what might be called bare rights of action to recover damages or compensation for personal injury, rights not ordinarily assignable, would nevertheless be treated as property divisible amongst the creditors of the bankrupt and therefore as property which vested under s 58 (1)."

19 They go on to say at page 68, in relation to the intent of this, that—

"It is consistent with the policy of the Act that after sequestration of the estates of unsuccessful litigants the successful party not be put at the risk of sustaining further costs of appellate litigation. The respondent to the appeal should not be left to seek what may turn out to be an inadequate order for security for costs. It is also in the interest of the orderly administration of the estate of the bankrupt that it be for the trustee to decide whether appeals of the nature involved here be instituted or continued."

20 In this case, if the right of Mr Gardner to claim his job back is a property right under the *Bankruptcy Act 1966 (Cth)*, then I consider it is covered by the exemption provided under s 116(2)(g) being an alleged wrong done to the bankrupt.

21 The respondent would then rely on *Said v Douglas Kay Real Estate* which separated a claim effectively for injury, being stress, shock and embarrassment, and allowed this to continue in the bankrupt's name; but denied the bankrupt the ability to pursue in his name a claim for pecuniary loss being loss of wages, accrued entitlements to holiday pay, statute entitlement to payment in lieu of notice and statutory entitlement to compensation (at page 48).

22 On one reading this could produce an odd result in this jurisdiction. One might have to distinguish a claim made by a bankrupt pursuant to s 29(1)(b)(ii) from a claim made pursuant to s 29(1)(b)(i). One might also have to distinguish a claim made under s 29(1)(b)(i) which incorporated an element of injury as opposed to compensation for lost wages. I doubt the practicability of the later either under the *Industrial Relations Act 1979* or the *Bankruptcy Act 1966 (Cth)*.

23 Nevertheless in this matter what is being sought is reinstatement of employment, which may or may not lead to considerations of compensation, and I consider, in the alternative, that this falls under the exemptions provided in s 116(2)(g) of the *Bankruptcy Act 1966 (Cth)*.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	KENNETH CHARLES GILL V CADBURY SCHWEPPES PTY LTD ACN 004 551 473
CORAM	COMMISSIONER J F GREGOR
DELIVERED	FRIDAY, 18 AUGUST 2000
FILE NO/S	APPLICATION 780 OF 1999

Result	Applicant unfairly dismissed. Awarded compensation of $19,500.00.
Representation	
Applicant/ Appellant	Mr Richardson and later Mr T Dixon of Counsel appeared on behalf of the applicant.
Respondent	Mr A Mackie and later Mr D Jones appeared on behalf of the respondent.

Reasons for Decision.

1 Kenneth Charles Michael Gill (the Applicant) was employed by Cadbury Schweppes Pty Ltd (Cadbury) in 1983, prior which he had worked for Heinz. He never received any documents detailing his conditions of employment. The relationship continued until it was brought to conclusion by his dismissal, on the 24 May 1999. It is argued by the applicant that the dismissal was summary in nature, this is denied by Cadbury. By his application the applicant seeks relief from the Commission by way of orders pursuant to Section 23A of the Act. Originally he sought reinstatement but later changed the relief sought to one of compensation.

2 The first 15 years service of the applicant with Cadbury were uneventful in terms of performance related issues. It appears for the majority of that period he was able to perform the functions that were allocated to him as a Sales Executive without much difficulty, at least there is no allegation to the contrary. The history of the applicant's employment until 1998 is hard to ascertain from the evidence he gave due to the rambling nature of the evidence in chief which was lead by his then advocate, Mr Richardson (later replaced by Mr Dixon of Counsel). As much as can be gleaned is that the work involved marketing of confectionery, particularly chocolates produced by Cadbury, to retailers in specific zones or territories which were from time to time allocated to the sales persons such as the applicant.

3 In order to put the issues at debate in this application in context it is best to focus on the period between 1998 until the dismissal in May 1999. In 1998 the applicant was working in what was described in his evidence as a large area including the South West of the State. On or about 10 September, *[Exhibit R1]* this followed a conversation he had with his then supervisor, George Hopkins he received a written warning. The complaint raised in the warning related to, what was described as a breakdown of his period tracker. It was alleged by Mr Hopkins that the applicant's failure to supply sales data in a timely manner delayed Mr Hopkins's team report and made it difficult to provide prompt and accurate information about sales performance of the sales team. This lead Mr Hopkins to question whether the applicant had the required commitment and whether he wanted to continue to work in the environment. There was also an allegation that he had placed Cadbury Dairy Milk (CDM) bars in the wrong place in a display.

4 On the 12 December 1998, the applicant underwent a performance appraisal.*[Exhibit M4]* At that time his length of service was 15 years and 6 months. The appraisal was carried out by Mr Hopkins. The applicant's performance rating objectives were not met in the area of call coverage, distribution objectives and period objectives but were insofar as merchandising objectives were concerned. None of his selling skills were found to be below specification, or was partnering relationships. His planning and effective use of time was found to meet specification with guidance as were his records and reporting. No retraining was recommended. The appraisal by Mr Hopkins was that the applicant had improved over the past 12 months but even though he had 15 years service as a sales executive he was not performing to the level Mr Hopkins expected. The overall assessment was disappointing but did not result in assessment that the performance level had dropped since the last review.

5 It appeared this picture of the applicant had not changed because around Christmas 1998, the applicant was told he was to be demoted to a relief sales executive and merchandiser. He received a job description which set out the duties and accountabilities of the position *[Exhibit R3]*. On the 25 February the applicant met with Mr Hopkins and the State field manager, Sue Bauers to discuss continued concern about his performance levels. The applicant received a letter dated 24 February 1999 headed 'Second and Final warning'. *[Exhibit R4]* This detailed Cadbury's complaints about the applicant's performance. These complaints arose following store audits conducted by Mr Hopkins. As a result of the audits, Mr Hopkins concluded that the applicant's information gathering and reporting was still not to the Cadbury standard nor was the applicant's CDM in the middle of the displays. The applicant's performance was to be reviewed at the end of sales period 3 and he was warned that the employer expected a substantial increase in performance. He received confirmation of the so-called warning in a letter signed by Ms Bauers *[Exhibit R6]*.

6 It was decided to further review the applicant's performance at the end of sales period 4. This was because Ms Bauers had formed the conclusion that there had not been demonstrated significant improvement. On the 24 April it became clear that the applicant was still having difficulty dealing with the email system. Ms Bauers sent him an email on 14 April giving him information about how to operate it and offering more training. On 30 April there was a meeting between the applicant, Ms Bauers and Scott McLean for the purpose of discussing learning objectives for a Negotiation Skills Course it was intended the applicant was to attend on May 3rd to 5th. It was noted the applicant's results for the period reflected a marked improvement in performance. The update did not cover the merchandising standards which were to be reviewed again at the end of sales period 5. The applicant still had trouble sending email even after additional training from Scott McClean. He was told ongoing training was always available to help him through difficulties, however, he was required to give feedback so Ms Bauers knew if he was struggling or unsure. He was also coached on different techniques to use when covering other peoples territories, with particular reference to introductions and creating reports. In a letter he was challenged to improve his level of performance in all facets particularly merchandising standards and reporting. Assistance was offered to coach him through any problems.

7 There is no indication from the evidence that any training occurred after the meeting of the 3 May and before 24 May when there was a meeting between Sue Bauers, Scott McClean and the applicant regarding his termination of employment. At that meeting Ms Bauers had reminded the applicant that he had received a second warning, his job performance was under review and maintenance of merchandising standards and accurate reporting was crucial. The applicant was told that Ms Bauers had conducted two separate audits in his territory and the results of those audits were then discussed. There were a number of problems with the layout of the merchandise. There was a further audit taken to check the first but this did not show a different picture. The applicant was told by Ms Bauers that he had been reminded of Cadbury standards, had shown no improvement and as a result his employment will be terminated. The applicant was asked to show any reason why that should not happen. The applicant had responded that he could not understand what was happening to him, he thought Cadbury was trying to get rid of him. He challenged the reliability of the audits and claimed his difficulties in merchandising were due to time limitations. Ms Bauers gave the applicant the option to tender his resignation but asked that she have it in writing before he left the building. He was given 5 minutes to consider this option. He again asked whether he could talk the matter over with his partner. He was given time to do that but it came to pass that he did not contact his partner, he instead sought advice from a government department. The applicant was then given a letter of termination, the final paragraph relevantly advising the applicant *".....therefore, the company has no alternative than to terminate your employment effective immediately"*. On or about the 25 May the applicant received a letter from the Human Resources Manager of Cadbury setting out the final payments due to him. He received a gross payment of $15,903.05 which included two weeks pay in lieu of notice. This letter carries the date 21 May 1999, three days before the discussion on the 24 May which was said to be the final opportunity for the applicant to convince Cadbury that his services should be retained. Cadbury say that the final pay had been prepared prior to the meeting in case it was needed.

8 The applicant argues that he was summarily dismissed when there was no conduct by him to justify that manner of dismissal. The dismissal therefore, lacks both procedural and substantive fairness. When the applicant had told Cadbury of his concerns about time management he was not given assistance. The applicant says Cadbury spent more time auditing him than assisting him. The audit policy was unfair because it used criteria applicable to a permanent sales representative when he was not in that position. The warnings that he did receive were of a character which did not disclose real concern on the part of the employer to see him improve. He was given minimal assistance even though he commuted difficulties about the reporting system and in any event he had showed improvement in merchandising. Ultimately, he was dismissed for not putting CDM in the correct position on the shelf and for an inability to grasp the information technology used for information gathering and reporting.

9 Cadbury says that the applicant was counselled on a number occasions commencing in September 1998 through to the termination date of 24 May. Between those two dates there were two warnings. The various audits of his work performance clearly show that he has received fair treatment. The applicant admitted in cross-examination that the employer did make their concerns known to him at every stage and they were taken seriously. He was given an opportunity to respond at each and every stage of the counselling process to the Cadbury's reasonable request for improved standards. He agreed that there was no evidence that he took the concerns seriously in his performance. It was clearly demonstrated by the applicant's evidence that he knew he was not improving his performance and that he did not really attempt to improve. He was under threat of termination, this was clear. There was no improvement after the second warning and there was a further incidence of failure to perform. In those circumstances termination of the nature of that executed would follow.

10 There were critical and repeating themes of failure to perform information gathering and marketing. The applicant's complaints that he did not get sufficient assistance must be balanced by the fact that he is a man of mature years of long experience in the industry. The evidence of Ms Bauers that it does not take detailed training to demonstrate how to market Cadbury products in the store should accepted. The applicant accepted that the merchandising was a clear requirement of his duty. As for his problems with technology there was a three day training course when it was introduced in which the applicant participated. The machines in use are simple to use. The applicant was not only given further training by one of his line management he was invited to attend for further training, but he did not do so. He had been given every opportunity to improve his performance in these areas but had not chosen to take advantage of the opportunities offered. There was no sufficient reason given by the applicant for not reaching the standards that had been set for him. His time management problems did not improve. Rearrangements of the sales record system might have created some pressures, however, the evidence is the same options were presented to the applicant as a relief sales manager. If the applicant had missed some key function he could report back to his line management for other alternatives to complete the tasks. The system was flexible. In the meeting of the 24 May he was told again of the problems, he had no adequate answers to satisfy Ms Bauers. He was asked if he wanted to resign so it could look better for him but he declined to do so. It was conceded by Mr Jones that the termination was summary. There was no effective communication that there would be 2 weeks pay in lieu of notice.

11 The Commission was urged by Mr Jones not to give too much significance on the dates of the preparation of the final pay on the 21 May and the day in which the applicant was dismissed. The 24th May was the day of dismissal, the applicant was given the opportunity to respond, he did not do so in the way which satisfied Ms Bauers that after 9 months counselling that the relationship should not be discontinued. Ms Bauers had not decided to terminate the applicant's service on 21 May, she wanted to review his performance and give him every opportunity to explain why he should be retained.

12 Mr Dixon says that clearly the applicant was victim of a pre-empery dismissal, he was asked to leave immediately without payment of notice. It was confirmed by letter that his termination had been effected immediately. The dismissal was summary and cannot be changed in nature by a payment in lieu of notice made later. The applicant

was unfairly treated because he was required to leave the premises immediately and not given any reason for that requirement.

13 Initially in the proceedings, the applicant was represented by an Industrial Agent. The lack of competence of that agent gave rise to concerns about the adequacy of the applicant's representation. I need take the matter no further other than to indicate that the applicant engaged Mr Dixon of Counsel to represent him and the Commission by leave allowed the applicant the opportunity presented by that change of representation to put the case more adequately. However, during the time the applicant was represented by the Industrial Agent he was subject to rigorous cross-examination, that cross-examination in my respectful view destabilised him. I am inclined by the conduct that I observed to view the evidence he gave in cross-examination somewhat warily. The applicant gave the impression of being somewhat overwhelmed by the surroundings in the court. He retreated into a somewhat taciturn demeanour and was obviously under great stress and tension. I think notwithstanding this he tried to give the Commission the best evidence possible about what happened to him and why he had bought the application. He seemed though to be a man somewhat fixed in his ways and it is not impossible to picture him as someone who might find change difficult to accept. That is not to say he was not a truthful and honest witness.

14 The main evidence from the respondent was given by Ms Sue Bauers. There was a considerable difference in her demeanour to that of the evidence. She projected a strong vigorous no nonsense approach, was very business like in the way she approached giving her evidence and I have no doubt that she told the Commission the truth from her point of view.

15 The Commission also heard from Mr Toghill and Mr Eastwood both of whom did not contribute all that much to the Commission's state of knowledge other than to tell it about their experiences as sales executives with the respondent.

16 The Commission is to apply the rules set out in *(Undercliff Nursing Home v Federated Miscellaneous Workers Union of Australia (1985) 65 WAIG 385)*, the question to be answered is whether the right of the employer to terminate the contract had been exercised so harshly or oppressively or unfairly against the applicant to amount to abuse of the right. The history of the applicant's relationship with Cadbury is important in the resolution of this application. He worked for over 15 years and it appears from 1983 through to 1998 there was no or little problem in the way he performed his work. That is a long time to have a successful working relationship but it appears that from 1998 up until the end of 1999 some problems arose. Whether those problems coincided with the ending of Mr Hopkins role as the Field Sales Manager and the assent of Ms Bauers into the position one cannot tell from the evidence but the major part of the problem at least after the first warning, coincides with that time.

17 Cadbury were on the evidence, trying to maintain their sales position in the market place, it was important to them that their sales policies were followed through, as it was important that they have adequate records of their sales in order that they could plan their sales campaigns. It seems that the applicant was having difficulty with meeting those policies. It is claimed on his behalf that when he had difficulties the respondent offered training but did not deliver it. As far as I can tell from the evidence there were offers of training but there does not seem to have been any attempt to introduce a structured training system which would help the applicant through an obviously difficult period he was having. In short Ms Bauers said that training was available but did not pursue the delivery of that training with the applicant to any degree. For instance it cannot be said as Mr Jones suggested that her email to the applicant on the 24 April 1999 *[Exhibit R10]*, about problems with his email technique was training, in the sense that at the end of Ms Bauers intervention the applicant would be equipped with knowledge that he did not have before she made the intervention. It is clear that the applicant had received the same training as other members of the sales team, but the fact is, he did not accumulate the knowledge that the others must have if he was the only one not following the process properly. This means that he needed additional training and that should have been provided to him. The applicant complained that the audits against him were not fair and that they did not take into consideration difficulties he was having with his clients. The applicant felt he could not go into a store where the store owner was not present and rearrange displays, at least not without potentially antagonising the owner. This perhaps is a product of his generation and was not acceptable to Ms Bauers but it is a legitimate explanation as to why there was some difficulties with his merchandising as disclosed by the audits. Again, it appears training in negotiation would have been useful in those circumstances, this was planned but it never came to pass because the applicant was dismissed before the course was undertaken.

18 Other than the promise of training and discussions that Ms Bauers had with the applicant, which should in all fairness be regarded as some form of training, there was no structured training system put into place to try and help this applicant. This applicant was not a new comer to Cadbury, he had given 15 years service. It was clear that he had difficulties and one would think it was reasonable to expect that some special effort would be made to meet the circumstance that he was in by virtue of his age and personality. It is true that an employer has a right to terminate the employment of an employee, a right that cannot be interfered with by this Commission unless it is exercised unfairly and it may well be that right could have been properly exercised sometime in the future after proper training had been given by giving the applicant proper notice of termination. However, that did not happen.

19 What occurred was the applicant was treated as if he had conducted himself in a way which went to the root of the contract of service, that is, that he had seriously misconducted himself because the dismissal was clearly summary. He was immediately removed from the property and this offends the rule that was established in *FDR Pty Ltd v Gilmore (1998) 78 WAIG 1099.* Of itself that was unfair.

20 It is clear when one objectively examines the evidence that there was a pre-disposition in the mind of Ms Bauers to dismiss the applicant on the 24th May. There can be no other explanation for the arrangements made for Cadbury's Head Office to produce a final pay. That arrangement was made on 21 May, three days before the termination meeting. It was said that this was done to merely have the pay ready if it was needed. The applicant says he received the pay on 25th May. It is hard to conceive that the postal system would have worked so well as to deliver his final pay to his home on the next day that the letter was posted from Sydney. The circumstances indicate on the balance of probabilities that the decision was made to dismiss before the meeting took place and regardless of what the applicant said on 24th he would have been dismissed in any event.

21 All these reasons, and in particular because of the summary nature of the dismissal, the dismissal was unfair.

22 The Commission is required to consider whether reinstatement is availing. The submissions of the respondent which I accept is that on the evidence of Ms Bauers reinstatement is impracticable, Cadbury has no trust in the applicant and Ms Bauers would not re-employ him.

23 Mr Jones suggested that in any event, the applicant would have been dismissed in a short time because of the way he had failed to respond to training and because of the comments of the Full Bench in *Boganovich v Bayside Western Australia Pty Ltd (1999) 79 WAIG 8* then there was no further payment ought to be made, the applicant having been sufficiently compensated. In short there is no cause for the Commission to award compensation to the level that has been claimed by the applicant.

24 I respectfully disagree with Mr Jones concerning the applicability of a comment by Kenner C in *Boganovich*

(ibid) to this matter. The learned Commissioner noted that is a proper function of the Commission when assessing compensation, to consider that the contract would have been brought to an end sooner than the completion of a period for which compensation would normally be granted.

25 It is not beyond a reasonable likelihood that if the applicant had been given reasonable training the 15 years he had already served would have continued for some considerable period. What we have here is a situation where there has been a summary dismissal which is unfair in itself. The applicant has tried to mitigate his loss since, but he has not been able to do so fully. He has received 5 weeks pay, plus he went on holidays overseas for 6 weeks. In the circumstances I am required to apply the tests set out in *Boganovich (ibid)*, this means I am to compensate the applicant so that he was in the position he would have been, had it not been for the unfair dismissal. It has been over a year since the termination of the applicant. As I understand the evidence, he was paid $750 per week by Cadbury, he should be compensated for the full period since the dismissal and this time. This means he would have earned over a years salary which is $39,000. Applying the tests in *Boganovich* relating to assessment of injury, the applicant gave evidence of the effect of the dismissal upon him and in those circumstances I would award him $2,000 for injury. The total compensation would therefore, be $39,000 for loss plus $2,000 for injury, minus 11 weeks being 5 weeks pay in lieu of notice and 6 weeks when the applicant was away from the country, being a total of $8,250, this to be deducted from the total amount of loss and injury of $41,200. The amount exceeds the cap of the equivalent of 6 months remuneration prescribed in Section 23A(4) of the Act and therefore, the cap of $19,500 will be awarded to the applicant.

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	KENNETH CHARLES GILL V CADBURY SCHWEPPES PTY LTD ACN 004 551 473
CORAM	COMMISSIONER J F GREGOR
DELIVERED	FRIDAY, 18 AUGUST 2000
FILE NO/S	APPLICATION 780 OF 1999

Result	Applicant unfairly dismissed. Awarded compensation of $19,500.00.
Representation	
Applicant/ Appellant	Mr Richardson and later Mr T Dixon of Counsel appeared on behalf of the applicant.
Respondent	Mr A Mackie and later Mr D Jones appeared on behalf of the respondent.

Order.

HAVING heard Mr Richardson and later Mr T Dixon of Counsel on behalf of the (Applicant) and Mr A Mackie and later Mr D Jones on behalf of the (Respondent), and by consent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act, 1979,* hereby orders—

THAT

1. The applicant was unfairly dismissed.
2. Reinstatement is unavailing.
3. The respondent pay the applicant the sum of $19,500.

(Sgd.) J. F. GREGOR,
[L.S.] Commissioner.

2000WAIRC 00436

WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION.

PARTIES	VERONICA LEE JACKSON V KITCHER PROPERTY INVESTMENTS PTY LTD
CORAM	SENIOR COMMISSIONER G L FIELDING
DELIVERED	FRIDAY, 25 AUGUST 2000
FILE NO/S	APPL 116/2000

Result	Application dismissed
Representation	
Applicant	Mr B F Stokes as Agent
Respondent	Mr A J Randles as Agent

Reasons for Decision.

(Given extemporaneously at the conclusion of the submissions and taken from the transcript as edited by the Senior Commissioner)

1. The Applicant, by these proceedings, seeks relief pursuant to the provisions of the *Industrial Relations Act 1979* in respect of an alleged unfair dismissal from her employment with the Respondent and in respect of contractual benefits said to have been denied her by the Respondent.

2. By her Notice of Application the Applicant asserts that she was employed by the Respondent from 13 December 1997 until on or about 17 January last. At all material times her work involved supervising weddings at the Respondent's premises in Caversham, as a permanent part-time supervisor of weddings. It is common ground that, at all material times, the Respondent operated a catering or function centre known as Mulberry Farm at Caversham. It is common ground that the Applicant's work was normally confined, although not exclusively so, to work on the weekends. It is common ground also that she last worked on or about 9 January last, when there seems to have been a difference of opinion between her and the principal supervisor, Ms Collier, regarding locking up the premises at the close of business. Briefly, the Applicant took the view that it was not her job to lock up the premises and indicated as much to Ms Collier. It seems common ground that Ms Collier reported that to the Respondent's acting manager, Ms Hoyne. It now seems to be common ground that Ms Hoyne, soon afterwards if not on the Monday, took up the matter with the Applicant. There is some conflict in the evidence as to what occurred on that occasion.

3. Ms Hoyne said that she indicated to the Applicant that the problem could be overcome by her locking up and giving the key to a courier or taxi the next day, to be returned to the Respondent at the Respondent's expense, but, as events have turned out, nothing really turns on that.

4. It is common ground also that a day or two later, it not being altogether clear when, Ms Hoyne received a telephone call from the Applicant asking whether she had been rostered to work the following weekend. Ms Hoyne told her that she was not rostered. Again, there is some conflict between the testimony of the respective witnesses as to precisely what was said, but the import of it seems to be that Ms Hoyne told the Applicant that she was not rostered because it was a slack time for the Respondent, that there was apparently only one wedding, and that there was enough work for the permanent staff to do. Moreover, she told the Applicant that the permanent staff needed to do the work to keep up their hours and, accordingly, the Applicant would not be required to attend. Ms Hoyne said that on that occasion the Applicant appeared to be somewhat taken aback by that response. The reason for that appears to be, and it seems to be common ground, that, except for a few weekends, the Applicant was almost always rostered to work on weekends, especially whenever a wedding was booked.