was not significant as working in other areas before dismissal—Respondent argued that as the Applicant's standards propped and more time was not warranted, termination was fair—Commission found that as complaints were not valid procedure adopted was fair—Dismissed—Mr A Segon -v- Select Cleaning Services—APPL 1643 of 1997—BEECH C—23/12/97—Business Services 537

[2]Appeal against decision of Commission (77 WAIG 1996) re compensation for unfair dismissal—Appellant argued the employment was casual, therefore it was not possible to reinstate the respondent even if there was an unfair dismissal and that the termination was not at the initiative of the employer—Appellant further argued that Commission misapplied the principles of an employee changing his/her mind after a heated argument with the employer and the whole, not part, of the Respondent's social security payments should have been deducted from the amount of compensation—Respondent argued social securities payments should not have been deducted from compensation—Full Bench found that on the evidence it was open to find that there was a straight and unequivocal summary dismissal—Full Bench further found the Commission erred in deducting the social security payments, but as their was no cross appeal there was no remedy the Full Bench could provide—Dismissed—Swan Yacht Club (Inc) -v- Ms L Bramwell—APPL 1485 of 1997—Full Bench—SHARKEY P/COLEMAN CC/SCOTT C.—Sport and Recreation 579

Application for compensation on the grounds of unfair dismissal—Applicant argued that allegations given against him were untrue and the respondent had confused the duties to be performed—Respondent argued that the Applicant was on probation and dismissed because of the inability to work to the required standards and other duties were voluntary—Commission found that the allegations were false and that endorsements on employment separation certificate were wrong and designed to paint the worst possible picture of the Applicant—Granted—Mr CJ Dehaan -v- Little Angels Day Care Centre—APPL 1494 of 1997—GREGOR C—08/01/98—Community Services 740

Application for compensation on the grounds of unfair dismissal—Applicant claimed that termination was unfair as no criticisms of work performance had been raised nor any concerns prior to termination-Respondent argued that employment was of a casual nature, that termination was within 3 month trial period and resulted from unsatisfactory work attitude-Commission found that as the employment nature was of a casual nature with weekly contracts there was no termination only an ending of a weekly contract-Dismissed—Ms A Devine -v- Sun Sai Kai—APPL 1692 of 1997—CAWLEY C.—21/01/98—Food Retailing 743

Application for reinstatement or compensation on the grounds of unfair dismissal—Applicant argued that the respondent had accused him of stealing and forced him to resign—Respondent argued that the Applicant resigned during a meeting concerned with suspicions of stealing—Commission found on evidence that the Applicant decided to resign and the resignation was not a dismissal for the purposes of the Commission's jurisdiction—Dismissed for want of jurisdiction—Mr MJ Dyer -v- Solahart Industries Pty Ltd—APPL 1524 of 1997—BEECH C—19/01/98—Metal Product Manufacturing 745

Application for compensation on the grounds of unfair dismissal—No appearance on behalf of Applicant—Respondent argued that matter should be dismissed for want of jurisdiction—Commission found Federal Award covered the field insofar as unfair dismissals were concerned, there was an inconsistency between State and Federal laws and the matter was beyond the Commission jurisdiction—Dismissed—Mr J Irimia -v- Swan Transit Services (South) Pty Ltd—APPL 1799 of 1997—FIELDING C—15/01/98—Road Transport 747

CUMULATIVE DIGEST—*continued*

Page

TERMINATION—*continued*

Application for compensation on the grounds of unfair dismissal and outstanding contractual entitlements -Applicant claimed that termination two weeks after giving notice was unfair as it resulted from reporting unsafe work practices to Worksafe-Respondent argued that termination resulted from Applicant's disruptive behaviour and attitude to work during the notice period and found that Applicant's recourse to Worksafe over safety issues was unacceptable -Commission found that Applicant's actions in contacting Worksafe were mischievous and that as attitude and performance had declined during notice period, termination was not unfair—Dismissed—Mr MW John -v- Outback Accessories—APPL 1530 of 1997—COLEMAN CC—20/01/98—Metal Product Manufacturing 748

Application for compensation on the grounds of unfair dismissal and allegedly denied contractual entitlements—Applicant claimed dismissal was unfair and sought compensation, holiday pay and loading, superannuation payments and payment in lieu of notice—Respondent argued that no contractual benefits due as the Applicant was summarily dismissed for gross misconduct—Commission found that respondent had cause to summarily dismiss the Applicant and no contractual entitlements due—Dismissed—Mr A Kittel -v- Alan J Marshall Pty Ltd—APPL 1092 of 1997—CAWLEY C.—16/01/98—Property Services 749

Application for allegedly denied contractual entitlements—Applicant claimed that an amount was deducted from the final remuneration payment without authority and unlawfully and dispute resolution clause in Work Place Agreement allowed Commission to deal with claim—Respondent argued that it was entitled to recoup payments made to training courses and the Commission lacked jurisdiction to deal with a registered Workplace Agreement—Commission found there was no jurisdiction to enquire and deal with the registered Workplace Agreement—Commission found there was no jurisdiction to enquire and deal with the registered Workplace Agreement—Dismissed for want of jurisdiction—Mr MD Morgan -v- Keyros Pty Ltd T/as Port Hedland Security—APPL 731,1835 of 1997—CAWLEY C.—24/12/97—Other Services 753

Application for unfair dismissal and allegedly denied contractual entitlements—Applicant claimed he was contractually dismissed and sought one weeks wages wrongfully deducted and pay in lieu of notice—Respondent argued that Applicant abandoned his employment—Commission found it was not necessary to determine which party terminated the contract and that one weeks notice was wrongfully deducted—Granted in Part—Mr C Pearson -v- J & R Sacca Poultry—APPL 1545 of 1997—PARKS C—01/12/97—Basic Material Wholesaling 756

Application for reinstatement or compensation on the grounds of unfair dismissal—Applicant argued he never received formal counselling or warnings and was unaware of poor performance complaints—Respondent argued that opportunities were given to improve performance sales and rectify deficiencies—Commission found that the respondent was justified in terminating Applicant and any procedural unfairness did not render the dismissal unfair—Dismissed—Mr RB Robertson -v-Kraft Foods Ltd—APPL 1494 of 1996—GEORGE C—23/01/98—Personal & Household Good W/sg 757

Application for misconduct/safety compensation on the grounds of unfair dismissal Applicant claimed that termination was unfair as it occurred despite his good record, the respondent took the opportunity presented by a positive drug test and the uncertainties of the mine manager's a "one off breach"—Respondent argued that termination resulted from employee declining all endeavours to resolve problems resulting from a positive routine drug test—Commission found that the Applicant had known about prohibition of drugs and that it was an implicit term of employment contract to be "drug free", and the claim was not made out—Dismissed—Mr SM Linn -v- Obion Pty Ltd Trustee For The Usukan Trust Trading As Personal Touch Caterers—APPL 1633 of 1997—CAWLEY C.—23/01/98—Business Services 751

Application for compensation on the grounds of unfair dismissal—Applicant claimed that termination was unfair as three warning letters had been received at one time after the date of the last warning-Respondent argued that each letter was provided soon after each warning but that copies of the first two were supplied with third warning as Applicant had lost them—Commission found that respondent had cause to terminate the employment and that it had not been demonstrated that employment was unfairly terminated—Dismissed—Mr S Ziola -v- Red Shield Industries—APPL 1818 of 1997—SCOTT C.—29/01/98—Personal & Household Good Rtlg 762

Application for reinstatement or compensation on the grounds of unfair dismissal—Applicant did not appear—Respondent applied for costs—Applicant argued non -appearance was due to a death in the family—Commission reviewed the procedural history, submissions, authorities, ss 27 & 26 of the IRAct 1979 and found it was necessary to strike a balance between discouraging an Applicant from pursuing a legitimate claim and a situation where a Respondent was put to unnecessary costs because the Applicant neither attended or advised of the inability to attend or any other associated difficulties with prosecuting the case until offered the opportunity to comment on an application for costs—Ordered accordingly—Mr N Diedrichs -v-Construction Anchoring Systems—APPL 1540 of 1997—SCOTT C.—13/02/98—Construction Trade Services 1055

Application for reinstatement or compensation on the grounds of unfair dismissal—Applicant sought matter be arbitrated following failure of Respondent to honour agreement made at a conciliation conference before the Commission—Commission issued order that Respondent file answering statement and following its non-compliance directed the Registrar to investigate—Commission found in the circumstances if it did not issue an order in the terms of the parties agreement it called into question the value of agreements reached before the Commission, certainly in s32 conferences, that it had power to issue the order and that costs were appropriate—Granted—Ms BR Macleod -v- Paulownia Trees Pty Ltd—APPL 279 of 1997—BEECH C—07/10/97—Agriculture 1057

Application for Compensation on the grounds of unfair dismissal—Respondent argued dismissal was due to unauthorised absence and if compensation was awarded it should be limited—Commission found Respondent had incorrectly applied policy relating to time recording and deducted pay from the Applicant—Commission found absence was directly caused by that deduction and to dismiss the applicant in those circumstances was harsh—Commission found reinstatement was impracticable, reviewed authorities and found that in assessing compensation the Commission's discretion did not equal the loss of earnings to the date of hearing plus an assessment of future loss and the Commission would take other factors into account—Granted—Mr PA Simons -v- Ismail Holdings Pty Ltd T/A Envelope Specialists—APPL 1363 of 1997—BEECH C—12/11/97—Wood and Paper Product Mfg 1058

Application for reinstatement on the grounds of unfair dismissal—Applicant argued that there had been no formal warnings or advice of work aspects that needed to be addressed—Respondent argued there had been concerns about the hostel involved and its management which were partly attributable to a less than positive attitude of the applicant as Supervisor in Charge and that complaints had been received against the Applicant—Commission found that a valid reason for termination could be said to exist, however the applicant was never formally warned or told of specific aspects of her work which were required to be addressed—Commission found that the Respondent had lost all confidence in the Applicant and compensation was the appropriate alternative remedy—Granted—Ms J Watkins -v- Plantagenet Village Homes Inc—APPL 288 of 1997—GEORGE C—02/02/98—Community Services 1060

Conference referred re unfair dismissal claim and claim for order that dismissed employee not be banned from Respondent's premises—Applicant Union argued worker was not given sufficient information of the material which the Respondent had, in sufficient time to respond and the decision was hasty—Applicant argued the ban was a continuation of the penalty of loss of employment and would affect the workers livelihood—Respondent argued order sought was too widely framed, there could be good reasons to refuse entry, there was no utility in the order and no power under S23A of the IR Act 1979—Commission found on evidence the possibility of a ground to justify the summary dismissal by virture of the discovery of material on the worker's property and against the unfair dismissal claim—Commission found no link between the worker's offences and his employment and that it did not seem fair that the worker lose his then present employment because of the ban, and the parties agreed the Respondent should reserve the right to refuse entry for the same reasons as any other employee—Granted in part—The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- WMC Resources Ltd—CR 405 of 1996—BEECH C—10/02/98—Metal Ore Mining 1065

CUMULATIVE DIGEST—*continued*

Page

TERMINATION—*continued*

[1]Cross appeals against decision of Full Bench (76 WAIG 4434) re unfair dismissal—Appellant argued matter to do with the employees general suitability were not relevant to the question of impracticality of reinstatement in the particular circumstances of the case—Appellant employer argued that no order for compensation should have been made as the very generous overpayment of salary adequately compensated for any loss or injury caused by the dismissal and that the order was beyond power—IAC found that proof that a position has been abolished is at least prima facie proof that reinstatement or re-employment is impractical and that it would be for the employee to displace that conclusion—IAC further found that the amount ordered did not exceed 6 months and could not be made to do so by notionally adding it to the amount of the termination pay made voluntarily by the employer and that payment did not preclude the Commission exercising its discretion to make an award of compensation for loss or injury in a case where the dismissal was unfair—Dismissed—Mr J Gilmore -v- Cecil Bros Pty Ltd & Other—IAC 23 of 1996—Industrial Appeal Court—- 25/03/98—Personal & Household Good Rtlg 1099

[2]Appeal against decision of Commission (77 WAIG 2989) re unfair dismissal claim and denied contractual entitlements—Appellant argued Commission erred in finding the employee was not constructively dismissed that it had no jurisdiction, failed to admit certain documents and sought to adduce new evidence—Appellant argued withdrawal of authority to sign cheques inhibited her employment and the conduct forced her to leave—Full Bench was not persuaded apart from financial statements that the other evidence was relevant—Full Bench found resignation followed deterioration of the relationship between the Appellant and a principal of the respondent and a breach of duty of the part of the Appellant—Full Bench further found that the withdrawal of authority to sign cheques was a proper protective measure by the Respondent, there was no dismissal and no jurisdiction to make orders—Dismissed—Ms WA Farrell -v- Harlem Enterprises Pty Ltd T/A Ace Rent A Car—APPL 1883 of 1997—Full Bench—SHARKEY P/BEECH C/SCOTT C.—11/03/98—Other Transport 1103

[2]Appeal against decision of Commission (77 WAIG 3005) re compensation for unfair dismissal—Appellant argued Commission erred in assessing compensation which resulted in a miscarriage of justice and sought orders for increased compensation or remittal—Full Bench reviewed authorities and observed that the question of loss or injury was a one of mixed law and fact and what compensation was ordered was a discretionary decision, designed to put the employee back in the situation in which s/he would have been in of not unfairly dismissed—Full Bench found Appellant had sought compensation for loss of income, it was open on the primary evidence to infer that employment would not have continued beyond a month and the discretion did not miscarry—Dismissed—Mrs J Manning -v- Huntingdale Veterinary Clinic—APPL 2193 of 1997—Full Bench—SHARKEY P/COLEMAN CC/PARKS C—18/03/98—Health Services 1107

[2]Appeal against decision of Commission (77 WAIG 3497) re contractual entitlements—Appellant argued the contract of employment denied the Respondent an entitlement to a full 40% Commission, that the contract expressly provided for a 20% commission in the circumstances and the term the Commission implied into the contract was contrary to the principles laid down in authorities—Respondent argued there had been no referral of the sale in terms of the contract of service and that the Appellant sought to exclude the Respondent from the sale to reduce commission payable—Full Bench found question was what entitled the sales person to earn a Commission as distinct from a referral fee—Full Bench found that it was open to the Commission to find that the Respondent was the effective cause of the sale and had been denied a contractual entitlement—Dismissed—Royal International (WA) -v- Mr WTJ Valli—APPL 2206 of 1997—Full Bench—SHARKEY P/CAWLEY C./PARKS C—18/03/98—Property Services 1110

Application for reinstatement or compensation on the grounds of unfair dismissal—Respondent argued the Applicant was still employed on the date the application was lodged and Regulation 89 re Service was breached—Commission gave opportunity for Applicant to present submissions and when none were received found that the application should clearly be struck out for want of jurisdiction further agent was unable to excuse the deliberate failure to comply with the regulations on the basis of acting on the clients wishes—Struck out for want of Jurisdiction—Ms VM Adams -v- Tiwest Pty Ltd—APPL 1908 of 1997—BEECH C—25/03/98—Wood and Paper Product Mfg 1391

Application for reinstatement on the grounds of unfair dismissal and allegedley denied contractual entitlements re 3 months notice and trafer of superannuation benefits—Applicant argued that the contract of employment was not a fixed term because it contained provision for termination during the probationary period and that there was therfore a dismissal—Respondent argued that the applicant was not dismissed and that employment simply ceased through the effluxion of time of an agreed probationary period—Commission found the matter of jurisdiction turned on whether there was a dismissal and the emplyment ended when the term of the contract expired—Dismissed for want of jursidiction—Mr VJ Benjamin -v- Gold Corporation—APPL 2227 of 1997—CAWLEY C.—05/03/98—Metal Ore Mining 1392

Application for reinstatement on the grounds of unfair dismissal—Applicant argued that the respondent failed to have reasonable regard for mitigating circumstances affecting the workplace at the relevant times including work load and availability of staff including to summarily dismiss the Applicant—Respondent argued that the Applicant failed to follow established procedures and breached policies and procedures and was grossly negligent justify instant summarily dismissal—Commission found there was no denial of procedural fairness and the Applicant's onus had not been discharged—Dismissed—Ms CJ D'Agostino -v- P & O Food Services Pty Ltd—APPL 1745,1882,2137,2149 of 1997—CAWLEY C.—26/02/98—Food Retailing 1393

Application for reisntatment or compensation on the grounds fo unfair dismissal—Applicant argued that the dismissal was unfair because of a prior arrangement entered into with the Respondent regarding 'casual employment' and guaranteed employment—Respondent argued that there was no such undertaking and the Applicant failed to perform the duties because of a bad attitude—Commission found that the Applicant's services were terminated by the Respondent and because of the arrangements previously entered into whereby she was assured of regular part-time work and that undertaking was not fulfilled the termination was rendered unfair—Commission further found that the Applicant had a duty to mitigate her loss and to the extent that that was not exhausted, detracted from the level of compensation which would otherwise be considered—Granted—Ms M De -Abreu -v- Renoir Patisserie—APPL 1489 of 1997—COLEMAN CC—27/02/98—Food Retailing 1395

Application for compensation on the grounds of unfair dismissal—Applicant argued summary dismissal was unfair because no consideration was given to his being assaulted and attempts to contact respondent—The Applicant also had an alcohol problem which affected his work and created problems and sought costs under Section 27(c) of the IR Act—Commission found that the Applicant had fabricated the events and the case was completely devoid of merit, Commission granted costs for airfares, accommodation and court attendance—Dismissed and cost awarded—Mr SP Erridge -v- Wesfarmers Energy—APPL 1592 of 1997—GREGOR C—10/03/98—Electricity and Gas Supply 1400

Application for reinstatement or compensation on the grounds of unfair dismissal—Applicant argued dismissal was unfair because Applicant requested proper wages be paid concerning superannuation and was summarily dismissed during a two week notice period—No appearance by respondent—Commission reviewed procedures, was satisfied service was made and that the Respondent did not exhibit a desire to put it's case—Commission found that dismissal was unfair and taking into account the length of employment as well as the length of employment granted compensation as reinstatement was not viable—Granted—Mr R Farrell -v- Bilbo Pty Ltd—APPL 791 of 1997—GREGOR C—10/03/98—Road Transport 1403

Application for allegedly denied contractual entitlements—Applicant claimed balance of wages, annual leave, superannuation and vehicle reimbursements were due—Respondent argued that no employee-employer contract of service existed and if it did there were no entitlements due—Commission found that the Applicant was an employee and the Applicant breached the contract by failing to give due notice of termination which gave right to the Respondent to withhold equivalent wages—Mr CI Firns -v- Braeside Enterprises Pty Ltd T/A Mt Gibson Emu Farm—APPL 1112 of 1997—CAWLEY C.—09/03/98—Agriculture 1404

CUMULATIVE DIGEST—*continued*

Page

TERMINATION—*continued*

Application for reinstatement or compensation on the grounds of unfair dismissal—Applicant argued that the dismissal was unfair because she was ill and that she had a very good employment history—Respondent argued the Applicant did not fit in was on probation and proper notice for a casual employee under the award was given and this is correct but reward—Commission found there had been no unfairness—Dismissed to the extent that warranted intervention—Ms VR Glover -v- Muntyls—APPL 1488 of 1997—GREGOR C—17/03/98—Accommodatn, Cafes&Restaurants 1408

Application for compensation on the grounds of unfair dismissal—Applicant argued that dismissal was unfair because no formal warning of dissatisfaction with performance was given—Respondent argued that alternatives were offered the Applicant accepted demotion and then latter resigned—Commission found that the Applicant's removal from his original position constituted a dismissal and no adequate warning was given—Granted—Mr DJ Grace -v- David Evans Real Estate—APPL 1911 of 1997—BEECH C—26/02/98—Property Services 1410

Application for compensation on the ground of unfair dismissal and allegedly denied contractual entitlements—Applicant argued that dismissal was unfair because no warning regarding his work performance or attitude given—Respondent argued that the Applicant was summarily dismissed for misconduct, his rude, disrespectful attitude and was not entitled to benefits claimed—Commission found the respondent had not established gross misconduct and the dismissal was without warning or notice—Granted—Mr RJ Harvey -v- Koast Corporation—APPL 1924 of 1997—CAWLEY C.—05/02/98—Road Transport .. 1413

Application for compensation on the grounds of unfair dismissal—Applicant argued that dismissal was unfair because he was informed he was permanent and the position was later offered to someone else—Respondent argued the Applicant was informed and award the position was to be advertised each season and contract of service to come to an end. Respondent further argued that the Application was out of time—Commission found that the application was filed outside the time limit of 28 days for the right of access to the Commission—Dismissed for want of jurisdiction—Mr G Johnson -v- Malembo Pty Ltd T/A Aquilla Carting Company—APPL 1745,1882,2137,2149 of 1997—CAWLEY C.—26/02/98—Commercial Fishing.. 1414

Application for compensation on the grounds of unfair dismissal and allegedly denied contractual entitlements Applicants argued that dismissal was unfair because termination came without warning and the sale of the business was a sham and a device to dismiss the Applicants—Respondent argued, Applicants were employees and were given an opportunity to purchase the business and entitlements of one employee were withheld because of refusal to sign a tax declaration form—Commission found the sale of the business was genuine and payment made was not so ungenerous to make the dismissal unfair—Commission found there was no reason to treat one differently to the others—Dismissed-Dismissed-Granted-Dismissed—Mrs YJ Liang -v- Great Evermore Pty Ltd T/A Sun Sai Kai—APPL 1392,1393,1394,1395 of 1997—FIELDING C—06/03/98—Accommodatn, Cafes&Restaurants 1416

Application for compensation on the grounds of unfair dismissal—Applicant argued respondent assured reengagement on return from leave on the same basis—Respondent argued that Applicant was employed on a casual basis and no offer guaranteed on return—Commission found the Applicant was employed on a casual basis on a service of weekly contracts and there was a offer and acceptance of employment on return—Granted—Miss J Marris -v- Swan (WA) Pty Ltd T/A La Pagnotta Italian Bakery—APPL 1671 of 1997;C 376 of 1997—CAWLEY C.—06/03/97—Food, Beverage and Tobacco Mfg 1419

Application for reinstatement or compensation on the grounds of unfair dismissal—Applicant argued dismissal as unfair because his work performance was satisfactory and it was wrong for the Applicant to be selected for redundancy, further the Applicant argued that he was on workers compensation—Respondent argued that for financial reasons and unsatisfactory work performance the Applicant was made redundant—Commission found that dismissal was unfair because employees work performance did not justify his selection for redundancy—Granted—Mr MG Pacey -v- Modular Masonry—APPL 1468 of 1997—BEECH C—13/02/98—General Construction 1421

Application for reinstatement or compensation on the grounds of unfair dismissal and allegedly denied contractual entitlements—Applicant sought to amend named respondents in application—Respondent argued that the Respondent had not been the employer and that what the applicant sought was to redirect the application and thereby commence the action against entirely different parties—Commission found that it was not open to it to strike out the cited respondent and cite in its place a different legal persona—Dismissed—Mr H Posch -v- De Campo Bakery Holdings Pty Ltd—APPL 1789 of 1997—PARKS C—26/02/98—Food, Beverage and Tobacco Mfg 1423

Application for compensation on the grounds of unfair dismissal—Applicant argued that dismissal was unfair as the respondent director was allowed a personal matter to interfere and denies his work performance was lacking—Respondent argued that repeated warnings, about poor performance and failures to adhere to policy and time keeping standards were given—Commission found that warning were raised and the contract was terminated lawfully—Dismissed—Mr F Silas -v- Red Hot Design—APPL 1546 of 1997—CAWLEY C.—04/02/98—Personal & Household Good Rtlg 1424

Application for reinstatement or compensation on the grounds of unfair dismissal—Commission found that fairness required the applicant be told that unless she found a way to work with another employee her employment would be in jeopardy, that reinstatement was not practical and that fairness required 4 weeks compensation—Granted—Ms E Simpson -v- David Cowley Real Estate T/A Ray White—South Perth—APPL 1836 of 1997—BEECH C—Property Services 1425

Conference Referred re unfair dismissal claim—Applicant union argued laws of the State in relation to Redundancy applied—Respondent employer argued that discussions held during a first dismissal sufficed in terms of the Minimum Conditions of Employment Act on the second occasion—Commission found that the redundancy was valid however the manner in which the dismissal was effected was less than fair—Commission further found that the assessment of loss or injury was not restricted to lost wages and the TCR case provided a good guide—Granted—LIQUOR, HOSPITALITY & MISC -v- Congregation Of Vietnamese Buddhists In WA T/A Landsdale Multicultural Childcare—CR 329 of 1997—BEECH C—25/03/98—Community Services 1433

Interlocutory application to set aside summons to witness to person residing overseas—Witness argued Commission had no power to issue summons out of jurisdiction and the summons was a nullity—Commission found it did not have jurisdiction beyond the Western Australian border and the summons had no force or effect—Reasons only—Mr V Tranchita -v- Wavemaster International Pty Ltd—APPL 1117 of 1997—FIELDING C—12/03/98—Machinery & Equipment Mfg 1436

Appeal decision to terminate Public sector employee for shooting at students with pellets—Appellant argued that the students voiced no objections, that he was unaware of the concept of duty of care, the dismissal was procedurally unfair and denied attempting to influence a witness to an investigation—PSAB found that the absence of general instruction on the duty of care did not provide a complete excuse for the Appellants conduct—PSAB found Appellant's actions went to the very heart of the contract of service and was unable to accept that the dismissal was harsh unfair or unjust—Dismissed—Mr J Ramos -v- Education Department of Western Australia—PSAB 9 of 1997—Public Service Appeal Board—BEECH C—17/03/98—Education 1438

Application re unfair dismissal and allegedly denied contractual entitlements-Applicant did not seek compensation for claim of unfair dismissal-Respondent failed to appear-Commission found that although the Applicant's evidence was the only evidence presented the Applicant was a most truthful person under oath-Commission further found that the claim for allegedly denied contractual entitlements fell under three headings-Granted —Mr MJ Carberry -v- TDK Carting Contractors—APPL 2366 of 1997—BEECH C—Road Transport 1892

CUMULATIVE DIGEST—*continued*

Page

TERMINATION—*continued*

Application for compensation on the grounds of unfair dismissal-Applicant denied alleged theft-Respondent argued that reinstatement was impracticable and employment was casual-Commission stated that an employer was not required to prove beyond a reasonable doubt that an employee was guilty of stealing from the employer to dismiss on that ground and do so fairly: It was enough that the employer had reasonable cause to believe that the employee stole -Commission found that the Respondent employer failed to undertake an adequate investigation and did not have reasonable cause to dismiss the Applicant-Commission also found in assessing loss that although designated 'casual' the applicant clearly had an ongoing employment relationship-Granted—Ms LM Cockram -v- Kays Bag Stores (NSW) Pty Limited—APPL 1783 of 1996—PARKS C—09/05/98 —Personal & Household Good Rtlg 1894

Application for compensation on the grounds of unfair dismissal-Applicant argued that none of the events which contributed to the decision to dismiss him were raised by the Respondent prior to the termination-Respondent argued that the Applicant had a tendency to be abusive and aggressive towards clients and suppliers and used his position in a way that was damaging to the Respondent's business-Commission found that it must consider whether, in effecting the termination, the employer had provided the employee with natural justice and in all the circumstances the dismissal was not unfair-Dismissed—Mr RAJ Cousins -v- Cannon Investments Pty T/A Travelshop—APPL 2155 of 1997— SCOTT C.—Air & Space Transport 1896

Application for compensation on the grounds of unfair dismissal- Respondent argued applicant was unreasonable and unco-operative during a rehabilitation programme following an accident at work and refused to obey a lawful instruction—Commission was satisfied that the Respondent had made serious efforts to assist the Applicant's rehabilitation—Commission noted that the Applicant's employment was terminated summarily for misconduct for wilful disobedience of reasonable and lawful instruction when given a warning that such action would result in dismissal.—Commission found such conduct warranted summary dismissal as it went the heart of the contract between the parties—Dismissed—Mr JD Cusato -v- Atlas Group Pty Ltd—APPL 1824 of 1997—SCOTT C.—17/05/98— General Construction 1898

Application for compensation on the grounds of unfair dismissal—Applicant argued that the reason for her dismissal told to her at the time was different from the reasons subsequently given in her letter of termination— Respondent argued that the Applicant had been given several verbal and written warnings that her work performance was poor and her job was in jeopardy—Commission did not find the Applicant's evidence entirely persuasive and that the grounds for claiming unfairness had not been made out— Commission further found that costs are not usually awarded in this jurisdiction and should only be awarded in an extreme case which this was not—Dismissed—Ms MT De Gois -v- Aardent Dental Centre (Juliann Management Pty Ltd)— APPL 2243 of 1997—BEECH C—Health Services 1902

Application for allegedly denied contractual entitlements -Further reasons for decision re redundancy payment upon Applicant's resignation-Applicant argued that he resigned in the belief that the 'Redeployment, Retraining and Redundancy General Order' applied to his situation -Respondent argued it valued Applicant's services and wished to retain him-Commission found that the Applicant had no formal written employment contract and any offer of severance pay to previous employees working under the relevant Award had been initiated by the Respondent -Commission further found that it was not in the public interest to require the Respondent to present its case in light of its findings-Dismissed—Mr P Fielding -v- Western Power Corporation—APPL 105 of 1997—BEECH C— Electricity and Gas Supply 1906

Application for compensation on the grounds of unfair dismissal-Applicant argued that the downsizing of the Respondent business was an excuse to terminate the Applicant's employment as other employees were brought in to complete work the Applicant had started-Respondent argued that the Applicant's competence to complete the work was in dispute-Commission found that at least part of the Respondent's reasons for selecting the Applicant for termination were associated with his views of the Applicant on a personal level-Granted—Mr DJ Maher -v- Francis Robert Ridgwell T/A The Cork Expert—APPL 1846 of 1997— SCOTT C.—Personal & Household Good Rtlg 1811 —Mr A Poli -v- Eagle Mining Corporation NL—APPL 2076,2077 of 1997—SCOTT C.—Other Mining 1914

Application for reinstatement or compensation on the grounds of unfair dismissal-Applicant argued he was never advised that his employment would terminate once his employer began full-time work in the business-Applicant further argued that the Respondent could have organised his business in a way that could have maintained the Applicant as an employee-Respondent argued that his business was experiencing financial difficulties and he had acted in the best interests of the business-Commission found that the Applicant had not discharged the onus placed upon him to demonstrate that there should have been a different way of staffing the business which would have included retaining him-Dismissed—Mr JH Tannahill -v-Gwydion Nominees T/A Greenwood Video—APPL 2263 of 1997—SCOTT C.—Personal Services 1916

Application for compensation on the grounds of unfair dismissal-Applicant argued that she had been constructively dismissed by requesting a reference for a job application which was assumed by the Respondent to be an indication of the Applicant seeking to leave her present employment -Respondent argued that they had been aware of the need for sustainable grounds for termination-Commission found that there was nothing in the evidence which would suggest that the Respondent tried to contrive a dismissal from the Applicant-Commission further found the application incompetent because it was out of time-Dismissed—Ms JSE Yeap -v- Chunagon Co Ltd T/A Chunagon Japanese Restaurant— APPL 808 of 1997—GREGOR C—Accommodatn, Cafes&Restaurants 1917

Application for compensation on the grounds of unfair dismissal-Applicants claimed they were victims of a conspiracy and were falsely accused of theft-Respondent claimed good reason for the dismissal based primarily on closed circuit television surveillance of the Applicants' alleged misappropriation of funds--Commission found Respondent had good reason to suspect that the Applicants were involved in dishonest conduct and in such circumstances it is unrealistic to retain them in its employment-Dismissed—Mr H Morley -v- Burswood Resort Casino—APPL 356,357 of 1997—FIELDING C—Sport and Recreation 2441

Application for compensation on the grounds of unfair dismissal-Applicant failed to appear-Dismissed for want of prosecution—Ms NS Arps -v- Oswald Merrett Holdings Pty Ltd—Vodafone—APPL 2306,2375 of 1997—CAWLEY C.— Personal & Household Good Rtlg 2443

Application for compensation on the grounds of unfair dismissal-Applicant argued he was told his services had been terminated as a cost cutting measure within the Respondent's activities and at no time was given the opportunity to discuss the decision-Respondent argued Applicant was constantly kept aware of office's deteriorating financial position-Commission found it must apply the provisions of the Act in a way which was consistent with commonsense and considerate of the practical realities of the situation-Dismissed—Mr R Bogunovich -v- Bayside Western Australia Pty Ltd—APPL 1125 of 1997—GREGOR C—Construction Trade Services 2444

Application for compensation on grounds of unfair dismissal remitted from Full Bench re relief-Applicant argued that his efforts at mitigating loss following dismissal from employment and loss of a remuneration package required granting of greater relief-Respondent argued Applicant's submission of a false document to Commission should reflect on compensation paid-Commission found that the behaviour of the Applicant in position of a senior manager in charge of a significant budget did not suggest good prospects for continuing employment with the Respondent and compensation should reflect this fact-Dismissed—Mr JA Capewell -v- Cadbury Schweppes Pty Ltd—APPL 29 of 1996—CAWLEY C.— Food, Beverage and Tobacco Mfg 2448

CUMULATIVE DIGEST—*continued*

Page

TERMINATION—*continued*

Application re alleged unfair dismissal—Applicant argued there had been no warnings nor an opportunity to improve his performance, that another two sales representatives, whose sales performances were also below the standard required, were only warned and that he was not aware that his termination was being contemplated—Respondent argued a term of the Applicant's employment was an understanding that if he failed to make the sales target in three successive months, his employment status could be reviewed and that he had, over a five month period consistently failed to meet the monthly sales budget—Commission found the term of the contract of employment did not say that a sales representative would be dismissed for failing to reach the sales targets but that the employment would be "reviewed"—Commission reinstatement impractical and even though the applicant had not lost income it did not mean he had not suffered loss or injury—Granted—Mr GP Collier -v- Police & Nurses Real Estate—APPL 2216 of 1997—BEECH C—20/05/98—Property Services..... 2449

Application for reinstatement or compensation on the grounds of unfair dismissal—Applicant argued that the dismissal was unfair because the reason for the dismissal was threatened legal action by a former customer of the Respondent regarding the Applicant attempting to return a pen he had found in a motor vehicle in the course of his duties—Commission found that the real reason was that the Applicant was given a written warning to stop writing to or contacting the former customer or an employee of another business and the conduct continued—Commission found it was not in the public interest for the application to go beyond the conference stage—Dismissed—Mr M Cooper -v- FMC Wholesale—APPL 520 of 1998—BEECH C—27/05/98— Personal & Household Good W/sg 2451

Application re alleged unfair dismissal—Applicant claimed that he was forced to sign a resignation as the Respondent threatened to action a police report against him— Respondent argued the Applicant was asked to sign a resignation because if he was dismissed he might not get a security licence again and would not be able to work in the industry again—Commission found that the conduct of Applicant went to the root of his contract of employment, that the Respondent was entitled to dismiss the Applicant summarily and the lack of procedural fairness did not outweigh the factors against the Applicant—Dismissed not outweigh the factors which weigh in the balance against the Applicant—Dismissed—Mr SM Deering -v- Secureforce International Pty Ltd—APPL 1879 of 1997—GREGOR C— 29/05/98—Business Services..... 2452

Application for compensation on the grounds of unfair dismissal—Applicant argued he only took up the security guard position after the respondent dismissed him from—Mr AR Dobbin -v- Chubb Security Australia Pty Ltd—APPL 2113 of 1997—CAWLEY C.—23/04/98—Business Services 2455

Application for compensation on the grounds of unfair dismissal and allegedly denied contractual entitlements— Parties agreed that a consent order should issue—Granted in part—Mr GA Hopkins -v- Wingstar Holdings Pty Ltd— APPL 2306,2375 of 1997—CAWLEY C.—07/04/97—Various..... 2459

Application for reinstatement or compensation on the grounds of unfair dismissal and allegedly denied contractual entitlements—Application not served for 5 months after filing—Commission found reasons for delay inadequate and Respondent disadvantaged—Dismissed—Mr SP Hodder -v- Marshal Hedlam—APPL 2047 of 1997—CAWLEY C.— 22/05/98—Various 2459

Application for compensation on the grounds of unfair dismissal-Applicant argued that the stress caused by the termination was evidence of the impracticability of re -employment or reinstatement-Respondent argued the Applicant had been made aware of her breach of company policy and performance failures-Respondent also argued Applicant had been given the opportunity to resign to make other employment easier to gain-Commission found that although the Applicant's prospects for continuing employment were limited the dismissal was harsh or oppressive and assessed compensation accordingly-Granted— Ms J Jones -v- Naturel Skin Care Pty Ltd—APPL 1052 of 1995—COLEMAN CC—Personal & Household Good Rtlg..... 2460

Application for allegedly denied contractual entitlements re redundancy package and pay in lieu of notice—Applicant argued that the payments received were inadequate— Respondent argued matter should be dismissed pursuant to the powers in s27 of the IRAct 1979—Commission found that the negotiation of the terms to bring a contract to an end was not reviewable under s29 of the IR Act 1979 because the section applied to extant contractual benefits or the terms that could be implied into an extant contract—Commission found that the period of notice was discoverable, the Applicant had been paid in accordance with it and the application was misconceived—Dismissed—Mr NB Pickersgill -v- Charlie Carters Pty Ltd—APPL 1276 of 1997 —GREGOR C—19/05/98—Food Retailing 2462

Application for compensation on the grounds of unfair dismissal-Applicant argued that his dismissal was a result of a conspiracy arising from repeated requests to drive a smoke-free truck and a flawed investigation-Respondent argued it was obligated under its contracts to work in a safe way and Applicant had failed to abide by safety procedures or alter behaviour-Commission found the actions taken by Respondent indicated an employer with a thorough and well managed approach to the administration of its safety policies-Dismissed—Mr S Stekic -v- AWP Contractors Pty Ltd—APPL 2446 of 1997—GREGOR C—Road Transport 2465

Application for compensation on the grounds of unfair dismissal-Applicant argued she had received no verbal warning or sighted any written warnings indicating failure to meet expected performance levels-Respondent argued Applicant had been given two warnings and was dismissed on the occasion of a third warning-Commission found Applicant did commit errors, was warned and finally dismissed -Dismissed—Ms SM Tsekos -v- Jurien Bay Pty Ltd T/A Jarrahdale Heating and Cooling—APPL 2037 of 1997—BEECH C—Personal & Household Good Rtlg 2468

Application re unfair dismissal and allegedly denied contractual entitlements-Applicant argued that on balance of appropriate criteria he was an employee of the Respondent-Respondent argued that the conduct of the parties all the way through the arrangement was consistent with Applicant as sub-contractor-Commission reviewed authorities and found that the conduct of the parties in some ways supported the view of Applicant as sub-contractor -Commission further found that where the conduct did not support the finding it is not sufficient to undermine the totality of the relationship-Dismissed—Mr R Valentin -v- Quadrant Holdings Pty Ltd & Others—APPL 2389 of 1997— SCOTT C.—Services to Mining 2469

Application re alleged unfair dismissal and denied contractual entitlements-Applicant argued the respondent did not give notice as to the Applicant's dismissal and owed wages for hours worked-Respondent had known of state of business-Respondent further argued that Applicant did not work the hours claimed and was not promised wages claimed-Commission found implied into contract term of one week notice-Granted in part—Mr Fernihough -v- Bluestream Holdings Pty Ltd T/F Zappacosta Family Trust T/A Bluestream Landscaping—APPL 1904 of 1997—GREGOR C— Business Services..... 2475

Application for relief on the grounds of unfair dismissal and allegedly denied contractual entitlements re wages, superannuation,living expenses and annual leave—Respondent argued that the abuse of other employees and the use of obscene language by one Applicant constituted gross misconduct incompatible with the faithful performance of his obligations under the contract of employment and that the acceptance of the resignation did not condone the conduct—Respondent argued there was a difference between annual leave under the contract and paid time off— Commission found on evidence that the Respondent was entirely justified in concluding that the Applicants had resigned, it was not unreasonable that the respondent did not continue with the dismissals forthwith and the conduct of both Applicants justified summary dismissal—Commission discovered no terms of contract which gave rise to the benefits claimed—Dismissed—Mrs VG Walker -v- Baracus Pty Ltd T/A Hannan's View Motel—APPL 2103,2104 of 1997— GREGOR C—29/05/98—Accommodatn, Cafes&Restaurants..... 2477

CUMULATIVE DIGEST—*continued*

Page

TRANSFER

[4]Application for stay of operation of decision of Commission re transfer of employees pending appeal to Full Bench—Applicant argued it was prepared to pay the difference in wages as if the employees were working shiftwork into a trust account pending the outcome of the appeal—Applicant further argued that it suffered due to current rosters and monies would not be recoverable if the appeal was successful—Respondent argued that there was shift work available for the employees and emphasised the provisions of the relevant award—President found that that the interests of the employees should not be subordinated to that of the Applicant and the balance of convenience did not lie with the applicant—Dismissed— Hamersley Iron Pty Limited -v- CONSTRUCTION, MINING, ENERGY —APPL 698 of 1998—President—SHARKEY P—Metal Ore Mining 2358

Application for compensation on the grounds of unfair dismissal—Applicant argued he only took up the security guard position after the respondent dismissed him from—Mr AR Dobbin -v- Chubb Security Australia Pty Ltd—APPL 2113 of 1997—CAWLEY C.—23/04/98—Business Services 2455

Conference referred re transfer of shift-work employees to day work-Applicant argued that proposed transfer would deprive applicant union's members of use of mainline trains, reduce member's earnings and discriminate against members by reason of their refusal to sign workplace agreements and sought order-Respondent argued a right under the Award to transfer employees without Commission interference unless the duties to be executed are onerous, safe or unfair-Commission found the decision to transfer was effected arbitrarily and unfairly and Commission should intervene to rescind that decision-Granted—CONSTRUCTION, MINING, ENERGY -v- Hamersley Iron Pty Ltd—CR 370 of 1997 —CAWLEY C.—Metal Ore Mining 2484

Conference referred re transfer of employee—Claimant Union argued the transfer of the employee was unfair harsh, unwarranted and sought reinstatement to his former position with extended tenure—Claimant Union argued that the transfer interrupted the employees career path and was not supportable on the grounds specified by the Respondent— Respondent argued it needed to solve management problems and that the transfer was not for disciplinary reasons— Commission found that although the matter could have been better managed there were insufficient grounds to intervene in the Respondent's legal right to deploy its staff in accordance with its needs—Dismissed—Western Australian Police Union of Workers -v- Hon Minister for Police—CR 53 of 1997—GEORGE C—02/02/98—Government Administration 2488

UNFAIR DISCREPANCY

Conference referred re transfer of shift-work employees to day work-Applicant argued that proposed transfer would deprive applicant union's members of use of mainline trains, reduce member's earnings and discriminate against members by reason of their refusal to sign workplace agreements and sought order-Respondent argued a right under the Award to transfer employees without Commission interference unless the duties to be executed are onerous, safe or unfair-Commission found the decision to transfer was effected arbitrarily and unfairly and Commission should intervene to rescind that decision-Granted—CONSTRUCTION, MINING, ENERGY -v- Hamersley Iron Pty Ltd—CR 370 of 1997 —CAWLEY C.—Metal Ore Mining 2484

UNIONS

[1]Appeal against decision of Full Bench (76 WAIG 4875) re application for enforcement of orders of the Commission -Appellant argued that Full Bench erred on refusing to: admit evidence, grant an adjournment, allow amendment of particulars, which put the Appellant in a position of being unable to adduce relevant evidence and in the subsequent dismissal of the applications-IAC found that the Full Bench refusal to amend the particulars brought about an injustice to the Appellant and prevented the Appellant from having its case fairly tried-IAC found that the Full Bench failed to give weight to the absence of any prejudice to the Respondent in the event of the proposed amendments being allowed and that in the circumstances the Respondents would have had ample time in which to answer the new allegations which related to the actions of their own officials- IAC found the observance of orders of the Commission was a matter in which the community as a whole had an interest, that the discretion of the Full Bench miscarried and disclosed an error at law which led to the dismissal of the applications—Upheld and Remitted—REGISTRAR -v- CONSTRUCTION, MINING, ENERGY—IAC 20 & 21 of 1996—Industrial Appeal Court—- 14/11/97—Other Services 289

Application for registration of new organisation-Applicant unions claimed that registration of new organisation known as "The Media, Entertainment and Art Alliance of Western Australia (Union of Employees)" be allowed and to also include 5 rule amendments be made to satisfy objection made by CSA -Full Bench found that application be initially adjourned to enable applicant organisation to make further submissions regarding union rules and further found that as all requirements had been complied with, new organisation be registered-Ordered and Declared Accordingly—Actors Equity of Western Australia (Union of Employees) & Others -v- (Not applicable)—APPL 1304 of 1997—Full Bench—SHARKEY P/GREGOR C/BEECH C—13/11/97—Unions 313

[4]Application for orders re alleged breaches of organisations rules- Applicant argued that the Respondent's Emergency Committee, Union President and Disputes Resolutions Committee acted ultra vires, with mala fides and bias and denied the Applicant natural justice when dealing with requests for legal assistance from herself and another member of the union and a complaint that the applicant had obstructed a committee of the Union -Applicant alleged Disputes Resolution Committee acted on instructions of the Union President as the applicant was a political opponent-Respondent denied allegations-President in various reasons for decision issued orders and gave reasons therefor over procedural and preliminary matters including: allegations of conflict of interest of appearing and instructing solicitors and agents, the named respondents and applicants to the application, witnesses, waiver of object on the grounds of bias, amendment of particulars and service of application-President found on evidence the Emergency Committee did not act improperly, unreasonably, ultra vires or without bona fides in allocating the funds for legal assistance, nor did it misuse or misappropriate any funds in so doing—President found no evidence that the suspension of the Dispute Resolution Committee related to the Applicant and that the Union President failed to ensure that the rules were performed or complied with or that he acted to cause or procure non-compliance with them-President found that it had not been established that a power given to a person or persons by the rules was exercised without good faith and for a purpose which the power was not given-President found it was not established that equity, good conscience and substantial merits of the case lay with the applicant- Dismissed—Ms R Bannon & Other -v- The State School Teachers Union of W.A. (Incorporated) & Others—APPL 1823 of 1996—President—SHARKEY P—22/01/97—Other Services 320

[2]Appeal against decision of Industrial Magistrate re Breach of award—Parties submitted that Industrial Magistrates actions constituted a decision—Full Bench found that at the time the Notice of Appeal was lodged there was no decision against which to appeal within the meaning of s84 of the Industrial Relations Act 1979, and that the appeal and the applications to extend time were incompetent—Dismissed—G Parri & M Parri T/A G & M Parri -v- The Western Australian Builders' Labourers, Painters & Plasterers Union of Workers—APPL 2041 of 1997—Full Bench—SHARKEY P/PARKS C/SCOTT C.—General Construction 586

[2]Application to alter Organisation rules re eligibility for membership to include union employees—Applicant Union argued s55 (2)(b) of the IR ACt 1979 was substantially complied with—Applicant Union further argued only 6 employees did not have a teaching qualification and it was not a distinguishing factor, there was a community of interest in the members and other organisations had similar provisions—Objector argued there would be a conflict of interest, there was an inequity in pay scales between employees and the members and employees would have an advantage at election times—Full Bench found that there was a mandatory requirement to publish a notice of the alteration sought not met and refrained from hearing the matter giving liberty to apply—Full Bench subsequently found that the procedural requirements of the IRAct had been met and there was no overlapping of membership—Majority of Full Bench found that the members felt confident that members felt confident that their interests would not be undermined, that the objections were more academic than real or held little merit—Granted and ordered accordingly—The State School Teachers Union of W.A. (Incorporated) -v- (Not applicable)—APPL 680 of 1997—Full Bench—SHARKEY P/FIELDING C/PARKS C—21/10/97—Other Services 1123

CUMULATIVE DIGEST—*continued*

Page

UNIONS—*continued*

[4]Application for orders re alleged breach of Organisation rules—Applicant argued that flaws in an appointment process for organiser positions breached rules and sought interim order and orders prohibiting the Respondent Union from making the appointments and for the positions to be readvertised—Respondent argued there was a quorum at the relevant committee meeting—President found no substantial case to be tried and there would be a detrimental effect on the persons appointed and the Respondent if interim orders were issued—President found an omission subsequently remedied when discovered even after the application was filed was sufficient to find that the Respondent's President and Executive did not fail to ensure that the rules were complied with and the Respondent's President was entitled to decide to write letters to successful applicants—President made procedural direction and orders and gave reasons therefor Witness expenses and appearances—Ordered accordingly and Dismissed—Ms RGA Jeakings -v- The State School Teachers Union of W.A. (Incorporated)—APPL 2111 of 1997—President—SHARKEY P—26/03/98—Other Services 1131

[4]Application for orders re alleged breach of organisation rules—Applicants argued that facsimiles sent out by the Respondents constituted unauthorised use of resources for the production and distribution of election material and failure of the Union President to ensure the rules were observed—Respondent argued Applicants' agent should not appear as he was not a registered agent and sought direction—President reviewed s112 of the IRAct 1979 and found that carrying on a business was not restricted to a commercial enterprise, but a person or body engaged in the activity of an industrial agent and dismissed oral application—President gave leave for counsel to appear for the Respondents and gave reasons therefore—President reviewed rules and found on evidence that the documents were not electoral material, the Union President could notify election results as CEO and no established breach of rules—Dismissed—Ms RGA Jeakings -v- The State School Teachers Union of W.A. (Incorporated)—APPL 2239,2241 of 1997—President—SHARKEY P—03/02/98—Other Services..... 1136

[2]Appeals against decision of Industrial Magistrates re enforcement of IR Act 1979 remitted from Industrial Appeal Court (77WAIG1073)re costs at first instance-Appellant argued the amount might be set by reference to the Cost Scales 1991 under the Offical Prosecutions (Defendants Costs) Act 1993 and the information used for assessment was vague and insufficent—Respondent argued the Industrial Magistrates' jurisdiction was not a summary jurisdiction, nor was it a matter of Defendant's costs—Full Bench reveiwed authorities and found it was impractical and undesriable to give precise reasons for fixing costs and inappropriate to fix a Bill of Costs—Full Bench found the amounts fixed were just and reasonable and there was no apparent misuse of the discretion to warrant interference—Full Bench further found Appeals were not frivolous or vexatious or warranted an order for costs on appeal—Dismissed—Mr J Cain -v- Mr AG Shuttleton—DOPLR—APPL 1246,1247 of 1995—Full Bench—SHARKEY P/GREGOR C/BEECH C—09/04/98—General Construction 1575

[2]Application for order pursuant to s72A re exclusive union coverage of one employer—Applicant Union argued the Commission had the power to make certian orders and sought orders for secret ballots—AWU, Employer and AMMA argued interalia the application ignored the separate membership requirements of each of the employee organisations concerned the employee prefernce should be weighed up and there was already eveidence of union numbers—Majoritu of Full Bench found it had not express powers to issue orders sought and it would go beyond the Commission merely informing itself—Majority Full Bench further found little relevance in balloting non-membersand was not peruade the equity good consoius and substantial merit lay with the applicant—Applicant sought to withdraw application and Employer sought costs—Full bench reviewed IRAct 1979 and found the emploery was not a party to t he applciation, there was no prescription enabling an award of costs to a person given leave to be heard under s72A and the rule generalia specialibus derogant did not apply—Full bench further found under the circumstances the employer could not critisise the applicant for a delay in reaching a decision to discontinue notify it and neither the employers or the Applcaits claims were an extreme case even if they were competent—Dismissed—CONSTRUCTION, MINING, ENERGY -v- (Not applicable)—APPL 1401 of 1997—Full Bench—SHARKEY P/GREGOR C/BEECH C—24/10/97—Other Mining 1581

[4]Application for orders re breach of union rules concerning referendum and expenditure on legal costs—Applicant argued that a referendum was not conducted in accordance with the procedures in mandatory rules—President found that for each complaint there was not a breach or it was not said to hinder or affect the full and free recording of results or been likely to effect a different result— President found some accounts in excess of the stipulated limit and directed that they be put to the general committee of the organisation to decide upon in accordance with the rules—Granted in part—Mr AP Shaw -v- The West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers—APPL 333 of 1998—President—SHARKEY P—12/05/98—Other Services 2360

[4]Application for orders that Organisation Rule be dispensed with re quorum required in executive meetings be dispensed with—Application unopposed—President found that it was in the interests of the Applicant, the Respondent Organisation and its members, and the equity good conscience and substantial merits of the case required the the order issue—Granted—Mr PW Veenstra -v- The West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers—APPL 818 of 1998—President— SHARKEY P—25/05/98—Other Services..... 2365

[4]Application to disallow Organisation Rule re political donations on the grounds that the rule was inconsistent with the IRACt 1979—Applicant argued that s97P and Part VIC served a legitimate end compatible with the notion of representative government and democratic process, and it was not probable that the implied right of equality operated at State level—Applicant argued organisations should be accountable to their members who should have a say in the use to which their political donations and levies were put—Applicant argued Organisations were the only organisations representing employees and their political expenditure should be regulated—Respondent Organisation argued that the statutory provisions were contrary or inconsistent with rights guaranteed by the Australian Constitution and to that extent were invalid or inoperative—Respondent argued the Act discriminated against Trade Unions by creating oppressive administrative barriers for the expenditure of monies on political matters —President reviewed the Respondent's rules, authorities , the implied rights of "equality" and "freedom of communication" under the Australian Constitution' and applied the test in Lange v Australian Broadcasting Commission (1997) (145 ALR 96)—President found that the rule enabled what was forbidden by s97P(4): the crediting of monies from members subscriptions to a political fund— President found that the provisions burdened the freedom to communicate, did more than regulate political donations and that ss97O and 97P(4), interalia, were invalid—President found it was not established that the rule was contrary or inconsistent with any Act, law, award, interalia, that was contrary to s66(2)(a)(iii) and that there was no jurisdiction or power to disallow it—Dismissed— REGISTRAR -v- COMM, ELECTRIC, ELECT, ENERGY—APPL 2194 of 1997—President—SHARKEY P—29/05/98—Other Services 2366

VICTIMISATION

2Appeals against decision of Industrial Magistrates re enforcement of IR Act 1979 remitted from Industrial Appeal Court (77WAIG1073)re costs at first instance-Appellant argued the amount might be set by reference to the Cost Scales 1991 under the Offical Prosecutions (Defendants Costs) Act 1993 and the information used for assessment was vague and insufficent—Respondent argued the Industrial Magistrates' jurisdiction was not a summary jurisdiction, nor was it a matter of Defendant's costs—Full Bench reveiwed authorities and found it was impractical and undesriable to give precise reasons for fixing costs and inappropriate to fix a Bill of Costs—Full Bench found the amounts fixed were just and reasonable and there was no apparent misuse of the discretion to warrant interference—Full Bench further found Appeals were not frivolous or vexatious or warranted an order for costs on appeal—Dismissed—Mr J Cain -v- Mr AG Shuttleton—DOPLR—APPL 1246,1247 of 1995—Full Bench—SHARKEY P/GREGOR C/BEECH C—09/04/98—General Construction 1575

CUMULATIVE DIGEST—*continued*

Page

WAGES

Application for orders re variation of roster-Applicant union argued that changes to rosters proposed by respondent should be cost neutral on the basis of past practice and sought a proposed roster or minimum salary—Respondent argued practice was limited to the introduction of One Man Operations, alternative claim conflicted with the paid rates award and should be tested against the Wage Fixing Principles—Commission reviewed s26A of the IR Act 1979 re evidence and workplace agreements—Commission found it was concerned at the time only with the issue of cost neutrality not the equality in the number of jobs between award and non-award employees—Commission found on evidence it was possible to draw up a roster which maintained earnings and integrated with staff schedule, that that ought occur and adjourned for the parties to confer—In Supplementary Reasons Commission found that though circumstances had changed, the Applicant was entitled to an order reflecting the Reasons for Decision—Granted with liberty to apply reserved—CONSTRUCTION, MINING, ENERGY -v- Hamersley Iron Pty Limited—APPL 929 of 1997—BEECH C—18/11/97—Metal Ore Mining 736

Application for allegedly denied contractual entitlements re wages, commission, and prorata annual leave—Respondent argued he was entitled to 75% commission on a property sold—Respondent argued that the Commission was only 50% and that expenses to be deducted from the payments were greater than the Applicant specified—Commission found on evidence that commission was 50% and that the Applicant did not have an entitlement of prorata annual leave independently of the Minimum Conditions of Employment Act 1993—Commission further found that the contract of service did not provide for deduction from salary and wages, nor for the deduction from commission of the cost of business cards and removal of advertising signs—Granted in Part—Mr MA Abbott -v- Roy Weston Carousel Southern Realty Branch—APPL 1421 of 1997—FIELDING C—03/03/98—Property Services 1054

Conference referred re dispute over insertion of overtime clause and application of arbitrated safety net wage increase in Fly in /Fly out Award—Applicant Union argued that employees worked shifts and take time away from site on a fixed schedule and that it was not possible for any small amount of overtime to be provided for in conjunction with annual leave unless taken in blocks of a week—Respondent argued it had no requirement for Hot Seat change over for employees covered by the award and that the reintroduction of overtime would reintroduce inefficiencies removed by the flyin flyout arrangements—Commission found likelihood of overtime was not sufficient to warrant variation of the award and that the arbitrated safety net adjustments were to be absorbed—Dismissed—The Australian Workers' Union, West Australian Branch, Industrial Union of Workers -v- Newcrest Mining Ltd—CR 310 of 1997—SCOTT C.—Metal Ore Mining 1431

[3]Conference referred re claim for wage increase under enterprise bargaining—Applicant Union argued application covered low paid workers who had only Arbitrated Safety Net adjustments, met the Wage fixing Pineapples, prompted further bargaining and structural efficiency and that the special case was the only avenue—Respondent argued negotiations should continue , there was no substance in the argument that the respondent had not bargained in good faith and that there re should be no arbitrated wage increase as interalia it did not meet the special case criteria and was not in the public interest—CCI and Hon Minister for Labour Relations argued Commission must be satisfied no further negotiation was possible, safety net adjustments should be absorbed, efficiencies must be established and attention must be made to flow-on—TLC argued Wage Fixing Principles should not frustrate the IR Act 1979, an order would not result in an award variation and there was no formula under the principles to split rewards from productivity increases between employer, employee and the government—CICS reviewed history of negotiations and found that past productivity increase were t be taken into account, that the result of arbitration was not static, that the 2 groups of employees should be treated separately, reviewed productivity measures, that the safety net adjustment did not have to be affirmed or the MRA completed—CICS found in favour of Applicant and granted a retrospective date of operation—Granted-—LIQUOR, HOSPITALITY & MISC -v- Education Department of Western Australia—CR 168 of 1996—Commission in Court Session— COLEMAN CC/GREGOR C/BEECH C—02/04/98—Government Administration 1489

[2]Application for order pursuant to s72A re exclusive union coverage of one employer—Applicant Union argued the Commission had the power to make certain orders and sought orders for secret ballots—AWU, Employer and AMMA argued interalia the application ignored the separate membership requirements of each of the employee organisations concerned the employee preference should be weighed up and there was already evidence of union numbers—Majority of Full Bench found it had not express powers to issue orders sought and it would go beyond the Commission merely informing itself—Majority Full Bench further found little relevance in balloting non-members and was not persuade the equity good conscious and substantial merit lay with the applicant—Applicant sought to withdraw application and Employer sought costs—Full bench reviewed IR Act 1979 and found the employer was not a party to t he application, there was no prescription enabling an award of costs to a person given leave to be heard under s72A and the rule generalia specialibus derogant did not apply—Full bench further found under the circumstances the employer could not criticise the applicant for a delay in reaching a decision to discontinue notify it and neither the employers or the Applicants claims were an extreme case even if they were competent—Dismissed—CONSTRUCTION, MINING, ENERGY -v- (Not applicable)—APPL 1401 of 1997—Full Bench— SHARKEY P/GREGOR C/BEECH C—24/10/97—Other Mining 1581

[3]Application to vary awards re inclusion of salary packaging provisions—Applicant Unions argued that any attempts to negotiate any kind of salary package through enterprise bargaining had been fruitless as respondent employers would not contemplate salary packaging due to a proscriptive government policy aimed at promoting workplace agreements even when employees may be employed alongside employees enjoying salary packaging—Respondents argued the claims were contrary to provisions in the IRAct 1979, the Minimum Conditions of Employment Act, the Wage Fixing Principles and had cost implications- Respondent further argued that the IRAct clearly contemplated differing conditions for employees covered under awards, enterprise agreements and workplace agreements—CICS found on evidence that salary packaging was a "fact of life' and consistent with individuals and employers negotiating at workplace level CICS however, found that the compulsory provisions sought were not consistent with that principle— In Further Reasons CICS found there was no question that an employee seeking to raise a request for salary packaging may do so through their relevant union—Granted in Part— The Civil Service Association of Western Australia Incorporated -v- Commissioner, Public Service Commission & Others—P 62 of 1994;P 5,6 of 1997—Commission in Court Session—GREGOR C/GEORGE C/BEECH C—13/03/98—Health Services 2346

Application for allegedly denied contractual entitlements re wages-Applicant argued he ceased working for the Respondent as a result of the Respondent failing to pay him in accordance with the contract-Respondent acknowledged the wage claim but it was due to the failure of creditors to meet obligations to the Respondent that there had been insufficient funds to pay the Applicant to time of hearing -Claim conceded-Granted—Mr GP Ryan -v- Night News—APPL 131 of 1998—CAWLEY C.—Motion Picture Radio & TV Service 2465

Application for allegedly denied contractual entitlements— Applicant sought order when payment was not made according to agreement—Respondent sought order not issue pending conpany restructure—Commission ordered adjournment of seven days and that the Respondent endeavour to pay Applicant in that time- Ordered accordingly—Mr LR Vickers -v- Imtech Industries Pty Ltd—APPL 2308 of 1997—BEECH C —27/05/98—Non-Metallic Min Product Mfg 2476

WORK VALUE

Conference referred re claim for temporary special allowance—Applicant Union claimed employee had continued to perform level 7 duties since abolition of the position she was acting in and sought allowance for difference between level 6 and 7—Respondent argued it had never been asked to consider a Temporary Special Allowance—PSA found duties were performed at level 7 and that the failure to follow correct procedure was not fatal—PSA reviewed Public Service Award and Work Value Changes Principle found that application of that principle supported the payment of an allowance—Granted—The Civil Service Association of Western Australia Incorporated -v- Department of Contract and Management Services—PSACR 38 of 1996;PSACR 54 of 1997—BEECH C—12/02/98—Government Administration 1069

By Authority: JOHN A. STRIJK, Government Printer.