RECOVERING DENIED CONTRACTUAL BENEFITS IN THE INDUSTRIAL RELATIONS COMMISSION - A WESTERN AUSTRALIAN EXPERIENCE

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There is a unique provision in section 29(b)(ii) of the Western Australian Industrial Relations Act 1979 ("the Act") which allows an individual employee to claim for a non-award contractual benefit in the Industrial Relations Commission. First introduced as section 29(2)(b) in the Western Australian Industrial Arbitration Act 1979 and amended by the 1984 amendments,[1] it took some time for the public to become aware that any employee could approach the Commission on a wide variety of grievances, but now applications under section 29(b)(ii) take up a considerable proportion of the Commission's time.

The provision was introduced by Commissioner Kelly into a draft Act included in his report and recommendations on industrial relations legislation[2] in 1978. Commissioner Kelly explained that, because the authors of Western Australia's Industrial Arbitration Act 1912 recognised that the existence and viability of unions of employees was crucial to the operation of the system of conciliation and arbitration, it had been found necessary to create special privileges for unions in order to encourage them to register

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1. (WA) Acts Amendment and Repeal (Industrial Relations) Act (No 2) 1984 which also changed the name of the Act.
2. *Department of Industrial Relations Report to the Hon R J O'Connor, Minister for Labour and Industry, with recommendations for an Industrial Relations Act to replace the Industrial Arbitration Act* ("*The Kelly Report*") (Perth: WA Government Printers, 1978).

under the industrial arbitration laws. One of those privileges was to give registered unions of employees the sole right of access to industrial tribunals to the exclusion, not only of other associations of employees, but also of individual employees. That Act, accordingly, had no provision for access by an individual employee or a group of employees, who were dependent upon a union or association or, in some cases, the Industrial Registrar if they sought a remedy for any grievance. There had been some modification to this position in 1963 when section 66(2) of the Western Australian Industrial Arbitration Act 1912 was added, enabling an industrial matter to be referred to the Commission by any person acting on behalf of less than 15 workers in an industry, but only when those workers could not conveniently belong to an existing union or join with other workers to form a society which would be eligible for registration as a union. This was therefore an exception to the general rule, not a change to the rule itself.

Commissioner Kelly was satisfied that the introduction of provisions allowing individual employees to protect certain basic entitlements posed neither a threat to the existence or viability of unions nor an incentive to them to leave the system. Moreover, he considered that the extension of rights to individual employees appeared to be supported by both logic and morality while the Act continued to make provision for exemption from membership.

The provision does not purport to confer express jurisdiction on the Commission to deal with contractual benefits, but is merely a procedural provision, dealing with standing before the Commission, and allowing claims to be made by individual employees in specified circumstances.[3] Section 29 of the Act reads as follows:

> 29. An industrial matter may be referred to the Commission -
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> (a) in any case by -
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> (i) an employer with a sufficient interest in the matter;
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> (ii) an organization in which persons to whom the industrial matter relates are eligible to be enrolled as members or an association that represents such organization; or
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> (iii) the Minister;
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> and
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> (b) in the case of a claim by an employee -
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> (i) that he has been unfairly dismissed in his employment; or

3. Compare *Perth Finishing College Pty Ltd v Watts* (1989) 69 WAIG 2307, 2312, where Sharkey P suggested that s 29(b)(ii) of the Act expands the definition of "industrial matter" *per se*.

(ii) that he has not been allowed by his employer a benefit, not being a benefit under an award or order, to which he is entitled

by the employee.

THE UNIQUENESS OF THE PROVISION

New South Wales and South Australia might, at first glance, appear to have somewhat similar provisions. In New South Wales, the Industrial Court has the power to make an order under section 275(3) of the Industrial Relations Act 1991 for the payment of money in connection with any contract when exercising its jurisdiction over unfair contracts pursuant to section 275(1) of that Act.[4] The New South Wales Act allows for recovery from the Industrial Court or a Local Court of wages due under awards and agreements, for work not fixed by an award or agreement, and over-award payments under a contract of employment.[5] It also provides for recovery of small claims relating to annual and long service leave in the Local Court.[6] The Commission itself has no power to enforce existing contractual benefits except to the extent of ordering, as compensation, payment of an amount not exceeding six months' remuneration in association with a claim for unfair dismissal.[7] Certain contractual benefits may be recovered in addition to severance payments under section 14(1) of the New South Wales Employment Protection Act 1983.[8]

In South Australia, the Commission has power under section 31(3)(c) of that State's Industrial Relations Act 1972[9] to order payment of compensation where it is of the opinion that the decision of the employer to dismiss the employee was harsh, unjust or unreasonable and an order for re-employment would not be an appropriate remedy. Until July 1991, the Industrial Court had power to hear a claim for a sum due to an employer or former employer under the Act or under a contract of employment that was *governed by an award or industrial agreement.*[10] Under the amended section 15(d)(i) of the South Australian Act, claims for a sum of money due under a contract of employ-

4. Replacing the Commission under s 88F of the (NSW) Industrial Arbitration Act 1940. *Walker v Hussman Aust P/L* (1991) 38 IR 180
5. (NSW) Industrial Relations Act 1991 ss 151-153.
6. Ibid, s 163.
7. Ibid, s 250(3).
8. See *Barry v Intec Ltd* 1992 AILR 8.
9. Given a new title by Act No 34 of 1991 (commenced 1 July 1991).
10. In WA the benefit must not be an award benefit. But "governed by an award" in this instance in SA was wider than "under an award". See *Vijand -Goodarz v Vaninni* (1978) SAIR 471.

ment, without the requirement that it be governed by an award or industrial agreement, have been added to the Industrial Court's jurisdiction. Section 15(d)(ii) of that Act allows employers to make similar claims against an employee or former employee. This bears some resemblance to the Western Australian provision but, as in New South Wales, the jurisdiction is in the Court and not in the Commission.[11] It is for a sum due and not for any other benefit, as in Western Australia. Further, it is available equally to an employee and an employer, whereas in Western Australia only an employee may make a claim under section 29(b)(ii).

The Western Australian claim need not necessarily be associated with unfair dismissal. Indeed, it is expressed as an alternative to a claim for unfair dismissal which is provided for in section 29(b)(i), being separated by the disjunctive "or". The claim may be made during the course of employment (although it rarely, if ever, is) or it may be made after termination of the contract, whether the termination was made by the employee or by the employer, and whether or not that termination was unfair. Before the Industrial Appeal Court decided that the Commission did not have power under section 29(b)(ii) to order compensation in lieu of reinstatement for an unfair dismissal,[12] some contractual matters, such as failure to pay an adequate amount in lieu of notice or failure to pay accrued wages or leave benefits, had been included in the compensation which was awarded for an unfair dismissal. Section 29(b)(ii) was then usually resorted to only where the contract had expired, where the employee had terminated the contract or, in the case of termination by the employer, where there was no allegation that the termination had been unfair. Many of the claims which formerly would have been made in association with a remedy for an unfair dismissal are now being made under section 29(b)(ii).

The provision is not an ancillary claim for an over-award contractual entitlement made in association with an application for enforcement of an award. It is a completely separate claim in a different forum, being made to the Industrial Commission, while the Industrial Magistrate is given exclusive jurisdiction to enforce awards and industrial agreements.[13] The claim is

11. Although the Court is governed by s 15(3)(d) (SA) Industrial Relations Act 1972 which is parallel to s 26(1) of the (WA) Industrial Relations Act 1979.
12. *Robe River Iron Associates v Association of Draughting, Supervisory and Technical Employees of WA* (1987) 68 WAIG 11 ("*Pepler*'s case"). See M V Brown, "The Demise of Compensation as a Remedy for Unfair Dismissal in Western Australia: A Casualty of the Robe River Dispute" (1989) UWAL Rev 29.
13. (WA) Industrial Relations Act 1979 ss 82 and 83.

available to anyone who falls within the definition of "employee" in section 7(1) of the Act, whether or not that person works under an award or is a member of an industrial organisation registered in the Commission.[14] In fact it is an alternative (albeit limited) avenue of redress by any employee for breach of a contract of employment by his or her employer. The application must relate to an industrial matter and usually begins in a conference but, by a strange paradox, an individual employee is not given the same right as a union to request a compulsory conference,[15] except in respect of long service leave entitlements.[16]

PROBLEMS ARISING FROM THE JURISDICTION

Although the provision is well utilized, there is uncertainty about the exact nature and breadth of the Commission's jurisdiction and the extent of its powers to make orders under it. The provision is obviously not a straightforward power in the Commission to adjudicate on contractual rights and then give legal remedies, since there are limitations imposed by the wording of the placitum. These are discussed by the author in more detail elsewhere.[17] A recent appeal decision of the Full Bench in *Conti Sheffield Real Estate v Brailey*[18] has drawn some of the problems into focus.

The Commission is required by section 26(1) of the Act to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms. It is not bound by any rules of evidence and is not restricted to the specific claim.[19] In spite of this legislative command, the Commission takes the view that section 29(b)(ii) requires it to act according to legal concepts;[20] but there is some ambivalence on this point.[21] The consequence is that a Commissioner, who in the majority of cases has no legal qualifications or formal legal training, assumes a common law jurisdiction over contractual rights in excess of the jurisdiction in monetary

14. Government State School Teachers and Public Servants would appear to be exceptions. See *State School Teachers' Union of WA (Inc) v Minister for Education* (1987) 67 WAIG 1523; *Bellamy v Public Service Board* (1986) 66 WAIG 1579.
15. Provided for by s 44 of the (WA) Industrial Relations Act 1979.
16. Ibid, s 44(7)(a)(iii).
17. *Western Australian Industrial Relations Law* 2nd edn, (Sydney: Butterworths, 1991) Ch 10.
18. (1992) 72 WAIG 1965.
19. *Belo Fisheries v Froggett* (1983) 63 WAIG 2394, Olney J, 2396.
20. *Bartlett v Indian Pacific Ltd* (1988) 68 WAIG 2508, 2519; *Simons v Business Computers International Pty Ltd* (1980) 65 WAIG 2039; *Conti Sheffield v Bailey* supra n 18.
21. *Waroona Contracting v Usher* (1984) 64 WAIG 1500, 1502; *Perth Finishing College v Watts* supra n 3.

terms of a Stipendiary Magistrate in a local court, or a Judge in the District Court, and equal to that of a Supreme Court Justice.[22] Claims which a District Court Judge would not be competent to hear are not unknown in the Commission.[23]

It is uncertain whether a "benefit under a contract of service" is analogous to "a contractual right" or whether it has a wider meaning.[24] For example, the provision has been used to give a remedy in money terms for the early termination by an employer of a fixed-term contract, the benefit being "a period of guaranteed employment".[25] If a claim for wrongful repudiation is a claim for a "benefit" to which a person is entitled *under* the contract of service, "benefit" has a wider meaning under section 29(b)(ii) as the employee need not render services for the wages guaranteed.[26]

Justice Olney made it clear in the Industrial Appeal Court that the Commission does not have the power to award legal remedies, but has a discretion when providing relief.[27] In *Gandy Timbers Pty Ltd v Gresty*,[28] the Full Bench suggested that although the merits of the case might warrant a finding that an employee had been denied a contractual benefit, the circumstances might be such that it would be inequitable to make such an order.[29] In an earlier case, the Full Bench said that the function of the Commission in cases of this kind is "not the ascertainment of legal rights but the determination, as a matter of discretionary judgment, of fair compensation for a contractual benefit".[30] The Commission has, on one occasion, not only allowed a claim for unpaid wages and pay in lieu of notice, but also for the fees charged on the employer's dishonoured cheque;[31] however, not all Commissioners consider it appropriate to go so far.[32] The Full Bench has

22. $10,000 and $80,000 respectively.
23. See, for instance, *Breeze v BNZ Norths Ltd* (1991) 71 WAIG 1912, 1915.
24. See *Balfour v Travelstrength Ltd* (1980) 60 WAIG 1015; *Perth Finishing College v Watts* supra n 3.
25. *Welsh v Hills* (1982) 62 WAIG 2708; *Waroona Contracting v Usher* supra n 21; *Perth Finishing College Pty Ltd v Watts* supra n 3.
26. As required at law: *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435.
27. *Belo Fisheries v Froggett* supra n 19; contra, *Pepler's* case supra n 12, where Kennedy J suggested that this provision is restricted to the employee's contractual rights.
28. (1986) 66 WAIG 1591, 1593.
29. Set-off against a claim for annual leave payments a number of paid absences from work due to a chronic illness.
30. *Waroona Contracting v Usher* supra n 21, where it considered that fair compensation for the loss a "guaranteed period of employment" of five months would be the equivalent of three months' salary.
31. *Joyce v Phillips* (1991) 71 WAIG 2173.
32. See *Jancec v Australian Outdoor Centre Holdings Pty Ltd* (1984) 64 WAIG 1825, for

drawn the line at awarding compensation for a bonus which would have been due under a contract, had not that contract been unfairly terminated, on the ground that the benefit had not accrued to the applicant at the time of the termination.[33]

The rights of the employer under this provision are also questionable. Justice Olney in *Belo Fisheries v Froggett*[34] approved a Commissioner's decision to set off an air fare and a sum for the employee's negligence against the claimed entitlements, considering it a proper exercise of the Commission's discretion.[35] Nevertheless, the Commission remains uncertain how far a set-off may extend.[36] It is prepared to exercise its discretion to take into account the rights of the employer in respect of dilatory claims, on the basis that an employer is entitled to expect claims made for a substantial sum of money to be dealt with promptly.[37]

However, although the employer may seek a set-off, it is generally thought that the Commission does not have a power to entertain a counter-claim from the employer as the employer has no right to make an application for a denied contractual benefit. According to the Full Bench, it would amount to enforcing legal rights, in exercise of a judicial power which the Commission does not have.[38]

It would also seem that the Commission cannot ratify a deduction made by an employer on the grounds of the employee's negligence, as such a deduction would be in breach of the provisions of the Western Australian Truck Act 1899,[39] even though it may take such negligence into account when assessing fair compensation.[40] The Commission will not ratify an illegal act.[41]

Uncertainty also surrounds the kind of orders that the Commission may make under this provision. For instance, does it have a power to make orders equivalent to specific performance, such as ordering provision of a car, as

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instance.

33. *Manfal Pty Ltd v Sone* (1988) 68 WAIG 1013.
34. Supra n 19.
35. And see *Gandy Timbers Pty Ltd v Gresty* supra n 28.
36. *Christie v Sintage Pty Ltd* (1990) 70 WAIG 4126 where breach of a restraint clause was in issue.
37. *Lewicki v HB Brady Co Pty Ltd* (1990) 70 WAIG 4143 where claims of $36 000 which were delayed for three-and-a-half years without adequate explanation dismissed. See also *Johnston v Wesfarmers Ltd* (1990) 70 WAIG 2434, 2435.
38. *Conti Sheffield Real Estate v Brailey* supra n 18.
39. *See Day v Atlanta Nominees Pty Ltd* (1989) 69 WAIG 2156.
40. As the Full Bench did in *Waroona Contracting v Usher* supra n 21.
41. *Conti Sheffield Real Estate v Brailey* supra n 18.
42. See *Tucker v Pipeline Authority* (1981) 3 IR 120.

distinct from payment of compensation for failure to provide the car?[42] Or may the Commission order the employer to allow the employee to take the leave which was due under the contract, rather than ordering payment of money in lieu? There is no obvious reason why the Commission could not make such an order, since it already has the power to make an order for reinstatement under section 29(b)(i) of the Act.

Section 29(b)(ii) expressly excludes claims for a benefit under an award or an order of the Commission.[43] The Commission presumes that it may entertain a claim for a benefit which is part award and part an over-award supplement.[44] This sometimes leads to some fine distinctions which may be real but are also confusing to an applicant. For instance, annual leave for all non-award employees, with very limited exceptions, is now governed by a General Order of the Commission[45] so enforcement of its terms is within the exclusive province of the Industrial Magistrate. Where part of a claim was for seven weeks' pay under a non-award contract and the other part was for *pro rata* annual leave pay, which the employer was bound to pay under a General Order, the Commission ordered the employer to pay a sum equivalent to the seven weeks' pay entitlement but advised the parties that the annual leave entitlement had to be pursued before an Industrial Magistrate.[46] On the other hand, where a contract provided for annual leave, which it is bound to do under the General Order, and also provided for an annual leave loading for which there is no provision in the General Order, the Commission allowed recovery of the whole amount as a denied contractual benefit on the basis of the contract.[47]

The Commission finds its authority in *Steele v Tardiani*[48] where the High Court held that a claim for a contract price which was higher than the rate prescribed by an industrial award gave the Supreme Court of Queensland jurisdiction to determine the matter.[49] It has not been explained why a decision concerning the jurisdiction of a State Supreme Court with unlimited jurisdiction in state matters should necessarily apply to an industrial tribunal

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43. See *Lyons Advertising Service v Nerad* (1981) 61 WAIG 854.
44. *Roberts v Groome* (1984) 64 WAIG 774; *Mason v Bastow* (1990) 70 WAIG 19.
45. *Trades and Labor Council of WA v Confederation of WA Industry (Inc)* (1989) 69 WAIG 3487.
46. *Hunter v Hakko Sunbay Resorts Pty Ltd* (1991) 71 WAIG 1923, Salmon C.
47. *Molloy v Starmist Holdings* (1991) 71 WAIG 1924.
48. (1946) 72 CLR 386.
49. See s 114(2) of the (WA) Industrial Relations Act 1979; *Amalgamated Collieries of WA Ltd v True* (1938) 59 CLR 417, 431; *Gregory v Philip Morris* (1987) 80 ALR 455, Wilcox and Ryan JJ, 478-479.

with limited discretionary powers to deal with a specific kind of claim concerning contractual benefits other than award benefits. Even though section 12(1) of the Act provides that the Commission is "a Court of Record" this does not make it a court of law.[50]

If the Commission can treat as one debt an award and a non-award payment for the purposes of section 29(b)(ii), it is a short step to say that it may enforce award benefits provided that there is reference to that benefit in the contract of employment. In *Gregory v Philip Morris*[51] it was suggested by members of the Federal Court that the award imports a term in the contract of employment independently of the true intention of the parties. It could then be reasoned that any award terms are "benefits" which may be applied for under section 29(b)(ii). Such arguments make the express exclusion of award benefits in the provision meaningless.

EMPLOYEES UNDER FEDERAL AWARDS

Prima facie, employees whose terms and conditions of employment are governed by federal awards may enjoy access to the Western Australian Industrial Commission under section 29(b)(ii), even though employees under state awards may not have this right. Although the Act excludes claims for a benefit under an award or order of the Commission, the term "Commission" means the Western Australian Industrial Relations Commission and the term "award" means an award made by the Commission under the Act.[52] Claims for federal award benefits are not unknown in the Commission but have usually failed for reasons other than jurisdiction.[53] The majority view in *Gregory v Philip Morris*,[54] that the contract of employment incorporates the terms of the award, may even assist in the advancement of such claims, since the express exclusion of state award benefits is not applicable.

The position of employees governed by federal awards under section 29(b)(ii) must be contrasted with the position of the same employees in relation to unfair dismissal under section 29(b)(i). The Industrial Appeal Court decided that where a federal award provided for termination together

50. See *Amalgamated Metal Workers and Shipwrights' Union of WA v Griffin Coal Mining Co Ltd* (1980) 60 WAIG 2137, 2139; *Robe River Iron Associates v Amalgamated Metal Workers' and Shipwrights' Union of WA* (1989) 69 WAIG 990, 998.
51. (1987) 80 ALR 455, 478-479.
52. (WA) Industrial Relations Act 1979, s 7(1).
53. *Penco v D'Arcy McManus and Masius and Gill Pty Ltd* (1985) 65 WAIG 529; *Colson v Shire of West Pilbara* (1986) 66 WAIG 1256; *Hill v Rushton Building Contractors Pty Ltd* (1987) 67 WAIG 923; *Lang v Telecom Australia* (1989) 70 WAIG 186.
54. Supra n 49.

with a board of reference to deal with any dispute under the award, the award "covered the field" of termination and there was no room for the unfair dismissal jurisdiction of the State Commission.[55] As far as claiming contractual benefits is concerned this reasoning obviously does not apply, but there may be an inconsistency with section 179 of the Commonwealth Industrial Relations Act 1988 which allows an employee to sue for payment due under the award in the Federal Court or "in any other court of competent jurisdiction". A "court of competent jurisdiction" for the purpose of section 178, which provides for the enforcement of awards, is a District, County or Local Court or a Magistrates' Court; but this definition applies only to that section. There is no interpretation of the phrase for the purpose of section 179 of that Act, but there seems to be no logical reason why the Western Australian Commission should be a court of competent jurisdiction for federal purposes if it is not for state purposes. Where an application for a redundancy payment was made under section 29(b)(ii) of the Western Australian Act by a Telecom worker whose conditions of employment were governed by a federal award, the Commission found that the claim itself was substantiated but decided that it did not have the jurisdiction to grant a remedy where the employer was a Commonwealth instrumentality, on the basis that the Commission was not a court of competent jurisdiction for the purposes of section 56 of the Commonwealth Judiciary Act 1903.[56]

Section 152 of the Commonwealth Industrial Relations Act 1988, which provides that an order, award, decision or determination of a state authority which is inconsistent with or deals with any matter within a federal award is invalid to the extent of the inconsistency and the federal law prevails, could also be an impediment.[57] It still has to be decided whether the action of the State Commission, in dealing with a matter in a federal award as a contractual entitlement, and making a subsequent order, is an inconsistency which invalidates the order .

Finally, the Australian Commission could exercise its discretion in section 128 of the federal legislation to restrain the State Commission from dealing with a section 29(b)(ii) application involving a benefit created by a

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55. *Metropolitan (Perth) Passenger Transport Trust v Gersdorf* (1981) 61 WAIG 611. See also, *Martindale v British Petroleum Refinery (Kwinana) Pty Ltd* (1992) 72 WAIG 1263; *The Queen v Clarkson; Ex parte General Motors-Holden's Pty Ltd* (1975-76) 134 CLR 56 and the discussion in *Eatts v Aboriginal Hostels* (1990) 70 WAIG 2877.
56. *Lang v Telecom Australia* (1989) 70 WAIG 186.
57. See *Metal Trades Industry Association of Australia v Amalgamated Metal Workers' and Shipwrights' Union* (1983) 152 CLR 632.

federal award.

CONCLUSIONS

It might be concluded that Parliament did not give much attention to the consequences of extending the jurisdiction of the Commission in relation to individual claims for contractual benefits. It probably did not foresee the extent to which lawyers would take over what was initially a lay tribunal and occupy it for several days in prolonged legal argument which could be difficult for lay Commissioners to follow. Bearing in mind that there is an appeal to the Full Bench, occupying the President and two other Commissioners, and yet another appeal to three Supreme Court judges sitting as the Industrial Appeal Court if an appeal can be framed in terms that the Commission acted beyond its jurisdiction or made an error of law, this five-dollar application is no simple small claims mechanism.

There are several ways in which some of the difficulties raised by section 29(b)(ii) might be resolved, each requiring various degrees of legislative amendment. The jurisdiction could be removed from the Commission altogether, leaving parties to seek their remedies in an action for breach of contract in the law courts. Although some Commissioners might prefer to be relieved of the jurisdiction, the Western Australian work force has become accustomed to using the Commission as an inexpensive means of enforcing contractual entitlements and, as a whole, employees gain some satisfaction from having their "day in court" in order to air their grievances against their employers in public. In any event, until the problem arising from *Pepler's* case[58] is remedied by legislation, the Commission has no means of giving compensation for unfair dismissal other than within the limits of section 29(b)(ii).

It would be possible to allow the Commission to continue to hear individual claims on a strictly arbitral basis, making it clear in the legislation that the Commission is not enforcing legal entitlements, but acting as an arbitrator in an industrial matter. This was probably the original intention of the provision. There should be no legal representation in the arbitral procedure and the Commission's order should still be enforced by the Industrial Magistrate. A restriction on the time allowed for each hearing should be made and there should be no appeal, except on a question of law or jurisdiction. By imposing such restrictions, an employee would have a clear choice between pursuing legal rights in a court of law or taking a matter for arbitration before

58. Supra n 12.

the Commission, a distinction which already exists in termination of employment between unlawful and unfair dismissal.

Another solution would be to have the jurisdiction in contractual benefits removed to the Industrial Magistrate's Court where the Industrial Magistrate could deal with contract of employment claims under ten thousand dollars[59] as well as breaches of awards and orders. The claims would be heard strictly according to law but the fee for an application would be the same as an application to the Commission and costs would not be allowed for the services of a legal practitioner or agent. Any claims for compensation beyond the statutory limit would have to be brought in the District Court.[60] If the Industrial Magistrate had the dual jurisdiction suggested, there would be sufficient work to warrant the appointment of a full-time Industrial Magistrate who would have a specialist knowledge of industrial and employment law and the Act itself.[61] There would be no need to separate award from non-award benefits for the purpose of jurisdiction and although employees would still be able to appear in person, lawyers would have a proper forum in which to introduce issues of law. The main disadvantage in this solution for the applicant appearing in person would be that the court would be bound by the rules of procedure and evidence: but the Commission itself adopts a more formal approach to hearing evidence in individual claims than the Act requires.[62]

Finally, the legislature could go one step further and set up an Industrial Court, consisting of two or more Commissioners with legal qualifications, to hear individual claims, leaving a discretionary jurisdiction in the Commission for unfair dismissals. The Industrial Court could encompass the existing work of the Industrial Magistrate and include a small claims jurisdiction in contractual entitlements and wrongful dismissal. There could still be pre-trial conciliation conferences for these claims in the Industrial Court, but Commissioners who are appointed on the basis of their industrial relations experience and conciliation and arbitration skills could be released from dealing with individual contractual benefits. They could then focus their attention more firmly on dealing with industrial matters and disputes involving unions and employers which disrupt commerce and industry.

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59. Currently the jurisdiction of Local Courts.
60. Or in the Supreme Court if in excess of the District Court's jurisdiction.
61. At present there is no permanent, full-time Industrial Magistrate.
62. (WA) Industrial Relations Act 1979, s 26(1)(6).