Termination of Employment — Unfair dismissal — Reinstatement — Appeals — Misconduct — Employees involved in clocking each other off and leaving work early — Employees, members of a self-management team and paid as such — Admission of guilt by employees — Whether dismissals harsh, unreasonable and unjust — Commissioner found that dismissals were harsh, unreasonable and unjust and ordered reinstatement and payment of wages forgone — Other penalties available — Whether inconsistency in imposing penalties — Appeals — Principles to be applied — Whether error on the part of the Commissioner — Commissioner’s failure to define correctly nature of admitted offences — Dishonest conduct and organised and continued misrepresentations on the part of the employees — Whether absence of warnings in appropriate circumstances might be taken into consideration in contemplating notions of harsh, unreasonable and unjust — Serious breaches of trust — Whether contrition and frankness on part of respondents — Held, dismissals were not unreasonable or unjust — Whether dismissals harsh — Matters considered — Length of service, good work performance etc — Held, no case made out that dismissals were harsh — Appeals upheld — Industrial Relations Act 1991 (NSW), s 246.

THE COMMISSION. This is an appeal by the Electricity Commission of New South Wales (trading as Pacific Power) (the appellant, the EC) against a decision of Conciliation Commissioner Sheils given on 22 March 1995, ordering the reinstatement in employment of the five respondents named above and the payment of wages forgone.

The Conciliation Commissioner had before him the five individual applications for reinstatement which he heard at the same time and in relation to which he issued the one written decision. It was not contended on appeal that the hearing of the applications should have been otherwise dealt with. We consider it appropriate to deal with the five appeals, which we view as undifferentiated on the essential facts, in one decision.

The employees were dismissed on 11 August 1994. They were reinstated with pay by a decision of 22 March 1995, dated back to five days after the day of dismissal.

The dismissals

The events giving rise to the dismissals and the salient facts are not seriously disputed.

The Conciliation Commissioner found that in June 1994 the management at
Vales Point became aware that stores personnel might be involved in clocking each other off and leaving work early. So much is confirmed by a diary note made on 3 June 1994 by Mr Wheelahan, Administration Manager — Vales Point. Investigations at that time, utilising computer print-outs of the security/time system and attendance systems together with payroll records, did not uncover any discrepancies. What Mr Wheelahan did, was to ask Mr Neely, the Manager of Vales Point to address a meeting of team leaders at which he advised them of their responsibility to ensure that employees were informed that they were expected to be at work and leave work at the nominated times. Team leaders were asked by Mr Neely to go back to their teams and remind them of their obligations in that regard.

Further information was received on 20 July 1994. Mr Mitchell, one of the respondents of this appeal, had been observed at about 3.50 pm on Saturday 16 July 1994 to present two ID cards to the exit reader while a second respondent, Mr Coombs, was observed on Sunday 17 July 1994 to present three ID cards to the exit reader. An examination of the exit door history report from the security system appeared to confirm the information.

It was then determined that at following weekends a watch would be kept. Sightings were made and confirmation was available from the door history reports. Some short time passed to enable a check to be made whether leave forms had been submitted or adjustments had been made to vary the time and attendance records for the month to accord with the actual time worked and actual payment earned. No adjustments were made, no leave was sought.

Letters were sent to all five employees involved who were asked to comment in writing.

Subsequently each applicant was interviewed, in the presence of a union official Mr Drew, and a transcription of the interviews was taken. The matters that were under examination can be conveniently extracted from the “please explain” letters. These are reproduced:

“Mr RR NIEASS
ADMINISTRATIVE OFFICER
VALES POINT POWER STATION
It has been reported to me that whilst being required for duty at Vales Point Power Station from 7.00 am to 4.00 pm on Saturday, 23 July 1994, and Sunday, 17th July 1994:

1. At approximately 3.56 pm on Saturday, 23rd July 1994, when you left the station, you breached standard procedures by also presenting another person’s ID access card to the exit card reader.
2. On Sunday morning, 17th July 1994, you drove a Pacific Power vehicle off site for which an explanation is required.
3. You have knowledge of and have participated in the incorrect recording of time in the Time and Attendance System.

Would you please let me have your comments in writing on the above matters by 10.30 am Wednesday, 3rd August 1994.

These matters will be discussed with you at 11.45 am Wednesday, 3rd August 1994, in the Administration manager’s office and in
accordance with usual procedures you may, if you so desire, have your union delegate or a representative present at such discussion.

J Neely
MANAGER/VALES POINT POWER STATION

MR T S COOMBS
ADMINISTRATIVE OFFICER
VALES POINT POWER STATION

It has been reported to me that whilst being required for duty at Vales Point Power Station from 7.00 am to 4.00 pm on Saturday, 23rd July, Sunday, 24th July 1994 and Sunday, 17th July 1994:
1. On Saturday morning, 23rd July 1994, you drove a Pacific Power vehicle off site for which an explanation is required.
2. On Sunday afternoon, 24th July 1994, you drove a Pacific Power vehicle off site for which an explanation is required.
3. At approximately 3.56 pm on Sunday 17th July 1994, when you left the station, you breached standard procedures by also presenting two (2) other person’s ID access cards to the exit card reader.
4. You have knowledge of and have participated in the incorrect recording of time in the Time and Attendance System.

Would you please let me have your comments in writing on the above matters by 11.00 am Monday, 8th August, 1994.

These matters will be discussed with you at 11.00 am Monday, 8th August 1994, in the Administration Manager’s office, and in accordance with usual procedures you may, if you so desire, have your union delegate or a representative present at such discussion.

J Neely,
MANAGER/VALES POINT POWER STATION

MR B LULHAM
ADMINISTRATIVE OFFICER
VALES POINT POWER STATION

It has been reported to me that whilst being required for duty at Vales Point Power Station from 7.00 am to 4.00 pm on Saturday, 23rd July 1994 and Sunday, 24th July 1994:
1. You were approximately 46 minutes late reporting for duty on Saturday, 23rd July 1994, for which there is no evidence of approval.
2. At approximately 2.35 pm on Saturday, 23rd July 1994, you are reported to have left the site.
3. At approximately 3.57 pm on Saturday, 23rd July 1994, your ID access card was presented at the exit card reader by a person other than yourself.
4. That you left the site on a number of occasions in a Pacific Power vehicle for which an explanation is required, namely:
   (a) On Saturday, 23rd July 1994, Vales Point to Munmora and return.
   (b) On Saturday, 23rd July 1994, Vales Point to the outlet canal and return.
   (c) On Sunday, 24 July 1994, Vales Point to Eraring and return.
5. You have knowledge of and have participated in the incorrect recording of time in the Time and Attendance System.
Would you please let me have your comments in writing on the above matters by 10.30 am Thursday, 4th August 1994. These matters will be discussed with you at 11.00 am Thursday, 4th August 1994, in the Administration Manager’s office, and in accordance with usual procedures you may, if you so desire, have your union delegate or a representative present at such discussion.

J Neely,
MANAGER/VALES POINT POWER STATION

Mr J T Beveridge
ADMINISTRATIVE OFFICER
VALES POINT POWER STATION

It has been reported to me that whilst being required for duty at Vales Point Power Station from 7.00 am to 4.00 pm on Saturday, 23rd July 1994, Sunday, 24th July 1994, Saturday 16th July 1994 and Sunday, 17th July 1994:

1. At approximately 3.49 pm on Saturday, 23rd July 1994, your ID access card was presented to the exit card reader by a person other than yourself.
2. At approximately 6.36 am on Sunday, 24th July 1994, your ID access card was presented to the entry card reader by a person other than yourself.
3. At approximately 3.05 pm on Sunday, 24th July 1994, your ID access card was presented to the exit card reader by a person other than yourself.
4. At approximately 3.55 pm on Saturday, 16th July 1994, your ID access card was presented to the exit card reader by a person other than yourself.
5. At approximately 3.56 pm on Sunday, 17th July 1994, your ID access card was presented to the exit card reader by a person other than yourself.
6. You have knowledge of and have participated in the incorrect recording of time in the Time and Attendance System.

Would you please let me have your comments in writing on the above matters by 10.30 am Wednesday, 3rd August 1994. These matters will be discussed with you at 2.15 pm Wednesday, 3rd August 1994, in the Administration Manager’s Office, and in accordance with usual procedures you may, if you so desire, have your union delegate or a representative present at such discussion.

J Neely
MANAGER/VALES POINT POWER STATION

Mr G J Mitchell
ADMINISTRATIVE OFFICER
VALES POINT POWER STATION

It has been reported to me that whilst being required for duty at Vales Point Power Station from 7.00 am to 4.00 pm on Saturday, 23rd July 1994, Sunday, 24th July 1994, Saturday 16th July 1994 and Sunday, 17th July 1994:

1. You left the site at approximately 3.49 pm on Saturday 23rd July 1994, without prior approval.
2. At approximately 3.49 pm on Saturday 23rd July 1994, when you left the station, you breached standard procedures by also presenting another person’s ID access card to the exit card reader.

3. At approximately 6.36 am on Sunday, 24th July 1994, when you entered the station you breached standard procedures by also presenting another person’s ID access card to the entry card reader.

4. At approximately 12.34 pm on Sunday, 24th July 1994, you left the station without prior approval.

5. At approximately 3.55 pm on Saturday, 16th July 1994, when you left the station, you breached standard procedures by also presenting another person’s ID access card to the exit card reader.

6. At approximately 3.56 pm on Sunday, 17th July 1994, your ID access card was presented to the exit card reader by a person other than yourself.

7. You have knowledge of and have participated in the incorrect recording of time in the Time and Attendance System.

Would you please let me have your comments in writing on the above matters by 10.30 am Wednesday, 3rd August 1994. These matters will be discussed with you at 12.30 pm Wednesday, 3 August 1994, in the Administration Manager’s Office, and in accordance with usual procedures you may, if you so desire, have your union delegate or a representative present at such discussion.

J NEELY

MANAGER/VALES POINT POWER STATION

After the individual interviews were completed, it was apparent from the admissions made that each employee had engaged in misconduct in that each had engaged in the practice of registering the arrival and departure of one another at times when various members of the group had not been present on the site.

This fraudulent recording of attendances occurred on 16, 17, 23 and 24 July 1994 at Vales Point Power Station.

Mr Nieass and Mr Coombs, admitted to and were found guilty of having:

1. deliberately presented another employee’s ID access card to the Exit Reader on one occasion
2. knowingly participated in the incorrect recording of time in the Time and Attendance System
3. knowingly enabled another employee, as a result of their actions, to receive payment of money to which they were not entitled.

Mr Lulham admitted to and was found guilty in addition to (2) above to having:

1. left the site (Vales Point) without approval on Saturday 23 July 1994
2. deliberately permitted his ID access card to be presented to the Exit card reader by a person other than himself on Saturday 23 July 1994
3. knowingly received and accepted payment to money to which he was not entitled.

Mr Beveridge admitted to and was found guilty of having:

1. left the site (Vales Point) without prior approval on 16, 17, 23 and 24 July 1994
2. deliberately permitted his ID access card to be presented to the Entry
Card reader by a person other than himself on 24 July 1994 and to the Exit Card Reader on 16, 17, 23 and 24 July 1994
(3) knowingly participated in the incorrect recording of time in the Time and Attendance System
(4) knowingly received and accepted payment of money to which he was not entitled.

Mr Mitchell admitted to and was found guilty of having:
(1) left the site (Vales Point) without prior approval on 17, 23 and 24 July 1994
(2) deliberately presented another employee’s ID access card to the Exit Card Reader on 16 and 23 July 1994
(3) deliberately permitted his ID access card to be presented to the Exit Card Reader by a person other than himself on 17 July 1994
(4) knowingly received and accepted payment of money to which he was not entitled as a result of his actions
(5) knowingly enabled other employees, as a result of his actions, to receive payment of money to which they were not entitled.

The self management team

The Commissioner’s decision describes the applicants’ duties and the operation of the Self Management Work Team of which they were all part. We adopt the Commissioner’s description:

“All of the applicants were employed on stores duties, and were members of the same Self Managed Work Team, a concept introduced at Vales Point on or about February 1993. The principal aim of such concept being that the team was responsible for the allocation and performance of tasks and responsibilities falling within their classification in lieu of having a direct supervisor. Various tasks were allocated to each member of the team with the expectation that there would be rotation through each task every six months. One of the responsibilities, which is pertinent to this case, is the recording of the attendance of the team in the computerised Time and Attendance System. The evidence in this case is that that responsibility lay almost exclusively with Mr Mitchell although it must be stated at the outset that is an issue between the parties.”

The system of recording the attendance of the employees at their work place was described in the Commissioner’s decision in terms, accepted by the appellant as accurate, as follows:

“The computerised time and attendance system, which also acts as a security system, as I understand it to operate from the evidence adduced in this case, might be summarised as follows. Each employee is issued with a computerised card which, amongst other things, records the time and date and employee enters or exits the site. To enter the site the card is presented to a computerised reader board which in addition to activating a turnstile to allow entry, records in the system the employee’s staff number, name and time of entry. The same process operates with respect to exiting the site. Documents recording this information were tendered in the proceedings.

The time and attendance system, as I understand it to operate, requires one member of the team to validate the attendance of each employee of the team each day or shift by accessing the computerised system. Again,
my understanding is that each member of the team is recorded in the time and attendance system as being present each day or shift and this is denoted by the letter ‘P’ appearing alongside each employee’s name. This requires the member of the team allocated the responsibility for recording time and attendance to either validate that the employee is present on that day or to record other than normal starting or ceasing times and if for example the employee is not present on that day to adjust the computer to indicate the reason for the absence. It is these records that ultimately form the basis for the preparation of the payroll by the Timekeepers.”

The work done by the appellants, and the nature of the employment contract under which they were employed, was given in evidence by Richard John Outridge.

The “designated title” of the appellants was “Warehouse/Admin Officer” in the Commercial/Stores Group Branch at Vales Point Power Station reporting to the Stores Co-ordinator. The employees were a part of a “self managed team”. The stores co-ordinator, who worked a nine day fortnight, was present only during the day shift and not at all during the weekends. That arrangement had the result that at weekends there were no supervisors to oversee the work of the Warehouse/Admin Officers. Prior to the introduction of the concept of self management there had been a shift supervisor directly on each shift responsible for the store. The “self management” concept, introduced with the agreement of the workforce including the five appellants, placed the responsibility for performance of the work on the individual employee.

Consequently management could and did remove weekend shift supervisors, and the storemen, then Warehouse/Admin Officers, assumed greater responsibility. The scheme also provided the opportunity for training. The salaries were increased, though not to the degree that the employees thought appropriate, each apparently being of the view that they possessed the skills and knowledge which should have given them the maximum salary of level 16.

Misconduct and the code of conduct

Section 66(1) of the Electricity Commission Act 1950 (NSW) provides:

“Employees guilty of misconduct

66(1) Where an employee of the Commission is guilty of misconduct or of contravening any regulation or by-law made under this Act, or any rule or direction of the Commission, the employee may in accordance with the regulations:

(a) be dismissed or suspended;
(b) be fined a sum not exceeding 0.1 penalty unit;
(c) be reduced in rank, position, or grade and pay,

but every such employee so dealt with shall be notified in writing of the nature of the misconduct charged or of the breach or regulation, by-law, rule or direction alleged to have been committed.

(2) . . .”

Tendered as Ex 7 in the proceedings was the EC’s published Code of Conduct applying to all employees. It sets out inter alia:

“You are responsible for maintaining high ethical standards in carrying out your duties and providing service.

...
You are expected to perform your duties with integrity, commitment and diligence, working to the best of your ability.

... You are accountable for your own conduct.

... You are expected to comply with the associated policies, systems and controls put in place to maintain integrity and security.

... Reporting of corrupt conduct.

You have a duty to report to a senior officer of Pacific Power any corrupt conduct involving or affecting Pacific Power, of which you are aware, or which you suspect.

... And as a footnote to the Code of Conduct:

‘‘Breaches of these standards may lead to disciplinary action (including dismissal) and/or the bringing of civil or criminal proceedings.’’

EC findings

The result of the EC’s investigation, after noting the admissions of all participants, were in our view inevitable. The findings were noted over the signature of P Wheelahan, Administrative Manager/Vales Point and R Outridge, Group Commercial Manager in these terms:

‘‘As a result of the investigation conducted:

1. It has been found that Messrs Nieass, Beveridge, Mitchell, Lulham and Coombs have been engaged in the practice of registering the arrival and departure of one another at times when various members of the group have not been present at the site.

2. It was further concluded that each of the above employees had knowledge of and/or participated in the fraudulent recording of time in the Time and Attendance System, resulting in themselves and/or others being paid for time they were not at work.

3. It was also found that Messrs Beveridge, Mitchell and Lulham have knowingly accepted payment of salaries for periods of time that they have not worked and have made no attempt to correct any such overpayment.’’

A further notation by the Manager/Employee Relations is in the following terms:

‘‘The evidence and admissions in the case persuade me that the employees’ actions were deliberate and planned. The effect has been to irrevocably breach the trust expected in the employment relationship and has led to financial benefit for a number of the work group. Dismissal supported.’’

Commissioner’s decision

The issue tendered by the employees before the Commissioner, in the circumstances of their admitted guilt, was whether their dismissals were harsh, unfair, or unreasonable within s 246 of the Industrial Relations Act 1991 (NSW). The Commissioner found that in respect to each of the five applicants, the three separate elements of harsh, unreasonable and unjust dismissal had been made out:
“In my view the dismissal of the applicants, in lieu of the imposition of other forms of punishment, amounts to, as contemplated by Part 8 Unfair Dismissals of the Act, a harsh, unreasonable or unjust dismissal.”

We consider it necessary to go to the reasons given by the Commissioner in some detail to ascertain what brought him to that conclusion.

In the Commissioner’s written decision as to his assessment of the seriousness of the offences the position of the union was noted:

“... it is not suggested by the union that the offences relied upon by the EC were not serious. It is also acknowledged by the union the EC was entitled to impose a penalty upon each of the applicants for the breaches of discipline which were admitted to.”

The Commissioner appears to have accepted that position. He noted, after referring to the Manual Of Personnel Policies and Procedures, and in particular to cl 33, that there were other punishments, apart from dismissal, available for the punishment of offences but held that those responsible for the recommendation of dismissal had considered only that penalty. He also found that no other factors, except the seriousness of the offence were given proper consideration by any of the officers of the EC who were responsible for recommending the applicants’ dismissal.

The Commissioner, also turned to what he found to be inconsistent punishment. He then noted that punishment “contrasts with the punishment imposed on two employees at another power station of the EC for misconduct similar to that committed by the applicants some six months prior to the instant circumstances”. He then examined in detail the punishment imposed on an employee, known in the record as “Mr X”, who received a suspension for five days, whose conduct the Commissioner found to have been similar to that of the appellants. This employee’s adverse disciplinary record went back to February 1982. Mr X received half day suspensions in October and December 1982, a one day suspension in 1985. He had repeated “short absences” from work in 1990, had an “on/off/on” record with Attendance at Work Programme for seven years and a series of further absences in 1994. He was said by his supervisor to be “a very unsatisfactory employee whose work performance is average but his whereabouts is of constant concern. He is not dependable or reliable”.

It is obvious on the facts that Mr X was a poor timekeeper and the Electricity Commission appears to have been very patient with Mr X and his problems. No dishonesty is imputed to Mr X although on one occasion “Mr X stated that Mr Y registered his time of arrival on 9 January ‘by mistake’”. There is an assertion in an affidavit tendered by the EC that Mr X “could not be proved to be guilty of the offence alleged”. In the event he appears not to have been dealt with for dishonesty.

Mr X was suspended for five days. The Commissioner found that Mr X’s circumstances showed that other forms of punishment were available. He characterised the comparison between Mr X and the five respondents on appeal as “demonstrating inequality of treatment”.

The Commissioner’s finding that each case stood alone in the assessment of penalty is certainly correct. The careful analysis of mitigating factors made by the Commissioner remains relevant but against a background of very much more serious misconduct than anything arising out of time-keeping.
The Commissioner expressed the view that there were further circumstances which he saw as calling for a lenient approach:

"Those circumstances include their length of service; their disciplinary history; their unchallenged good work performance; their contrition and the effects of their dismissal on their personal and family life."

He also referred to the misconduct observed during the first weekend and the continued surveillance during the next weekend:

"...it was decided to continue the surveillance over the following weekend quite contrary to the requirements in 33.1 General Policy of the procedures with respect to early intervention which prescribes:

1. EARLY INTERVENTION

Most problems start out small with minor breaches of rules. These must be identified and the matter discussed with the employee immediately."

The Commissioner also considered the employees were entitled to the consideration of the Commission because of:

"... the failure of the Management of Vales Point to draw to the applicants' attention the seriousness of the offences they were ultimately dismissed for and (also) the failure to issue appropriate warnings to the applicants that a continuation of such offences would lead to their dismissal."

The Commissioner further found:

"... it was obligatory upon management being advised that two of the applicants had been sighted presenting more than one ID card to the exit readers on 16 and 17 July 1994 to immediately raise that allegation with the employees concerned. Not to do so was not only a failure by management to abide by the well documented procedures but, in my view, grossly unfair."

In dealing with frankness and contrition the Commissioner considered submissions before him that the applicants had neither shown contrition for their action, nor had dealt with the employer, or the Commission, in a frank and forthright manner. With respect to those submissions the Commissioner found:

"I could not detect from their evidence that they had withheld vital information from their employer or the Commission... I did not perceive any deliberate attempt on their part to be untruthful before the Commission... the submission by the EC that the applicants were insincere as to any contrition expressed by them either to the EC or before the Commission is not supported by the evidence."

The Commissioner expressed his conclusions in these terms:

"Having regard to all the circumstances of this case I am satisfied that all of the applicants have been harshly, unreasonably or unjustly dismissed. In arriving at this conclusion I rely on a decision of a Full Commission of this Commission in Electricity Commission of New South Wales v a Pacific Power v Crump ((1993) 48 IR 296)."

There still remained an issue for the Commissioner to determine whether the discretion to reinstate the applicants should be exercised and, if so, on what terms.

The Conciliation Commissioner ordered reinstatement and the payment of 31 weeks wages at $720 per week. After the deduction of a sum equal to five days
pay calculated as being in the nature of a suspension, a sum amounting to $22,320 was ordered to be paid to each respondent.

The Commissioner explained the deduction of five days pay from the calculation as follows:

"In assessing the amount that should be ordered I have taken into account that it would be appropriate having regard to the nature of the breaches of discipline committed by the applicants to deduct an amount equivalent to five days pay which would be treated as a suspension, the maximum period of suspension given pursuant to the EC disciplinary procedures."

**Appellant’s submissions**

The notice of appeal set out the grounds of appeal as being:

1. The Commissioner erred by reinstating the respondents.
2. The Commissioner erred in not placing sufficient or any weight on the seriousness of the offences.
3. The Commissioner erred in finding that the decision to dismiss was contrary to the Appellant’s procedure.
4. The Commissioner erred in finding that all the respondents had been harshly, unreasonably and unjustly dismissed.
5. The Commissioner erred in finding that the maximum penalty imposed for such offences was five days suspension.
6. The Commissioner erred in finding that all the respondents had been truthful before the Industrial Relations Commission.
7. The Commissioner erred by placing excessive weight upon an assertion that no specific warnings had been issued to the respondents concerning the use of another’s Identification Card (ID card) to falsely record starting or finishing times when there is an overwhelming inference that long term employees would have known that such a practice was unlawful and contrary to honest work practices.
8. In all the circumstances the Commissioner’s decision is too lenient.
9. The Commissioner did not take adequate or any proper regard to Mr Lulham’s disciplinary history.
10. The Commissioner’s decision is against principle and contrary to the evidence."

The relief claimed by the appellant was:

- That the orders of Commissioner Sheils be set aside.
- That if reinstatement is ordered (which is opposed) then no order for the payment of money be made between dismissal and reinstatement.
- In the alternative, if the Commission does make an order for the payment of money between dismissal and reinstatement that sum have deducted from it a sum greater than five days pay.
- The Appellant seeks a stay of the whole of the decision and orders of Commissioner Sheils."

Mr Phillips, counsel for the appellant, made available his submissions in written form and spoke to that document. The argument relied upon errors in the reasoning of the Commissioner, including:

- Insufficient weight being given to the seriousness of the offences."

In his address Mr Phillips invoked public standards of behaviour by references to decided cases and statute law.
He referred to *Clouston & Co Ltd v Cory* [1906] AC 122 at 129:

“There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand misconduct, inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal.”


“‘To my mind the proper conclusion to be drawn from the passages I have cited and the cases to which we have been referred is that, since a contract of service is but an example of contracts in general, so that the general law of contracts will be applicable it follows that the question must be — if summary dismissal is claimed to be justifiable — whether the conduct complained of is such as to show the servant to have disregarded essential conditions of the contract of service. It is, no doubt, therefore generally true that wilful disobedience of an order will justify summary dismissal, since wilful disobedience of a lawful and reasonable order shows a disregard — a complete disregard — of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the master and that unless he does so the relationship is so to speak, struck at fundamentally.’”

Mr Phillips also relied upon a passage by Macken J in *Elcom v Electrical Trades Union of Australia, NSW Branch* (1983) 5 IR 267 who, after citing *Clouston* and *Laws* said at 270:

“The Industrial Commission of New South Wales has always applied these principles. In *Re Homebush Abattoir* [1966] AR (NSW) 371 at 374 the Commission offered these views adding that ‘… the question of whether the conduct of an employee amounts to misconduct justifying instant dismissal would generally depend upon whether or not the act complained of can properly be regarded as deliberate or wilful or of such a nature as to strike at an essential element of the contract of service.’”

On the general approach to the language of statute considered in the context of employees’ misconduct Mr Phillips referred to *Bostik (Australia) Pty Ltd v Gorgevski* (1992) 41 IR 452 at 459:

“‘These are ordinary non-technical words which are intended to apply to an infinite variety of situations where employment is terminated. We do not think any redefinition or paraphrase of the expression is desirable. We agree with the learned trial judge’s view that a court must decide whether the decision of the employer to dismiss was, viewed objectively, harsh, unjust or unreasonable. Relevant to this are the circumstances which led to the decision to dismiss and also the effect of that decision on the employer. Any harsh effect on the individual employee is clearly relevant but of course not conclusive. Other matters have to be considered such as the gravity of the employee’s misconduct.’”

Mr Phillips’ further relied on a passage in *Lane v Arrowcrest Group Pty Ltd* (1990) 43 IR 21:

“‘… In my opinion the fact of the dishonesty, apart from considerations arising under cl 6(c)(v), fully justified the dismissal: cf *Printing Industry...*”
Employees’ Union of Australia v Jackson & O’Sullivan Pty Ltd (1957) 1 FLR 175. The lawfulness of the dismissal under the general law does not necessarily mean that the dismissal may not in all the circumstances be harsh, unjust or unreasonable under an industrial law like cl 6(c)(v) which applies to all dismissals, lawful or unlawful: R v Industrial Court (SA): Ex parte General Motors-Holdens Pty Ltd (1975) 10 SASR 582. However the lawfulness of the dismissal is a relevant consideration in determining whether the dismissal was harsh, unjust or unreasonable. As King CJ observed in R v Industrial Court (SA): Ex parte Mount Gunson Mines Pty Ltd (1982) 30 SASR 504 at 506; 2 IR 336 at 336: ‘If it is seen that a summary dismissal for misconduct was lawful because the employee’s misconduct provided lawful justification, the employer is a long way towards repelling an allegation that that dismissal was harsh, unjust or unreasonable.’ per von Doussa J at 238.”

Mr Phillips submitted the wilful and deliberate acts of the relevant employees amounted to obtaining money based upon misleading conduct, either individually for themselves or to help others to obtain it. Such matters were regarded in the criminal law as being very serious. He cited s 516 of the Crimes Act 1900 (NSW) (larceny as a servant), s 178 (falsification of accounts) and particularly s 178BB (the making of a statement (whether or not in writing) known to be false or misleading for financial advantage); the seriousness of the case lay in the obtaining and acceptance by false representations of money to which they were not entitled.

Mr Phillips referred to John Lysaght (Aust) Ltd v Federated Ironworkers Association of Australia, NSW Division (unreported, NSW Industrial Commission, Matter No 488 of 1981, 20 August 1991, Watson J) where two long-serving employees (17 years and 12.5 years) had been dismissed. The employment record of both was satisfactory. Each had given an assurance as to future conduct. Time sheets had been falsified, overtime and an overtime meal docket improperly claimed. The two men had been clocked off by someone else; there had been a deliberate attempt to defraud the company. His Honour noted the difference between cases where some arrangement of convenience was involved with no attempt made at gain, and cases where a dishonest claim was made. In rejecting the claim for reinstatement he held that ‘dishonesty cannot be condoned with or without general warnings, which I am satisfied occurred . . .’.

Mr Phillips also cited Pasminco — Sulphide Corporation v Federated Ironworkers Association, NSW Division (unreported, NSW Industrial Commission, 17 May 1991, Matter No 250 of 1991, Sheils CC), a case where a claim had been made for overtime not worked. The Commissioner concluded that the employee had lied to the employer. The Commissioner held ‘‘that an employee under his common law contract must, at all times, be honest in his dealings with his employer’’. The onus of ensuring the correctness of any claim made for overtime or any other matter was on the employee.

Mr Phillips submitted that an examination of the cases in State and Federal tribunals, in relation to clocking off other person’s cards so as to base a false claim for time worked, showed a common standard in application throughout industry. It was always a very serious offence aggravated where fraud was involved and telling against any expectation that the relevant Commission
would intervene in such cases by way of reinstatement. This case, he submitted, displayed the elements of aggravation including fraud.

Mr Phillips submitted the seriousness of the matter alone could support a dismissal and dealt extensively with the view that comparisons with like or unlike cases could not of themselves override the force of the actual admitted facts as in this case and the unavoidable inferences of deceit that arose from them. The evidence plainly showed, to the extent in this class of case other penalties were relevant, that those matters on the evidence had been considered.

He also submitted:

- The Commissioner misinterpreted the Manual of Procedures in coming to the conclusion that the decision to dismiss was contrary to the EC procedures;
- The Commissioner was in error in finding that seriousness alone could not support a dismissal;
- The Commissioner was in error in finding that different punishment for other offenders alone amounted to grounds for reinstatement;
- The finding that the EC should have warned the respondents of the seriousness of the offences took no account of the obligation to investigate offence or the objective seriousness of the offence;
- The finding that the procedure for the identification of minor breaches had not been complied with was in error because the breaches were not minor;
- The finding that the employees did not withhold information from the employer was perverse having regard to the interviews conducted by the EC;
- The assessment of the amount to be paid to the respondents took no account of the obligation to mitigate the damage;
- The Commissioner’s finding that five days was the maximum suspension available pursuant to the EC guidelines was in error.

Respondents' submissions

Mr Crawshaw’s submissions addressed, as he put it, “the more germane points of the employer’s grounds of appeal”, grounds which he said were directed toward aspects of the deliberative process undertaken by the Commissioner as well as certain findings made in consequence thereof.

As to the first ground of appeal:

(i) The Commissioner erred in not placing sufficient or any weight on the seriousness of the offences

Mr Crawshaw argued that the Commissioner had properly identified the question to be answered by the Commission as being “in all circumstances whether or not the dismissal of the applicants was appropriate?”. Thereafter the Commissioner undertook a balancing exercise whereby the serious nature of the offences, as admitted to by the applicants, was considered as against other mitigating factors such as length of service, previous disciplinary records, the contrition of the employees; and their work performance. He said the considered deliberation of the Commissioner naturally stood in contraposition to that undertaken by the Electricity Commission which was put by Mr Crawshaw in the following terms:

“Mr Outridge and Mr Wheelahan did not carry out any balancing exercise
but rather it was their position that this particular offence could only carry one penalty.”

Mr Crawshaw submitted that such default alone constituted sufficient grounds for the Commissioner to find that the dismissals were unfair.

As to the second ground of appeal:

(ii) The Commissioner erred in finding that the maximum penalty imposed for such offences was five days suspension

Mr Crawshaw conceded the Electricity Commission Act imposes no such limitation and the Commissioner was similarly aware of the provisions of the Act in this regard; he was ultimately guided by the Electricity Commission’s customary practice as submitted by the union.

Mr Crawshaw submitted that it was questionable whether the Commissioner had made a finding as to alternative forms of disciplinary procedures being available; however, whether or not the Commissioner actually made such a finding, it was available on the evidence and ought not be disturbed on appeal.

In support of that argument Mr Crawshaw referred to the earlier similar offence committed by another Pacific Power employee who was referred to as Mr X. In so doing Mr Crawshaw contrasted the punishment meted out to Mr X as against that which the respondents received, that is five days suspension for the former and dismissal for the latter for a similar offence. The case of Mr X was cited, said Mr Crawshaw, in support of “the proposition that the Electricity Commission in similar circumstances considered options other than dismissal”.

Mr Crawshaw argued that the variance of treatment as between the two circumstances highlighted the similar deficiencies in the approach taken by Messrs Outridge and Wheelahan in dealing with the offences committed, and admitted to, by the respondents in the circumstances of this case.

Such deficiencies in themselves constituted a breach of the Electricity Commission’s own disciplinary procedures said Mr Crawshaw and he relied on the above comparison in part to counter the appellant’s third ground of appeal:

(iii) The Commissioner erred in finding that the decision to dismiss was contrary to the appellant’s procedure

The “appellant’s procedure” as referred to in the above ground of appeal was the Electricity Commission’s disciplinary procedures contained in the Manual of Personnel Policies and Procedures tendered as Ex 19 before the Commissioner.

Mr Crawshaw’s submissions in respect of this ground were advanced on a number of different but related bases which to varying extents are comprehended by other grounds of appeal and the associated arguments in reply put by Mr Crawshaw.

Four points emerge in Mr Crawshaw’s argument dealing with the procedural ground, two of which have appeared earlier, namely the failure of the Electricity Commission to consider all possible mitigating factors when considering the question of punishment and secondly, the failure of the Electricity Commission to consider alternative forms of punishment. Mr Crawshaw submitted that those two findings without more were sufficient grounds for a finding of unfairness in respect of the dismissals as the Commissioner so found.

Mr Crawshaw raised two additional points in support of his contention that the Electricity Commission was in breach of its own disciplinary procedures
namely with the employer’s failure to warn its employees of the consequences of such conduct and also the delayed intervention of the employer once it became aware of the occurrences.

Mr Crawshaw’s additional submissions in respect of the procedural ground touched upon the sixth ground of appeal and in addition served to introduce Mr Crawshaw’s submissions on issues both of credit and contrition.

The sixth ground of appeal was:

(vi) The Commissioner erred by placing excessive weight upon an assertion that no specific warnings had been issued to the respondents concerning the use of another’s Identification Card (ID card) to falsely record starting or finishing times when there is an overwhelming inference that long term employees would have known that such a practice was unlawful and contrary to honest work practices

In respect of this ground Mr Crawshaw was careful to point out the warnings he was referring to concerned “failure to warn the employees that such offences would lead to dismissal, not failure to warn the employees that these were offences”; to that extent Mr Crawshaw’s submissions repeated the remarks made by the Commissioner at first instance (AB 1146). He said there was some variance between the parties as to the nature and role of such warnings in the Commissioner’s decision, especially having regard to the fact that the Commissioner’s finding as to the unfairness of the dismissals appeared independently of, and prior to, consideration of the lack of warnings.

In respect of these issues Mr Crawshaw submitted (at p 5725):

“... these findings are not necessary for the decision and must be viewed in that way ... However they are made out on the evidence ... The appellant was not able to produce any evidence that the employees were warned that such offences would lead to dismissal.”

The appellant’s fifth ground of appeal was directed toward the credit of the employee respondents:

(v) The Commissioner erred in finding that all the respondents had been truthful before the Industrial Relations Commission

Whilst conceding that the employees concerned failed to co-operate during the original interview with officers of the Electricity Commission, Mr Crawshaw claimed that they had been open and frank in proceedings before the Commissioner. It was further put by Mr Crawshaw that any complaint made as to the imperfect recall of the employees in the giving of their evidence was explicable by reference to the three month delay between the occurrence of the offences and that relevant part of the proceedings before the Commissioner. That the explanation accounted for any alleged inconsistency in the evidence as given, either internally or as against other accounts given by the other employees, and to the extent that there were inconsistencies of any significance, which was not conceded, such differences could hardly be supportive of the conspiratorial approach which the employer sought to impute.

Mr Crawshaw countered a submission by the employer that the Commission should consider the initial reluctance of the employees to implicate others, suggesting that such a submission was “nothing if not bold” and further stating that there was no charge to the effect of having “failed to tell your employer at the interview what other employees were doing in relation to timekeeping
offences”. Such matters led Mr Crawshaw to the question of contrition in respect of which he put the following:

‘‘... in my submission the moral doctrine ... of contrition only requires one to be contrite about one’s own acts and not about other employees.”

And concluded with the submission:

‘‘In any event when it came to the hearing there was no such refusal (to implicate others) and therefore the question does not arise.”

We note that no allowance was made by the Commissioner when calculating the order for the payment of money for offsetting any earnings of the respondents between the date of the dismissal and the date of the order for reinstatement.

On appeal, although no point had been made before the Conciliation Commissioner nor reference made in the grounds of appeal, counsel for the respondents informed the Full Commission that his clients did not wish to take advantage of any double earnings and consented to an appropriate offsetting being made should the question arise. For reasons later appearing the question does not so arise.

Consideration

Both counsel assisted the Full Commission on appeal by reference to and analysis of a number of cases decided on the questions posed on the appeal. We have had regard to the cases and the principles and views therein expressed.

The respondent emphasised the various cases in which the Commission and the Court have considered the question of the principles to be applied on appeal. We indicate that we are satisfied that the principles applicable to this appeal are those set out by the Full Commission in Electricity Commission (NSW) t/a Pacific Power v Crump (1993) 48 IR 296; Big W Discount Stores v Donato (1994) 58 IR 239 and Re Government Cleaning Service (Privatisation) Award (1995) 59 IR 348 and by the Full Court in Haynes v CI & D Manufacturing Pty Ltd (1994) 60 IR 149.

We approach this case on the basis that to succeed the appellant must show an error as that term has been interpreted in the above mentioned cases. The appellant could show such an error were the Commissioner to have misdirected himself on a question of law, or the correct principles to be applied to the questions before him or were it demonstrated that the Commissioner had made findings of fact or inferences from facts which were not available on the evidence presented.

The approach to the difficult task of determining whether the Commission should intervene in dismissal cases was considered in Busways v Johnson (1994) 55 IR 255 at 260:

‘‘Apart from the employer’s obligation to keep the name of a complainant confidential which we have mentioned, the employer in this case was making decisions in the ordinary course of conducting its business (following a review process agreed with the relevant union and approved by the Department of Transport) as to whether complaints it had received from its customers were justified or not. That exercise did not involve a judicial or administrative review of what had occurred. Questions of ‘natural justice’ and a ‘confrontation’ with an accuser are not matters which ordinarily or necessarily arise in the conduct of such business affairs. They were not requirements of the agreed review process, nor are
they tests which must be satisfied in a subsequent consideration of a dismissal, if challenged under s 246 of the Act. What then arises for consideration is whether the decision to dismiss was harsh, unreasonable or unjust.

In the decision of the Full Federal Court in *Byrne v Australian Airlines Ltd* (1994) 52 IR 10 Black CJ observed at 11 in relation to the award provision there under consideration, which provided that: ‘Termination of employment by an employer shall not be harsh, unjust or unreasonable’, that:

‘Although there is an obvious overlap between the words ‘‘harsh’’, ‘‘unjust’’ and ‘‘unreasonable’’, they describe different concepts and it may well be that to dismiss an employee who is in fact not guilty of any misconduct is objectively ‘‘unjust’’, notwithstanding that in a procedural sense the employer’s conduct was not unreasonable and the decision to dismiss was one the employer might properly have arrived at.’

We adopt those observations and add that a decision to dismiss an employee who is in fact guilty of misconduct, may not be unjust or unreasonable, but may in particular circumstances nevertheless be harsh. This was the conclusion reached by a Full Bench of the Commission in *Electricity Commission of New South Wales v Crump* (1993) 48 IR 296.

The principles developed by the Commission’s predecessor under the *Industrial Arbitration Act* 1940 (NSW) in relation to reinstatement applications have been displaced by the provisions of Ch 3 of Pt 8 of the Act. For example the oft quoted principle of ‘a fair go all round’ enunciated in *Re Loty v Holloway and Australian Workers’ Union* [1971] AR (NSW) 95 must now give way to a consideration of whether a dismissal is harsh, unreasonable or unjust. (See *Outboard World Pty Ltd v Muir* (1993) 51 IR 167 at 182.)

Those new tests nevertheless comfortably carry with them some of the well known approaches adopted to the exercise of the former jurisdiction under the *Industrial Arbitration Act* 1940. For example, a consideration of whether a dismissal was harsh, unreasonable or unjust does not involve an appeal from an employer’s decision, nor does it give to the Commission the power to substitute its decision for that of the employer, as if it had control of the business.’’

We consider the jurisdiction and the grounds on which the Industrial Commission has authority to intervene are to be found in the terms of s 246 of the *Industrial Relations Act* 1991 (NSW) and in no other source. That is not to say that in considering the facts presented, the tribunal may not have access to the wide variety of the previous considerations of the section in decided cases and the expression of the principles and the bases on which the tribunals have acted.

In *Burke v McGirr* (unreported, NSW Industrial Relations Commission, Bauer, Schmidt JJ and Patterson CC, Matter No IRC2940 of 1994, 24 May 1995) the Full Commission observed at p 4:

‘‘Counsel for the respondent on appeal relied upon an absence of ‘‘procedural fairness’’, in the events leading to dismissal. This is a concept which seems to be put forward as an argument in dismissal cases. We are of the view, however, that such a concept has not been become accepted in
this Commission as a ground of reinstatement, separate from the statutory concepts of harsh, unreasonable or unjust dismissal. The legislation provides relevantly:

‘246(1) If an employer dismisses, or threatens to dismiss, a person who is an employee of the employer and the person claims that the dismissal was, or that the threatened dismissal would be harsh unreasonable or unjust, the person (or an industrial organisation of employees on behalf of the person) may apply to the Commission for the claim to be dealt with under this Part.’

We are of the view that the discretionary basis for reinstatement resides in the terms of the statute and that the statutory instruction can not be made to give way to imprecise general concepts such as ‘procedural fairness’. A consideration of the procedures followed in implementing a dismissal may be relevant in a particular case. Nevertheless, all the relevant circumstances must be considered by the Commission in determining whether a dismissal was harsh, unreasonable or unjust, not merely such procedures alone.”

As was observed in Mason v Electricity Commission (NSW) t/a Pacific Power (1995) 62 IR 436 the question arising not infrequently in proceedings for reinstatement of an employee is whether or not a failure to afford procedural fairness to an employee in respect of a decision to dismiss renders the dismissal harsh, unreasonable or unjust. Section 249 of the Act deals to some extent expressly with the matter by providing that in determining a claim the Commission may, if appropriate, take into account inter alia (at 442 per Hill J):

‘‘(a) whether a reason for the dismissal or threatened dismissal was given to the applicant and, if the applicant sought but was refused reinstatement or re-employment with the employer, whether a reason was given for the refusal to re-employ; and

(b) if any such reason was given — its nature, whether it had a basis in fact, and whether the applicant was given an opportunity to make out a defence or give an explanation for his or her behaviour or to justify his or her reinstatement or re-employment;

...the statute provides only that the Commission may, where appropriate, take into account the specific considerations there set out and, finally, any other matters it considers relevant. It may well be in some circumstances for example where the failure to afford procedural fairness causes substantial and irrevocable prejudice to the employee, that such failure will result in the dismissal being harsh, unreasonable or unjust. However, at the end of the day, the ultimate disposition of the claim for reinstatement, remains within the discretion of the Commission; that discretion must, of course, be properly exercised.

In my opinion, it is relevant that proceedings under the Act enable the dismissal and all of its attendant features to be reviewed; although the matter is not an ‘appeal’ against an employer’s decision, the employee has an opportunity to present a full case going to the merits and/or lawfulness of the dismissal including the severity of the consequences.’”

We now turn to consider the Conciliation Commissioner’s decision and the application of the principles we have outlined above.

The Commissioner, although he referred to the Manual of Personnel
Procedures of the EC, and also referred to the general discussion of an appropriate approach to the assessment of the seriousness of misconduct within cl 33, made no actual comment on the nature of the misconduct which made up the offences. The discussion which he pursued in that section of his decision treated the discussion in cl 33 as a list containing a gradation of punishment which the manual provided for offences. We are unable to ascertain the view that the Commissioner came to of the offences independently of the discussion of cl 33 except that he viewed as appropriate a punishment equal to five days suspension.

We consider that the Commissioner was in error in approaching these dismissals in the way that he did. The misconduct alleged and admitted was not that of some absences from the workplace or poor time keeping which might be excused through the application of consideration of human frailty. The conduct of the respondents was a deliberate and concerted process not only to subvert the systems that they had a duty to administer, but also to obtain moneys in breach of their contract obligations. The essentials of the case brought against the respondents did not relate to poor time keeping, it was about dishonest conduct and organised and continued misrepresentations. The Commissioner erred in failing to define correctly the nature of the admitted offences.

The explanation of the Commissioner of the reason for his finding on this aspect of the case lacks some clarity. He appears to have concluded that because the penalty was too harsh, the dismissal was also unreasonable and unjust. If that were so the argument would fail because of circularity. Dismissal as being unjust or unreasonable was not raised or discussed independently in the Commissioner’s decision. We have read the evidence of the two witnesses which the Commissioner considered justified his finding that they had not considered any punishment except dismissal and we have difficulty in coming to the conclusion that the evidence supports that finding. In cross-examination Mr Outridge maintained the view that the circumstances of the offences would determine his view about punishment notwithstanding that the offence being considered was one of a class for which dismissal was appropriate.

Mr Outridge was cross-examined at length on the basis that he had not adequately considered either the lengthy period of employment or the good disciplinary records of the respondents. He maintained that he did take the record into consideration. The fact that the ultimate recommendation was for dismissal does not demonstrate that the matter was not properly considered.

The actual process involved, following the interviews and consideration by the senior officers we consider to be quite acceptable. Mr Outridge and Mr Wheelahan wrote a report (Ex 57) dated 10 August 1994 which set out a résumé of the facts, the offences which the respondents had been charged with, the admissions of the respondents, the charges found made out, reference to the period of employment with the EC and their disciplinary history, the findings of the senior officers, a résumé of the basis for the finding, and a recommendation. The report was forwarded with a copy of the records of the interview. The recommendation was in the following terms:

“The actions of . . . (the respondents) . . . have been a deliberate attempt to defraud Pacific Power and consistent with Pacific Power Policy, it is recommended that (the respondents) be dismissed.”

The report document then itself recorded the process of review of the
recommendation. The first consideration was by the Manager of the Vales Point Power Station who supported the recommendation. From there, it seems to have been sent to the Manager Employee Relations who supported the recommendation. The report then went to the Chief Executive who made the decision and effected the dismissal on the following day 11 August 1994. We have no difficulty with what appears to be a regular and careful step by step administrative process.

The Commissioner dealt extensively with what he saw as being inconsistent punishment. We have serious doubts whether alleged inconsistency of punishment should form part of the consideration of the reasons for intervention under s 246 in the manner in which the Commissioner saw as appropriate. The response to misconduct is a matter of discretion. The time, place and circumstance of one breach, the circumstances of the offender and the implications for adequate administration of an enterprise, will seldom coincide. The comparison must become even more difficult when successive acts of misconduct are the subject of complaint amounting to a conspiracy between several individuals to achieve dishonest manipulation of a pay and security system.

The real questions for consideration were:

- the seriousness of the misconduct found proved or admitted;
- the range of actions which might be available as a response to the misconduct;
- any mitigating or aggravating factors, especially any where a breach of trust is involved.

We have considered the material which the Commissioner relied upon to demonstrate inconsistent punishment. We have been unable to accept the validity of the comparison. To commence with, where an employee whose lack of social or industrial skills causes him to become a poor or very poor timekeeper, a compassionate employer might be prepared to take a lenient view. If the employer does so, in no sense is he bound to take the same view of every further case, whether similar or dissimilar. It is desirable that employers where they can should exercise leniency. Employers should not be discouraged from such a course by labouring under the disability that once a benign view is taken in one case that no other view is available.

The serious problem inherent in the Commissioner’s narrow comparisons, is that the cases are essentially dissimilar. Mr X’s case is about Mr X’s personal and social deficiencies which appeared to have made the customary performance of timekeeping difficult. By contrast the cases here under consideration concern long-serving, self-managing and knowledgeable employees who have no demonstrated personal, social or industrial difficulties concerning timekeeping at all. The essence of their behaviour is what the Commissioner has called elsewhere ‘a conspiracy’ that is a form of behaviour based on dishonesty and deceipt for their own gain and convenience. This they did co-operatively, systematically and repeatedly while employed as part of a self managing team, at weekends, in the absence of the team manager, as ‘a team thing’ as two of them described it at interview, in serious breach of the trust that management was entitled to have in them.

The error of the Commissioner’s approach to the case lies in his non-acceptance that at the centre of the case lay not a problem about timekeeping, but a problem, not denied, of a carefully constructed and dishonest
manipulation of the time and security system. Assessment of the problem should have included the consideration that in breach of the Code of Conduct and their trusted position as members of a self-managed team they were undoubtedly possessed of the knowledge that their conduct was dishonest when they fraudulently manipulated the Time and Attendance System for personal gain.

We find no basis on the evidence for inconsistency as found by the Commissioner. We note that the offence relied upon in the comparison occurred at a different power station distant from the present work site and the offences were those of Mr X not occurring in concert with fellow employees. There was no dishonesty demonstrated to be involved. Mr X was not a member of a self-management team, was not paid an extra salary for performing that additional duty, but was under ordinary supervision. We consider that the Commissioner was in error in finding the breaches comparable; we accept that they certainly were not; and it must follow that the Commissioner was in error in finding that the dismissals were for this reason rendered so inconsistent as to be inappropriate.

The Commissioner found that there were additional grounds which justified the intervention of the Commission (AB, p 1146.4):

‘‘Those circumstances include their length of service; their disciplinary history; their unchallenged good work performance; their contrition and the effects of their dismissal on their personal and family life.’’

There was no doubt that the Commissioner was correct in finding that the length of service of the appellants was a factor in their favour. We consider that the disciplinary record of the appellants, including that of the employee who had previously been disciplined, was such that the appellants could rely on it as excellent. Their work must have been good enough for them to have been accorded the status of a member of a self-managed team and the effects of their dismissal on their personal lives and those who depended upon them was no doubt very serious. For reasons set out we have difficulty in coming to a similar conclusion with respect to contrition as a ground upon which the respondents could properly have relied both before the Conciliation Commissioner or on appeal.

There has been developed within relatively recent time an industrially sound view that procedures relating to reviews of unsatisfactory work performance should give employees the advantage of warnings about that unsatisfactory performance. The purpose of warnings, includes the notion that an employee, having received a warning in terms has an opportunity to improve his work performance, meet the work requirements of the employer, and preserve his employment. Whilst by no means universal, formal procedures relating to warnings and the manner in which they are to be given are to be found in a number of awards, more usually than not the result of consent variations.

However, such award terms dealing with warnings are not those the Commissioner had in mind when he spoke of warnings, nor do the type of warnings contemplated by those awards reflect the circumstance which applied to the offences of the respondents. Competing obligations of management come to the fore when serious and dishonest misconduct of employees is suspected. For a statutory employer, the primary obligation might require it to take action to comply with the terms of the Act under which the corporation is established and protect the public moneys that the corporation administers. At a
management level the industrially appropriate responses might include the obligations to investigate the suspicions and the affording to those suspected of offences the opportunity to give explanations. In the circumstances of this case suspicions were raised that the appellants were involved in serious misconduct. If the suspicions were confirmed such actions might amount to criminal misconduct, certainly they would require consideration under s 66 of the Electricity Commission Act. Management decided to investigate whether there was substance to the suspicions. Those investigations involved the observation of the workplace over three weekend periods. The investigations did, in fact, reveal a concerted arrangement to obtain money by a false pretence, the pretence that some employees were at work and in gainful employment when they were not. Had the employer acted without investigation on rumour and without firm evidence, in our view it would have been open to criticism.

The Commissioner formed the view that the employees should have been told that if the behaviour continued dismissal might result. We do not wish to say that absence of warnings in appropriate circumstances, might be taken into consideration in contemplating notions of harsh, unjust, and unreasonable. In industrial circumstances as in other avenues of life an employee or an employer must be taken to be aware of the natural and probable consequences of their actions. However, we reject as industrially inappropriate any notion that adult, responsible, and senior employees are entitled to a warning that they might be dismissed if they continue to misconduct themselves within employment, dishonestly. No employee of ordinary understanding and certainly not employees of mature age, substantial classification and seniority, need to be told that if they deal dishonestly with their employer they may be dismissed, any more than they need to be told that they should be careful in crossing the street.

We have noted earlier that the employer when first apprised of these possibilities called the team leaders together and directed that they remind their members of the employees’ duty to conform to the pay and security system. In the circumstances and in the light of the information the employer had at that time, we consider this to be an appropriate response. We can see no criticism of the dismissals based on the failure to warn the appellants personally that they should desist from the practice of defrauding the EC. It follows that the Commissioner was in error in so finding.

The attitude of the applicants to the misconduct, in circumstances where the offences had been admitted, was an important element in the reinstatement case. The EC submitted that there had been a lack of both frankness and sincerity in contrition on the part of the respondents. Counsel before the Conciliation Commissioner relied upon both the express answers recorded when interviewed and put again during the hearing before the Commissioner. We do have regard to the advantage that the Commissioner had in the observation of the witnesses. The difficulty we encounter with this problem is not related to a question of whether or not a witness is to be believed: in such cases there is a clear advantage in the Commissioner in that he has seen and heard the witnesses and we have not. Consequently we would not ordinarily intervene on an issue as to what should be accepted unless the advantage enjoyed by the Commissioner was not sufficient to explain or justify his conclusion (Watt v Thomas [1947] AC 484 at 488; Abalos v Australian Postal Commission (1990) 171 CLR 167 at 178).
We do, however, consider that the Commissioner, at least in part, misapprehended the relevant consideration. The relevant consideration was not had there been a deliberate attempt to tell mis-truths. The question was rather, whether given the admission of their misconduct, the appellants had thereafter so co-operated with the EC so that it could be inferred, as claimed, that there had been full and frank disclosure of their own behaviour and the behaviour of other persons within their knowledge. The EC had a clear interest in learning the full extent of the misuse of the time and security system, for how long it had been going on, how many employees were involved and the cost of that misuse to the EC and the need to guard against any repetition. Ordinarily, a full and frank admission of how and to what extent the fraud was carried forward and expression of genuine regret would count in favour of an employee in the such circumstances. So much was claimed on their behalf. We consider the appellants had the positive obligation to demonstrate that degree of contrition and frankness if they wanted contrition and frankness to be accepted in their favour.

In a substantial and emphatic passage the Commissioner found:

"As with the witnesses for the EC, the applicants had some difficulty with their recollection on some matters, but I do not perceive any deliberate attempt on their part to be untruthful before the Commission. As to the submission by the EC that the applicants were insincere as to any contrition expressed by them either to the EC or before the Commission is not supported by the evidence. I gleaned from their evidence that this whole affair has had a traumatic effect on each of the applicants and their families and they genuinely regret what they have done."

The Commissioner’s formulation “that the submission by the EC that the applicants were insincere as to any contrition” was not the primary submission and mis-states the issue. What had been claimed on behalf of the employees, was that they had admitted their guilt (we note, an important factor) and had given a full account of their blameworthy conduct and answered all relevant aspects of the misconduct. From this it was submitted genuine contrition and remorse was to be inferred and in the consideration of any punishment such candour should be in their favour. There is no doubt that if this was correct, genuine candour and remorse would count in their favour. The onus of demonstrating true candour and remorse would of course be upon those seeking to take the advantage of the submission, the employees.

But there are at least some difficulties. To commence with the issue as determined by the Commissioner was that the dismissals by the EC were harsh, unfair and unjust. The candour and regret requiring relevant demonstration must be related to the time the decision to dismiss was under consideration by the EC so that it could there and then be noted and if appropriate taken into account. This is not the same as giving the evidence months later before the Commissioner. The Commissioner’s conviction that the employees were then before him telling the truth about their candour and remorse is not the relevant conviction. We note in fact that the two accounts are fairly similar. The interviews held with the employees all raise two matters bearing directly on candour and remorse. They can be conveniently said to represent:

- attempts made and questions asked designed to find out for how long the adverse practices had been going on,
- the extent of involvement of others.
The EC in our view had an unavoidable management responsibility to ascertain the extent of the corruption of the Time and Attendance system. Frank and complete answers by the employees would have helped with this problem and would have provided firm evidence of genuine contrition and remorse.

In industrial circumstances, contrition should amount to more than saying ‘‘sorry’’ after being caught out. The employer received no real assistance, not even adherence to the Code of Conduct which provides specifically for the reporting of corrupt conduct of which the employee is aware or which he suspects. The transcript of the records of interview are short and reveal no such assistance was forthcoming. It was claimed that the employees did not know what was going on. There were successive refusals to answer relevant questions. The transcript of the Commissioner demonstrates little improvement. Where something additional appears it is always in the context of already known facts.

From the analysis of the answers to the questions asked during the investigation and the transcript in the s 246 proceedings put forward by Mr Phillips, we consider that no such desire to co-operate with the degree of candour and contrition to the extent necessary to engage the favourable consideration of the tribunal has been demonstrated.

Because of the emphasis placed upon this aspect of the case we take the course of citing some questions and answers from the record of interview prior to the decision to dismiss being made. The accuracy of the record was not challenged.

‘‘Mr Nieass:
Q. Whose ID access card did you present on 23 July 1994?
A. Not prepared to say.

... Q. How did that person get through the turnstiles the next day without his ID access card?
A. I gave the card back.

... Q. Is this the only time that you have clocked somebody on or clocked them off?
A. I am not willing to answer that question.

Mr Lulham
Q. Do you know that your ID access card was presented to the exit card reader at approximately 3.57 pm that day by another person?
A. Yes.
Q. Who?
A. Don’t know.
Q. How did the other person get your ID access card?
A. I threw the card over the fence near the bike shed. Don’t know who picked it up.

... Q. How did you get your ID access card back?
A. It was given to me the next day in the car park.
Q. Who by?
A. Won’t say who.

Mr Beveridge
Q. Who presented it? (the ID access card at 3.49 pm on 23 July 1994)
A. Rather not say.
Q. Where were you?
A. Home. I gave my card to the other person sometime after lunch.

... 
Q. How did you get into work on Sunday 17 July 1994 when somebody else had your ID access card after they clocked you off the previous day?
A. Met in car park and got card.

... 
And later:
A. Normally arrangements are that we pick up card in the car park.

Mr Coombs
Q. Whose ID access card was it?
A. Not prepared to divulge it.

... 
Q. Why did you do it?
A. I was not going to but it was part of a team thing.

Mr Mitchell
Q. Why did you present another person’s ID access card?
A. I was helping out the shift, the guy had to leave early so I clocked him off.

Q. Whose ID access card was it?
A. Can’t answer.
Q. Did you know the other person?
A. Yes.’’

At the time that the EC had to determine what action it had to take there was no evidence before it of a desire to co-operate with the degree of candour and contrition that would raise any question of mitigation of penalty. The refusal to assist would appear to be a further breach of the Code of Conduct which provides for the reporting of any corrupt conduct of which an employee is aware or suspects.

Decision
In the light of all the evidence and submissions, a strong case of misconduct has been made out, both from the admissions made by the five employees and the documentary record. In common all five employees:

(i) disobeyed the lawful orders of their employer to administer the computerised time and attendance system which also acted as a security system in an appropriate manner;
(ii) dishonestly manipulated the time and attendance system to make it appear that they or others were at work when they were not;
(iii) dishonestly represented by means of manipulation of the time and attendance system that they or others should be paid for time not worked;
(iv) each dishonestly collaborated with others to achieve these ends.

This admitted serious misconduct is aggravated by the circumstance that the employees were members of a self-management team, paid as such. It is difficult to imagine misconduct that could strike more precisely at the fundamentals of their contract of employment. Their conduct amounted to a serious breach of the trust the employer was entitled to have in them.
The Commissioner found that the dismissals were harsh, unreasonable and unjust. The decision does not distinguish between the concepts. We consider that there is no basis upon which it could be found that the dismissals were unreasonable or unjust. To that extent we would uphold the appeals against the finding of unreasonable or unjust dismissal.

There remains the Commissioner’s decision that in the circumstances the decisions were harsh. Included in these circumstances the Commissioner included length of service, their disciplinary history, their unchallenged good work performance and the effects of their dismissal on their personal and family life.

All these matters are appropriate to consider and weigh in the balance. Where the offences are not serious or of moderate seriousness, such considerations may weigh down the balance in favour of the dismissed employees. It depends on the facts of the particular case. Unfortunately no one has said that these offences were not most serious. To deliberately and co-operatively seek to subvert the security of the Time and Attendance system for gain, strikes at the fundamentals of employment. We do not consider that on balance a case has been made out that the dismissals were harsh so as to enable the Commission to exercise its discretion to reinstate the dismissed employees, or that a finding that the dismissals were harsh was available to the Commissioner.

The appeal is upheld.

The Commissioner’s orders of reinstatement are set aside.