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## INDUSTRIAL MAGISTRATE—Claims before—

2025 WAIRC 00015

### INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

**CITATION** : 2025 WAIRC 00015  
**CORAM** : INDUSTRIAL MAGISTRATE D. SCADDAN  
**HEARD** : WEDNESDAY, 27 NOVEMBER 2024  
**DELIVERED** : FRIDAY, 10 JANUARY 2025  
**FILE NO.** : M 19 OF 2024  
**BETWEEN** : AUSTRALIAN WORKERS' UNION

**CLAIMANT**

AND

UGL RESOURCES (CONTRACTING) PTY LTD

**RESPONDENT**

**CatchWords** : INDUSTRIAL LAW – Construction of a clause of an enterprise agreement – Entitlement to Shift Over Cycle rate – Determination of when Shift Over Cycle rate is paid

**Legislation** : *Fair Work Act 2009* (Cth)  
*Industrial Relations Act 1979* (WA)  
*Superannuation Guarantee (Administration) Act 1992* (Cth)

**Instrument** : *UGL Resources (Contracting) Pty Ltd Karratha Enterprise Agreement 2019*

**Case(s) referred to in reasons:** : *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* [2006] FCA 813; (2006) 153 IR 426  
*Transport Workers' Union of Australia v Linfox Australia Pty Ltd* [2014] FCA 829; (2014) 318 ALR 54  
*Kucks v CSR Ltd* [1996] IRCA 166; (1996) 66 IR 182  
*Amcor Limited v Construction, Forestry, Mining and Energy Union* [2005] HCA 10; (2005) 214 ALR 56  
*King v Melbourne Vicentre Swimming Club Inc* [2020] FCA 1173  
*King v Melbourne Vicentre Swimming Club Inc* [2021] FCAFA 123  
*Mildren v Gabbusch* [2014] SAIRC 15  
*Miller v Minister of Pensions* [1947] 2 All ER 372  
*Briginshaw v Briginshaw* [1938] HCA 34; 60 CLR 336  
*Fedec v The Minister for Corrective Services* [2017] WAIRC 00828; 97 WAIG 1595

***Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Excelior Pty Ltd*** [2013] FCA 638

**Result** : Claim dismissed

**Representation:**

Claimant : Mr K. Sneddon (of counsel)

Respondent : Mr R. Boothman (of counsel)

### REASONS FOR DECISION

- 1 The effects of the novel Coronavirus, COVID-19, and the subsequent global pandemic continues to reverberate years after a return to normalcy. It is trite to say that in March 2020 desperate steps were taken to protect people and infrastructure, and it is reasonable to say that steps were often taken ‘on the fly’. There were no crystal balls.
- 2 The relevance of this is that in July 2019 when the *UGL Resources (Contracting) Pty Ltd Karratha Enterprise Agreement 2019* (UGL Agreement) was approved by the Fair Work Commission, the people and organisations involved in negotiating and approving the UGL Agreement were highly unlikely to have ever turned their mind to how it would operate during a period of nationwide lockdown due to a global pandemic.
- 3 But, as the uncontroverted evidence reveals, in February and March 2020 the parties to the UGL Agreement worked collaboratively to implement a change of roster cycle designed to keep the workers working at the Karratha Gas Plant and, no doubt, to ensure UGL Resources (Contracting) Pty Ltd (the respondent) maintained its commercial agreement with Woodside Energy Limited (Woodside).
- 4 On 5 March 2024, the Australian Workers Union (the claimant) lodged a claim alleging the respondent failed to pay Shift Over Cycle rates for time worked over 10 hours in a shift to a group of alleged affected workers (the Affected Workers) from 7 May 2020 to 4 March 2022 (the Claim).
- 5 In failing to pay Shift Over Cycle rates, the claimant alleges the respondent has contravened s 50 and s 323 of the *Fair Work Act 2009* (Cth) (FWA) in that the respondent has contravened cl 14.8 of the UGL Agreement.
- 6 The claimant claims:
  - \$34,861.43 (as amended) in underpayment to the Affected Workers;
  - interest on the amount claimed; and
  - payment of a civil penalty to be paid to the claimant.
- 7 The respondent denies the alleged contravention and says the controversy between the parties involves interpreting cl 14.8 of the UGL Agreement where the respondent says the Shift Over Cycle rates only applies to hours worked in excess of those contemplated in a given roster cycle.
- 8 After considering the Claim and the respondent’s evidence (see below), the claimant accepted that it did not have standing to continue the Claim as it related to an alleged contravention of s 50 of the FWA. However, the parties agreed the claimant had standing to continue the Claim as it related to an alleged contravention of s 323 of the FWA<sup>1</sup>.
- 9 Schedule I of these reasons outlines the jurisdiction, standard of proof and practice and procedure of the Industrial Magistrates Court (IMC or Court).
- 10 Schedule II of these reasons outlines the principles applicable to construction of an industrial agreement.

#### Agreed Facts

- 11 The parties provided a statement of agreed facts<sup>2</sup>.
- 12 In summary, the claimant has standing to commence the Claim (as amended), and the respondent is a national systems employer under the FWA. The UGL Agreement covers and applies to the parties and to the Affected Workers after the Fair Work Commission approved it on 3 July 2019<sup>3</sup>.
- 13 The following table details the Affected Workers at the Karratha Gas Plant, the dates of their employment relevant to the Claim, the number of shifts each worked of 10.87 hours in length and the amount claimed<sup>4</sup> in relation to each Affected Worker:

Name	Affected employment dates	Number of shifts	Amount claimed <sup>5</sup>
Robert Clark	11 May 2021 – 4 March 2022	157	\$3,833.16
Erwan De Pelseneer	16 June 2021 – 15 February 2022	112	\$2,914.92
Peter Fellows	7 May 2020 – 20 January 2022; 2 February 2022 – 15 February 2022	271	\$5,770.69
David Hall	18 June 2021 – 4 March 2022	104	\$2,802.92
John Hicks	7 May 2020 – 18 July 2020;	135	\$4,189.02

	11 August 2020 – 26 February 2021; 15 April 2021 – 27 October 2021		
Liam O'Donnell	7 May 2020 – 22 February 2022	253	\$5,118.41
Michael Pavleka	7 May 2020 – 4 September 2021; 25 October 2021 – 4 March 2022	283	\$4,752.75
Matthew Henry Turner	24 March 2021 – 4 March 2022	158	\$2,302.96
Mark Williams	16 June 2021 – 16 October 2021; 20 October 2021 – 22 February 2022	93	\$3,176.60

- 14 In each case, the respondent paid each Affected Worker for all time worked but 0.87 hours was paid at the base rate of pay whereas the claimant says 0.87 hours should have been paid at the Shift Over Cycle rate.
- 15 That is, the respondent paid each Affected Worker 10.87 hours at the base rate of pay rather than on the claimant's case each Affected Worker should have been paid 10 hours at the base rate of pay and 0.87 hours at the Shift Over Cycle rate.

#### Other Evidence

- 16 The respondent relied upon a witness statement by Terence John Clement Elliott (Mr Elliott) signed and dated 27 September 2024<sup>6</sup> (Elliott Statement). Mr Elliott's evidence was not contested.
- 17 Mr Elliott is employed as Group Manager Industrial Relations – Corporate by UGL Pty Ltd and is responsible for overseeing all of the industrial relations activities of entities within the UGL corporate group, which includes the respondent<sup>7</sup>.
- 18 Mr Elliott provides some historical background to the respondent's services contract with Woodside for the provision of brownfields implementation service at the Karratha Gas Plant and other Woodside-operated sites<sup>8</sup>.
- 19 In February 2018, the respondent commenced bargaining for what was to become the UGL Agreement. The Australian Manufacturing Workers' Union (AMWU) and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) were the bargaining representatives. Mr Elliott contributed to and signed off on the UGL Agreement<sup>9</sup>.
- 20 The UGL Agreement covered the respondent, the AMWU, the CEPU, and the respondent's employees who performed work in connection with any Woodside operated facility in Karratha and fell within the UGL Agreement classification structure. This includes the Affected Workers but not the claimant.
- 21 The UGL Agreement was subsequently replaced by a new enterprise agreement on 19 May 2023 which covered the same parties, but now included the claimant<sup>10</sup>.
- 22 Mr Elliott explains the bargaining process around the UGL Agreement<sup>11</sup>.
- 23 In summary, employees at the Karratha Gas Plant were engaged on a 28-day roster cycle of 19 days on and 9 days off (19:9 Roster) and were rostered to work 10 hours per day for 19 days. The total hours worked in 28 days was 190 hours, which comprised 152 *ordinary hours* (based on an average weekly hours of 38) and 38 *overtime hours*, and they were paid a flat all-inclusive rate (referred to as a 'loaded rate').
- 24 The effect of the loaded rate was that employees were paid the same rate whether they worked *ordinary hours* or *overtime hours* for the 190 hours<sup>12</sup>.
- 25 The 19:9 Roster formed the backbone of bargaining to the UGL Agreement, although UGL proposed a future change of roster cycle to 18 days on and 10 days off (18:10 Roster) which comprised 152 *ordinary hours* and 28 *overtime hours* (180 hours) with the same flat all-inclusive rate being paid to compensate for the reduction of overtime hours worked.
- 26 The bargaining team alerted Mr Elliott to the AMWU and CEPU's concern that Woodside may wish to increase hours of work to an 11 or 12-hour day, consistent with another on-site contractor's employment conditions. In that case, the loaded rates provided in the proposed agreement may not compensate employees for any *extra* overtime worked on either a 19:9 Roster or 18:10 Roster.
- 27 To address this possibility, the bargaining parties agreed to Shift Over Cycle rates<sup>13</sup>, which would compensate employees if the hours per day were to increase as contemplated in cl 14.3 of the UGL Agreement applicable to shutdown work requiring 12-hour days.
- 28 According to Mr Elliott, the Shift Over Cycle rate was designed to compensate employees for time worked in excess of 190 rostered hours (and the future 180 rostered hours) because the loaded rate did not contemplate or compensate work in excess of 190 hours under the 19:9 Roster. He explains cl 14.8 refers to work in excess of 10 hours per shift meaning employees working in excess of the 190 rostered hours per roster cycle<sup>14</sup>.
- 29 The COVID-19 pandemic resulted in negotiations between the respondent, the AMWU, CEPU, Woodside and the respondent's employees at the Karratha Gas Plant to enable maintenance works and employment to continue involving a 70% FIFO workforce. Ultimately, an even time roster of 14 days on and 14 days off was agreed (14:14 Roster) where Woodside's sites had been declared an 'essential asset' by the Western Australian Government. The 14:14 Roster was modelled on the respondent's rosters at Esso facilities in Victoria and Barrow Island in Western Australia<sup>15</sup>.

- 30 The respondent's employees were declared 'essential workers' under the *Resources Industry Worker (Restriction on Access) Directions* and were able to continue to travel subject to quarantine restrictions<sup>16</sup>.
- 31 Mr Elliott recounts two concerns raised by Glenn McLaren, AMWU Assistant State Secretary about the 14:14 Roster. The first was that if the respondent maintained 10-hour shifts under the 14:14 Roster, employees may be worse off where they would not complete the full-time hours within the 28-day cycle and lose up to 12 hours superannuation. The second was that employees would be working on a part time basis because their hours would be less than the full time equivalent<sup>17</sup>.
- 32 Mr Elliott states the respondent, the AMWU and the CEPU agreed a resolution where<sup>18</sup>:
- the respondent retained the all-inclusive pay rates, notwithstanding employees worked 152 hours rather than 190 hours and earn less pay, but would have more recreational days off and retain their jobs during the COVID pandemic restrictions; and
  - the shift length would increase from 10 hours to 10.867 hours on a temporary basis so as to ensure employees met the base requirement of working 152 hours (based on an average 38 hour working week in a roster cycle). This also enabled the accrual of annual and personal leave based on an average 38 hour working week.
- 33 In February 2020, the respondent notified employees of its intention to vary the roster cycle to the 14:14 Roster under cl 14.5 of the UGL Agreement and on or around 7 March 2020 the roster cycle was changed<sup>19</sup>.
- 34 Mr Elliott explains that under the 14:14 Roster, the respondent continued to pay employees at the all-inclusive rate specified in Appendix 2 of the UGL Agreement even though this rate contemplated employees working 38 hours of overtime. Employees did not work overtime during the 14:14 Roster so while they were paid less than on the 19:9 Roster, they were paid a proportional amount more because of what the all-inclusive rate was designed to compensate for<sup>20</sup>.
- 35 In addition, the respondent made superannuation contributions for each of the 10.87 hours worked per shift and employees accrued annual and personal leave on 10.87 hours worked per shift<sup>21</sup>.
- 36 In respect of the Shift Over Cycle rates, Mr Elliott explains that under the 14:14 Roster and the 19:9 Roster the respondent paid employees for all work performed in excess of their rostered hours within a roster cycle. Accordingly, Shift Over Cycle rates were paid for all work performed either over 152 rostered hours or 190 rostered hours, respectively<sup>22</sup>.
- 37 The respondent did not make superannuation contributions and employees did not accrue annual and personal leave for work paid at the Shift Over Cycle rate consistent with cl 14.8 and cl 17.1 of the UGL Agreement<sup>23</sup>.
- 38 Mr Elliott's understanding, based on his experience in the oil and gas industry, is that it is widely accepted the phrase 'over cycle' refers to hours or work performed in addition to either the normal shift length in a roster cycle or for days worked in excess of an 'on cycle'. The purpose of an over cycle payment being to compensate an employee for having to work additional hours or days reducing available recreational time<sup>24</sup>.

#### **The Parties' Contentions**

- 39 The principles applicable to the interpretation of industrial agreements are well known. In summary, the interpretation of an industrial instrument begins with consideration of the natural and ordinary meaning of the words used<sup>25</sup>. An industrial instrument is to be interpreted in light of its industrial context and purpose and must not be interpreted in a vacuum divorced from industrial realities<sup>26</sup>. An industrial agreement must make sense according to the basic conventions of the English language<sup>27</sup>. The circumstances of the origin and use of a clause is relevant to an understanding of what is likely to have been intended by its use<sup>28</sup>. Narrow and pedantic approaches to the interpretation of an industrial agreement are misplaced<sup>29</sup>.

#### **The claimant's submissions**

- 40 The claimant relies upon the ordinary words of cl 14.8 of the UGL Agreement read as a whole and in context. However, the claimant says that while context may assist in the interpretative task, it does not displace the primacy of the language used. The 'inquiry is directed to the proper construction of what the instrument says, and not what it was meant to say.'<sup>30</sup>
- 41 In summary, there is no room for subjectivity or a search for the makers' subjective intent. It is not open for these proceedings to rewrite the clause. Further, the claimant says there is no common understanding where the respondent's evidence is only evidence of the respondent's intention or unilateral understanding. The claimant disputes there was a meeting of the minds.
- 42 Clause 14.8 of the UGL Agreement is unambiguous and is not qualified in any way. That is, once an employee works over 10 hours, they are entitled to the Shift Over Cycle rate, and the only condition is the length of the shift.
- 43 It is unnecessary for an employee or the employer to read any other words into the clause, which would introduce ambiguity where it otherwise does not exist. The respondent's suggested interpretation introduces words and a nexus to a roster cycle, which does not exist and complicates an otherwise easily understood meaning. The respondent's position is a *ridiculous* situation where 10 hours does not mean 10 hours but means something other than 10 hours.

#### **The respondent's submissions**

- 44 The respondent says the claimant was not a party to the UGL Agreement and the claimant lacks an understanding of the surrounding circumstances in the making of the UGL Agreement and in the introduction of the 14:14 Roster.
- 45 Fundamentally, the respondent says the parties to the UGL Agreement agreed a different roster cycle with shift hours varied to 10.87 hours at the commencement of the COVID-19 pandemic restrictions.
- 46 The respondent further says the claimant's construction of cl 14.8 of the UGL Agreement does not pay due regard to the context of the Agreement as a whole and the purpose of the Shift Over Cycle rates contemplated between the parties at the time the UGL Agreement was made. According to the respondent, when properly considered it is apparent that cl 14.8 conferred an entitlement when employees worked in excess of their *Rostered Hours* on a shift.

- 47 The respondent refers to the lack of clear definition of 'Shift Over Cycle rate' and 'Over Cycle' in the UGL Agreement and says both should be construed having regard to its industry meaning as provided in the Elliott Statement. Further, the combined reading of cl 14.8 and cl 14.9 of the UGL Agreement evinces an intention for the Shift Over Cycle rate to compensate employees for time worked in excess of the Rostered Hours within the Roster Cycle.
- 48 The effect, on the respondent's submission, is where an employee is rostered to work in excess of 10.87 hours on a shift on a 14:14 Roster they are entitled to payment at the Shift Over Cycle rate.
- 49 The respondent also refers to the two types of hours worked under the UGL Agreement and, in essence, says that Shift Over Cycle rate is only payable on Overtime Hours not on Ordinary Hours worked during Rostered Hours or on Rostered Shift.
- 50 Additionally, if the claimant's construction of cl 14.8 of the UGL Agreement is accepted, the payment of Shift Over Cycle rate payable on Ordinary Hours means that for the Affected Workers 0.87 hours of Ordinary Hours do not attract superannuation contrary to the *Superannuation Guarantee (Administration) Act 1992* (Cth) (SGA Act) (and which was paid by the respondent).
- 51 The UGL Agreement was bargained for and made with the 19:9 Roster (and 18:10 Roster) in mind. When this context is properly regarded, it is clear that the reference in cl 14.8 to an employee being regarded to work in excess of 10 hours per shift was intended to reflect the shift length under the 19:9 Roster (and 18:10 Roster) and was confined to that roster structure.
- 52 The respondent accepts that cl 14.8 of the UGL Agreement was not drafted more clearly to reflect the intention behind the reference to '10 hours'. However, this should not prevent the Court from, or be relied upon to, not giving effect to its evident purpose. The respondent says the evident purpose was to compensate employees for hours worked in excess of their Rostered Hours (as that term is defined) on a given shift.
- 53 Where the Roster Cycle was permissibly changed to a 14:14 Roster and the Rostered Hours were permissibly changed to 10.87 hours, the reference to 10 hours in cl 14.8 should now be read to reflect the shift length under the new Roster Cycle.
- 54 The respondent outlines a hypothetical roster involving 20 days on and 8 days off where the employee works 7.6 Ordinary Hours (152 hours over a four-week period). On the hypothetical roster, the respondent says that on the claimant's construction an employee who worked 10 hours on a shift would not be entitled to Shift Over Cycle rate for the additional 2.4 hours, whereas on the respondent's view they would.
- 55 The respondent says this supports the preferred construction that cl 14.8 renders the Shift Over Cycle rate payable when an employee works in excess of their Rostered Hours (as that term is defined) on a given shift.

**What is the preferred construction of when the entitlement to Shift Over Cycle rates applies?**

**UGL Agreement**

- 56 The UGL Agreement provides for two classes of employees; Full Time and Casual. A Full Time Employee is engaged to work an average of 38 ordinary hours per week averaged over a four-week period. The effect of this is that a Full Time Employee is required to work 152 ordinary hours over a four-week period<sup>31</sup>.
- 57 The Ordinary Hours and Overtime Hours will be worked in accordance with the Rostered Hours at a Site<sup>32</sup>.
- 58 Rostered Hours or Rostered Shift means the number of Ordinary Hours and Overtime Hours required to be worked by employees in the Roster Cycle. Work may be rostered 10 hours per day or as otherwise amended from time to time<sup>33</sup>.
- 59 Consistent with Mr Elliott's evidence, but *subject to* cl 14.15 of the UGL Agreement, the hours of work are ordinarily worked over a roster cycle on a compressed basis. The *subject to* is that there are three roster cycles referred to in the UGL Agreement: the 19:9 Roster (and future 18:10 Roster) also referred to as the FIFO or Non-Local roster; five days worked Monday to Friday and two days off also referred to as the Local roster; and six days on and one day off also referred to as the Shutdown roster.
- 60 Also consistent with Mr Elliott's evidence about the bargaining and making of the UGL Agreement, the employees on the 19:9 Roster were paid for 190 hours of work each roster cycle where the rostered hours on each day was 'currently 10 hours in duration' made up of ordinary hours and overtime hours<sup>34</sup>. That is, the employees on the 19:9 Roster were paid for 152 ordinary hours worked and 38 overtime hours worked.
- 61 However, *all* employees were paid at a flat all-inclusive rate which compensated for ordinary and overtime hours, irrespective of whether the employee was on the 19:9 Roster, a Local roster or Shutdown roster. Thus, an employee working on a Local roster was being paid at the same rate as an employee on the 19:9 Roster, notwithstanding they may not work more than 152 ordinary hours in a four-week period, but they would continue to be paid the same rate if they worked overtime<sup>35</sup>.
- 62 Clause 14.3 of the UGL Agreement refers to the Shutdown roster which requires employees to work 12 hours per day and provides '[t]he Shift Over Cycle rate shall be paid to Employees for hours worked in excess of 10 hours per day on Shutdowns.'
- 63 Superannuation is paid in accordance with the SGA Act 'on Ordinary Time Earnings at the all-inclusive rate which incorporates all allowances and penalties': cl 13.1 and cl 13.2 of the UGL Agreement. Ordinary Time Earnings is not defined in the UGL Agreement, and the respondent says it should be construed consistently with the SGA Act.
- 64 Section 6(1) of the SGA Act defines 'ordinary time earnings' as:
- (a) the total of:
    - (i) earnings in respect of ordinary hours of work other than earnings consisting of a lump sum payment of any of the following kinds made to the employee on the termination of his or her employment:
      - (A) a payment in lieu of unused sick leave;

(B) an unused annual leave payment, or unused long service leave payment, within the meaning of the *Income Tax Assessment Act 1997*; and

(ii) earnings consisting of over - award payments, shift - loading or commission; or

(b) if the total ascertained in accordance with paragraph (a) would be greater than the maximum contribution base for the quarter --the maximum contribution base.

65 The UGL Agreement provides for the introduction of new rosters based on operational requirements: cl 14.15. Clause 23 of the UGL Agreement required the respondent to consult with employees or their nominated representatives in the event of, amongst other things, a proposal to introduce a change to the regular roster or ordinary hours of work of employees. For proposed changes to regular rosters or ordinary hours of work, the respondent is to comply with subclauses 23.10 to 23.15. Mr Elliott's evidence, while not expressly referring to cl 23, demonstrated the respondent complied with the clauses when the respondent moved to the 14:14 Roster.

#### Shift Over Cycle rate

66 Clause 14.8 of the UGL Agreement states:

If an employee is required to work in excess of 10 hours per shift, the employee will be paid the flat Shift Over Cycle rate at Appendix 4(b) for those hours. Shift Over Cycle rates do not attract superannuation as they do not form part of the Ordinary Time Earnings. For example, where the rostered hours are 10 hours per day and an employee is required to work an additional one hour then this one hour shall be paid at the Shift Over Cycle Rate.

67 In addition to cl 14.3 of the UGL Agreement, cl 14.9 and cl 14.13 also refer to Shift Over Cycle rates with cl 14.9 providing another example:

14.9 If an employee is required to work additional days in excess of the normal roster pattern, the employee will be paid the flat Ordinary Hours hourly rate and Overtime Hours hourly rate as applicable at Appendix 2 for those additional days. For example, where the normal roster pattern is 19 days on, 9 days off, 10 hours per day and an employee is required to work on the 20<sup>th</sup> day for 12 hours, the employee is paid for the flat Ordinary Hours and Overtime Hours hourly rates for 10 hours and is paid the Shift Over Cycle rate for the remaining 2 hours.

14.13 UGL may roster Employees to work shift work and shall give such Employees twenty four (24) hours' notice of the commencement of a shift or to change from one shift to another. Where such notice is not given, the appropriate Shift Over Cycle Rate will be paid for all time worked until the expiration of the notice period.

68 The payment of the Shift Over Cycle rate is not only referable to cl 14.8, but also applies to cl 14.13 of the UGL Agreement, which does not tie the payment of the Shift Over Cycle rate to working over 10 hours per shift.

69 Clause 1.1 of the UGL Agreement in the definition of 'Overtime Hours' provides that all Overtime Hours (meaning all time worked in excess of Ordinary Hours) is paid at the flat overtime hourly rate of pay in Appendix 2 or 3 or at the Shift Over Cycle rate *as applicable*. Similarly, cl 8.1.3 provides that casual employees who work in excess of Ordinary Hours shall be paid the applicable flat Overtime Hours Hourly Rate, or Training Rate, or Shift Over Cycle rate, *as applicable*.

#### Determination on construction

70 The claimant refers to *King* in relying upon the words in cl 14.8 of the UGL Agreement to advance its preferred construction of the clause. The primary judge's decision was overturned on appeal in *King v Melbourne Vicentre Swimming Club Inc* [2021] FCAFA 123 (*King Appeal*) with the Full Bench summarising the principles of construction of awards, which also apply to enterprise agreements. It is useful to set out the relevant parts of *King Appeal*, at [40] - [43], in full:

40. The principles governing the construction of awards are well-established and the primary judge's exposition of them was not challenged on appeal. The construction of an industrial instrument depends on its language, understood in light of its industrial context and purpose: see *Amtcor Ltd v Construction, Forestry, Mining and Energy Union* [2005] HCA 10; (2005) 222 CLR 241 at [2] (Gleeson CJ and McHugh J). In *City of Wanneroo v Holmes* [1989] FCA 369; (1989) 30 IR 362 at 378-379, French J said (most citations removed);

The interpretation of an award begins with a consideration of the natural and ordinary meaning of its words. The words are to be read as a whole and in context. Ambiguity if any, may be resolved by a consideration, inter alia, of the history and subject matter of the award. Resort to such matters as prefatory statements and negotiations is of dubious assistance if admissible at all. The logs of claim and arbitrator's reasons for decision may be referred to determine the ambit of the dispute which led to the making of the award so that where there are two possible interpretations, one within the ambit and one without, the former may be preferred. ... That is not to say the words must be interpreted in a vacuum divorced from industry realities. As Street J said in *Geo A Bond & Co Ltd (in liq) v McKenzie* [1929] AR(NSW) 498 at 503:

it must be remembered that awards are made for the various industries in the light of the customs and working conditions of each industry, and they frequently result ... from an agreement between the parties, couched in terms intelligible to themselves but often framed without that careful attention to form and draughtsmanship which one expects to find in an Act of Parliament. I think, therefore in construing an award, one must always be careful to avoid a too literal adherence to the strict technical meaning of words, and must view the matter broadly, and after giving consideration and weight to every part of the award, endeavour to give it a meaning consistent with the general intention of the parties to be gathered from the whole award.

41. We agree with the primary judge's observation (at PJ [127]) that:

Practices in the relevant industry may provide material context. An illustration is *Transport Workers Union v*

*Linfox Australia Pty Ltd* [2014] FCA 829; 318 ALR 54, where Tracey J held that evidence about the morning commencement time of work in the transport industry, together with an examination of the history of relevant award provisions, informed the construction of the term ‘day shift’ with the consequence that ordinary day workers were not to be regarded as shift workers for the purposes of the award, and were therefore not entitled to ‘crib time’.

42. Hence the framers of documents such as awards may well have been more concerned with expressing their intention in a way likely to be understood in the relevant industry rather than with legal niceties or jargon, so a purposive approach to interpretation is appropriate and a narrow or pedantic approach is misplaced: see *WorkPac Pty Ltd v Skene* [2018] FCAFC 131; (2018) 264 FCR 536 at [197] (Tracey, Bromberg and Rangiah JJ) applying *Kucks v CSR Ltd* [1996] IRCA 166; (1996) 66 IR 182 at 184 (Madgwick J). An award may be read that way despite mere inconsistencies or infelicities of expression which might tend to some other reading, and ‘meanings which avoid inconvenience or injustice may reasonably be strained for’: *Kucks* at 184.
43. The circumstances may lead the court to conclude that a clause in an award is a product of history; in such circumstances it may be possible to discern the purpose of the award only by reference to its history: see *Short v FW Hercus Pty Ltd* (1993) 40 FCR 511 at 518 (Burchett J). But there are limits to that; as the primary judge said in the present case (at PJ [128]-[129]), the texts of modern awards are widely available to members of the public and should be reasonably capable of being understood and implemented by participants in the relevant industry by reference to the language of the award itself, without having to delve into the pedigree of the instrument. That is especially so where, as here, non-compliance with an award can expose a person to pecuniary penalties: see *Wanneroo* at 380.
- 71 The difficulty with considering only the words in cl 14.8, without more, is that it risks a constrained construction without regard to the context in which the clause appears and the agreement as a whole.
- 72 That is, cl 14 and cl 23 of the UGL Agreement contemplate a change in the hours of work. The fact that the change in the hours of work in this case was the consequence of a global pandemic is not to the point. That is, a global pandemic is merely one reason, albeit a reason which was arguably not reasonably foreseeable at the time the agreement was made by the parties, that the respondent could introduce change to the regular roster or ordinary hours of work of employees.
- 73 Further, the definition of ‘Roster Cycle’ in cl 1 contemplates the roster cycle as it relates to the FIFO or Non-Local roster may be varied via consultation with employees, along with the Rostered Hours or Rostered Shift.
- 74 The starting point is to determine the minimum working requirement under the UGL Agreement.
- 75 Full time employees are engaged to work an average of 38 Ordinary Hours per week averaged over a four-week period where Ordinary Hours are defined as 38 hours per week, or 76 hours per fortnight or 152 hours per four-week period. The clear intention associated with the definition, when regard is had to the rostering structures employed in the similar industries, is that FIFO or non-local employees work something other than Monday to Friday with Saturday and Sunday off, but the employer is required to adhere to certain employment standards.
- 76 However, under the UGL Agreement, consistent with the bargaining and agreement between the bargaining parties, full time FIFO or non-local employees worked and were paid for additional 38 hours worked outside of the Ordinary Hours, referred to as Overtime Hours. The agreed payment for doing so was an all-inclusive rate for all time worked for the Rostered Hours. The Rostered Hours were the Ordinary Hours and Overtime Hours in the Roster Cycle, with the work being rostered 10 hours per day or as amended from time to time.
- 77 The Roster Cycle is a four-week cycle<sup>36</sup>, which, relevant to when the UGL Agreement was made, was the 19:9 Roster (with the 18:10 Roster in contemplation) but with the scope to implement a different roster cycle.
- 78 Thus, the combined effect of the Roster Cycle and the Rostered Hours is a full time FIFO (or non-local) employee was paid for 190 hours consistent with cl 14.4 of the UGL Agreement. This combined Roster Cycle and Rostered Hours was due to change on 30 July 2019 to the 18:10 Roster, however, the proposed change was a reduction in the number of workdays from 19 to 18. The all-inclusive rate remained the same as did the proposed number of working hours per shift.
- 79 As seen in Appendix 2 of the UGL Agreement, the Ordinary Hour and Overtime Hour rate of hourly pay is the same for full time employees (save for a night shift increase). Appendix 3 of the UGL Agreement shows the same Ordinary Hour and Overtime Hour rate of hourly pay is the same for casual employees.
- 80 While Overtime Hours are included in the Rostered Hours, the working of unrostered overtime is contemplated in cl 1.1 of the UGL Agreement where all Overtime Hours are paid at the rates specified in Appendix 2 or 3 or at the Shift Over Cycle rate *as applicable*.
- 81 Further, where cl 14.8 of the UGL Agreement specifically provides that superannuation does not apply to the Shift Over Cycle rate as the rate does not form part of Ordinary Time Earnings, consistent with s 6(1) of the SGA Act, but it is paid on the all-inclusive rate which includes a component for Overtime Hours<sup>37</sup>, this supports the Shift Over Cycle rate applying to hours of work undertaken outside of the Rostered Hours in the Roster Cycle.
- 82 Further, the examples provided in cl 14.8 and cl 14.9, are broadly consistent with the payment of the Shift Over Cycle rate for work undertaken outside of the Rostered Hours in the Roster Cycle, noting that there is no *other* overtime hourly rate provided. That is, full time employees who work outside of the Rostered Hours in the Roster Cycle are either paid at the all-inclusive rate or at the Shift Over Cycle rate.
- 83 The use of the words ‘Shift Over Cycle rate’ clearly has meaning in the industry in which the term is used<sup>38</sup>.
- 84 When regard is had to the entire agreement taken in context, I find that the payment of the Shift Over Cycle rate applied to work required to be undertaken outside of the Rostered Hours or Rostered Shift in the Roster Cycle.

- 85 However, what does this mean if there is a change in Roster Hours or Roster Cycle, in particular if there is an increase in Roster Hours over 10 hours?
- 86 For the Shutdown Roster, cl 14.3 of the UGL Agreement *specifies* the Shift Over Cycle rate applies to hours worked over 10 hours per day on *Shutdowns*, which is also consistent with the example in cl 14.9 of the UGL Agreement. However, this example refers to the *normal roster pattern* being the 19:9 Roster, 10 hours per day.
- 87 For the following reasons, and notwithstanding the words used in cl 14.8, I find that the Shift Over Cycle rate did not apply to 0.87 hours worked by the Affected Workers, which was over 10 hours:
- the intention to the Shift Over Cycle rate is to compensate employees for something more than overtime, otherwise the payment of unrostered overtime in cl 1.1 at the all-inclusive rate or at the Shift Over Cycle rate *as applicable* is unnecessary;
  - this also accords with cl 14.13 of the UGL Agreement where the Shift Over Cycle rate is, in effect, a penalty rate where the respondent fails to give the notice specified in the clause;
  - similarly, the Shift Over Cycle rate compensates employees who are required to work outside the duration of ordinary rostered hours;
  - to that end, superannuation does not apply to the Shift Over Cycle rate because it is work required to be done outside of work designated Ordinary Time Earnings;
  - therefore, the Shift Over Cycle rate is not intended to further compensate employees for undertaking Ordinary Hours of work;
  - the change from the 19:9 Roster to the 14:14 Roster, irrespective of the reason for the change, altered by agreement, as contemplated under the UGL Agreement, not only applied to the Roster Cycle but also applied to the Roster Hours or Roster Shift;
  - the effect of the combined change was that FIFO or non-local employees were required to work their minimum 38 Ordinary Hours per week or 152 Ordinary Hours per four week period by working new Roster Hours or Roster Shifts of 10.87 hours per day;
  - under the 14:14 Roster the Shift Over Cycle rate contemplated in cl 14.8 did not apply unless an employee was required to work in excess of the 10.87 hours per shift; and
  - to find otherwise would make commercial nonsense in that FIFO or non-local employees would be further compensated to do no more than the minimum requirement under the UGL Agreement and would be, arguably, liable to repay to the respondent superannuation paid on 0.87 hours to which they are not entitled.
- 88 While not determinative, the negotiations surrounding the change to the 14:14 Roster and the hours of work are consistent with the preferred construction. That is, based on the uncontroverted evidence of Mr Elliott, one of the issues occupying the relevant representative union was the 'underpayment of superannuation' if employees worked 140 ordinary hours rather than 152 ordinary hours. Given the union involved was also one of the bargaining parties to the UGL Agreement, it is reasonable to infer that the relevant union was aware of cl 14.8 and did not seek to substitute this clause in lieu of the 12 hours of superannuation. Failing the relevant union and the respondent forgetting about cl 14.8, it is also reasonable to infer that cl 14.8 was not invoked because it was always intended to apply to work outside Rostered Hours on the Roster Cycle.

### Conclusion

- 89 I am satisfied, and I find, albeit for different reasons, that the preferred construction of cl 14.8 of the UGL Agreement is consistent with the respondent's construction, in that the Shift Over Cycle rate did not apply to the 0.87 hours worked by the Affected Workers between the dates identified.
- 90 Accordingly, I find that the respondent did not contravene cl 14.8 of the UGL Agreement as it relates to the Affected Workers and, therefore, did not contravene s 323 of the FWA.
- 91 The claimant's claim is dismissed.

**D. SCADDAN**

**INDUSTRIAL MAGISTRATE**

### SCHEDULE I: Jurisdiction, Practice and Procedure of the Industrial Magistrates Court (WA)

#### Jurisdiction

- [1] An employee, an employee organization or an inspector may apply to an eligible state or territory court for orders regarding a contravention of the civil penalty provisions identified in s 539(2) of the FWA.
- [2] The IMC, being a Court constituted by an industrial magistrate, is 'an eligible State or Territory court': FWA, s 12 (see definitions of 'eligible State or Territory court' and 'magistrates court'); *Industrial Relations Act 1979* (WA), s 81 and s 81B.
- [3] The application to the IMC must be made within six years after the day on which the contravention of the civil penalty provision occurred: FWA, s 544.
- [4] The civil penalty provisions identified in s 539 of the FWA include the requirement to pay an employee amounts payable to the employee in relation to the performance of work in full: FWA, s 323(1)(a).
- [5] An obligation upon an 'employer' covered by an agreement is an obligation upon a 'national system employer' and that term, relevantly, is defined to include 'a corporation to which paragraph 51(xx) of the Constitution applies': FWA, s 42, s 53, s 14 and s 12. An entitlement of an employee covered by an agreement is an entitlement of an 'employee' who is a 'national system

employee' and that term, relevantly, is defined to include 'an individual so far as he or she is employed ... by a national system employer': FWA, s 42, s 53 and s 13.

#### **Contravention**

- [6] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the Court may make orders for an employer to pay to an employee an amount that the employer was required to pay under the modern award: FWA, s 545(3)(a).
- [7] The civil penalty provisions identified in s 539 of the FWA include:
- Failing to pay an employee amounts payable in full in relation to the performance of work: FWA, s 323(1).
- [8] An 'employer' has the statutory obligations noted above if the employer is a 'national system employer' and that term, relevantly, is defined to include 'a corporation to which paragraph 51(xx) of the Constitution applies': FWA, s 14 and s 12. The obligation is to an 'employee' who is a 'national system employee' and that term, relevantly, is defined to include 'an individual so far as he or she is employed ... by a national system employer': FWA, s 13
- [9] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the Court may make orders for:
- An employer to pay to an employee an amount that the employer was required to pay under the FWA: FWA, s 545(3).
  - A person to pay a pecuniary penalty: FWA, s 546.
- [10] In contrast to the powers of the Federal Court and the Federal Circuit Court, an eligible State or Territory court has no power to order payment by an entity other than the employer of amounts that the employer was required to pay under the FWA. For example, the IMC has no power to order that the director of an employer company make payments of amounts payable under the FWA: *Mildren v Gabbusch* [2014] SAIRC 15.

#### **Burden and standard of proof**

- [11] In an application under the FWA, the party making an allegation to enforce a legal right or to relieve the party of a legal obligation carries the burden of proving the allegation. The standard of proof required to discharge the burden is proof 'on the balance of probabilities'. In *Miller v Minister of Pensions* [1947] 2 All ER 372, 374, Lord Denning explained the standard in the following terms:
- It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not,' the burden is discharged, but, if the probabilities are equal, it is not.
- [12] In the context of an allegation of the breach of a civil penalty provision of the Act it is also relevant to recall the observation of Dixon J, said in *Briginshaw v Briginshaw* [1938] HCA 34; 60 CLR 336:
- The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences. (362)

#### **SCHEDULE II: Construction of Industrial Instruments**

- [1] This case involves, in part, construing industrial agreements. The relevant principles to be applied when interpreting an industrial instrument are set out by the Full Bench of the Western Australian Industrial Relations Commission in *Fedec v The Minister for Corrective Services* [2017] WAIRC 00828; 97 WAIG 1595 [21] - [23].
- [2] In summary (omitting citations), the Full Bench stated:
- The general principles that apply to the construction of contracts and other instruments also apply to the construction of an industrial agreement;
- (1) The primary duty of the court in construing an instrument is to endeavour to discover the intention of the parties as embodied in the words they have used in the instrument;
  - (2) It is the objectively ascertained intention of the parties, as it is expressed in the instrument, that matters; not the parties' subjective intentions. The meaning of the terms of an instrument is to be determined by what a reasonable person would have understood the terms to mean;
  - (3) The objectively ascertained purpose and objective of the transaction that is the subject of a commercial instrument may be taken into account in construing that instrument. This may invite attention to the genesis of the transaction, its background and context;
  - (4) The apparent purpose or object of the relevant transaction can be inferred from the express and implied terms of the instrument, and from any admissible evidence of surrounding circumstances;
  - (5) An instrument should be construed so as to avoid it making commercial nonsense or giving rise to commercial inconvenience. However, it must be borne in mind that business common sense may be a topic on which minds may differ';
  - (6) An instrument should be construed as a whole. A construction that makes the various parts of an instrument harmonious is preferable. If possible, each part of an instrument should be construed so as to have some operation; and
  - (7) Industrial agreements are usually not drafted with careful attention to form by persons who are experienced in drafting documents that have legal effect.

[3] The following is also relevant:

- Ascertaining the intention of the parties begins with a consideration of the ordinary meaning of the words of the instrument. Ascertaining the ordinary meaning of the words requires attention to the context and purpose of the clause being construed. *City of Wanneroo* at [53] - [57] (French J).
- Context may appear from the text of the instrument taken as a whole, its arrangement and the place of the provision under construction. The context includes the history of the instrument and the legal background against which the instrument was made and in which it was to operate. *City of Wanneroo* [53] - [57] (French J); *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Excelior Pty Ltd* [2013] FCA 638 [28] - [30] (Katzmann J).

<sup>1</sup> The claimant was not a party to the UGL Agreement, and it did not otherwise concern the claimant: for an alleged breach of s 50 of the FWA, see s 539(2), item 4 of the FWA when read with s 540(3) of the FWA. However, for an alleged breach of s 323 of the FWA, see s 539(2), item 10 when read with s 540(2) of the FWA.

<sup>2</sup> Exhibit 1 – Agreed Statement of Facts.

<sup>3</sup> Exhibit 2 – Further Agreed Statement of Facts.

<sup>4</sup> The respondent does not accept the amounts claimed as it does not accept it has liability to pay these amounts.

<sup>5</sup> See footnote 2.

<sup>6</sup> Exhibit 3 – Statement of Terrence John Clement Elliott dated 27 September 2024.

<sup>7</sup> Exhibit 3 at [1] and [2].

<sup>8</sup> Exhibit 3 at [7] to [9].

<sup>9</sup> Exhibit 3 at [11] to [14].

<sup>10</sup> Exhibit 3 at [16].

<sup>11</sup> Exhibit 3 at [17] to [21].

<sup>12</sup> UGL Agreement at cl 8.1.1 and Appendix 2 (for permanent employees) and Appendix 3 (for casual employees).

<sup>13</sup> UGL Agreement at Appendix 4

<sup>14</sup> Exhibit 3 at [22].

<sup>15</sup> Exhibit 3 at [23] to [27].

<sup>16</sup> Exhibit 3 at [28].

<sup>17</sup> Exhibit 3 at [29].

<sup>18</sup> Exhibit 3 at [30] and [31].

<sup>19</sup> Exhibit 3 at [32] and [33].

<sup>20</sup> Exhibit 3 at [34a-c].

<sup>21</sup> Exhibit 3 at [34d-e].

<sup>22</sup> Exhibit 3 at [35].

<sup>23</sup> Exhibit 3 at [36]-[37].

<sup>24</sup> Exhibit 3 at [38].

<sup>25</sup> *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* [2006] FCA 813; (2006) 153 IR 426, 438 (*City of Wanneroo*).

<sup>26</sup> *City of Wanneroo* 438, 440.

<sup>27</sup> *City of Wanneroo* 440.

<sup>28</sup> *Transport Workers' Union of Australia v Linfox Australia Pty Ltd* [2014] FCA 829; (2014) 318 ALR 54.

<sup>29</sup> *Kucks v CSR Ltd* [1996] IRCA 166; (1996) 66 IR 182; *Ancor Limited v Construction, Forestry, Mining and Energy Union* [2005] HCA 10; (2005) 214 ALR 56.

<sup>30</sup> *King v Melbourne Vicentre Swimming Club Inc* [2020] FCA 1173 at [122] (*King*).

<sup>31</sup> Clause 5.2.1 and 5.2.2 of the UGL Agreement and cl 1.1 definitions.

<sup>32</sup> Clause 5.2.2 of the UGL Agreement.

<sup>33</sup> Clause 1.1 of the UGL Agreement.

<sup>34</sup> Clause 14.4 of the UGL Agreement.

<sup>35</sup> Clause 8.1.1 of the UGL Agreement and cl 1.1 definitions.

<sup>36</sup> See cl 1.1 under definition of 'Roster Cycle'.

<sup>37</sup> Clause 13.2 of the UGL Agreement.

<sup>38</sup> Exhibit 3 at [38].

2025 WAIRC 00039

## INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

**CITATION** : 2025 WAIRC 00039  
**CORAM** : INDUSTRIAL MAGISTRATE T. KUCERA  
**HEARD** : MONDAY, 8 APRIL 2024, TUESDAY, 9 APRIL 2024, WEDNESDAY, 10 APRIL 2024,  
 THURSDAY, 11 APRIL 2024 & FRIDAY, 12 APRIL 2024  
**DELIVERED** : TUESDAY, 28 JANUARY 2025  
**FILE NO.** : M 147 OF 2022  
**BETWEEN** : JILLIAN DIXON, DEPARTMENT OF MINES, INDUSTRY REGULATION AND  
 SAFETY

CLAIMANT

AND

KAHRAMAN KARAKUYU

FIRST RESPONDENT

DÖNE KARAKUYU

SECOND RESPONDENT

**CatchWords** : INDUSTRIAL LAW – Enforcement of State Award – Breaches of Award - Underpayment of Wages Claim – Award contraventions – Records contraventions – Reverse Onus of Proof – Onus of Proof – Failure to keep and maintain employment records – Non-compliance with Notices to Produce – Obstruction s 102 *Industrial Relations Act 1979* – s 82A Time limit for certain applications – s 83A Underpayment of employee, orders to remedy – s 83EB Employer to have burden of disproving certain allegations by – claimant under s 83 – s 49D Employer’s duties as to employment records – Retrospective application of statute – Excuses for not providing employment records – Claim proven

**Legislation** : *Industrial Relations Act 1979* (WA)  
*Industrial Relations Legislation Amendment Act 2021* (WA)  
*Fair Work Act 2009* (Cth)  
*Misuse of Drugs Act 2001* (Tas)

**Instrument** : *Restaurant, Tearoom and Catering Workers’ Award*  
*Catering Workers’ (Fast Food Operations, Catering and Restaurant) Agreement, 1979*

**Case(s) referred to in reasons:** : ***Ghimire v Karriview Management Pty Ltd (No 2)*** [2019] FCA 1627; (2019) 290 IR 331  
*Maxwell v Murphy* [1957] HCA 7; (1957) 96 CLR 261  
*Attorney-General’s Reference No 1 of 2004* [2005] TASSC 10  
*Ah Hing v Hough* (1926) 28 WALR 95  
*Richardson v Shipp* [1970] Tas SR 105  
*Rodway v R* [1990] HCA 19; (1990) 169 CLR 515  
*Browne v Dunn* (1893) 6 R 67  
*Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation (Cth)* [1983] 1 NSWLR 1; (1983) 70 FLR 447  
*Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11; (2011) 243 CLR 361  
*Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298  
*Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd* [2012] FMCA 258  
*Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)* [2017] FCA 557  
*Fair Work Ombudsman v South Jin Pty Ltd (No 2)* [2016] FCA 832  
*Jubilee Jackpot Pty Ltd v Federated Liquor and Allied Industries Employees’ Union of Australia, Western Australian Branch, Union of Workers* (1989) 69 WAIG 1048  
*Federated Liquor and Allied Industries Employees’ Union of Australia, Western Australian Branch, Union of Workers v Jubilee Jackpot Pty Ltd trading as McDonald’s Family Restaurants* (1988) 68 WAIG 2851  
*Minister for Labour v Como Investments Pty Ltd* (1990) 70 WAIG 3539.  
*Hungry Jacks Pty Ltd v Wilkins* (1991) 71 WAIG 175

*Nyree Collins, Department of Consumer and Employment Protection v Yule Brook College Parents and Citizens' Association Incorporated* [2003] WAIRC 8476; (2003) 83 WAIG 1787

*Fedec v The Minister for Corrective Services* [2017] WAIRC 00828; (2017) 97 WAIG 1595

*Kucks v CSR Ltd* (1996) 66 IR 182

*Amtcor Ltd v Construction, Forestry, Mining and Energy Union* [2005] HCA 10; (2005) 222 CLR 241

**Result** : Claim proven

**Representation:**

Claimant : Mr J. Carroll (of counsel), and with him Ms I. Inkster (of counsel)

Respondent : Mr S. Heathcote (of counsel)

**REASONS FOR DECISION**

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### Introduction

- 1 This matter involves enforcement proceedings (**proceedings**) that were commenced under ss 83(1) and 83E(1) of the *Industrial Relations Act 1979* (WA) (**IR Act**) by Jillian Dixon (**claimant**), an industrial inspector from the Department of Mines, Industry Regulation and Safety (**Department**).
- 2 The claimant filed the proceedings alleging Kahraman Karakuyu and Döne Karakuyu (**respondents**) who, in partnership, as proprietors of the business trading as Newroz Kebab and Turkish Bakery (**Newroz**), had failed to maintain employment records and significantly underpaid one of its employees, Şahin Zeyrek (**Mr Zeyrek**).
- 3 Mr Zeyrek, who is not proficient in speaking English, commenced work at Newroz in July 2013. At or around this time, Mr Zeyrek was, for immigration purposes, granted a refugee protection visa. Mr Zeyrek continued to work at Newroz until he resigned from his employment in the later part of 2020.
- 4 After ceasing employment with Newroz, Mr Zeyrek made a complaint to the Fair Work Ombudsman (**FWO**) about his pay and employment entitlements (**complaint**).
- 5 In May 2021, when it became clear that Mr Zeyrek was, for much of the time he worked at Newroz, not employed by a 'national system employer', the FWO referred his complaint to the Department to investigate.
- 6 As part of the Department's investigation into Mr Zeyrek's complaint, on 12 April 2022, the claimant issued three Notices to Produce under s 98(3)(e) of the IR Act, including one to the respondents that required them to provide the claimant with employment records for Mr Zeyrek (**Notices to Produce**). The respondents were required to comply with the Notices to Produce by 26 April 2022.
- 7 On 19 December 2022 following the completion of the Department's investigation, the claimant commenced the proceedings alleging the respondents had:
  - i. failed to keep records in relation to Mr Zeyrek's employment contrary to s 49D(2) of the IR Act (**record contraventions**); and
  - ii. contrary to the provisions of the *Restaurant Tearoom and Catering Workers' Award 1979* (**the Award**), the respondents failed to pay Mr Zeyrek correct rates of pay and entitlements (**award contraventions**).
- 8 The respondents for their part, admitted the record contraventions. In relation to the award contraventions, the respondents on two bases, denied they engaged in any contravening conduct.
- 9 First, the respondents say the Award did not apply to their business. Second, and even if it can be established that the Award applied, the respondents denied that Mr Zeyrek worked the number of hours the claimant says he worked and for which it is alleged he was underpaid.
- 10 In the reasons that follow, I have considered whether the claimant has proved its claim against the respondents and whether, they have engaged in the alleged award contraventions.

### Issues to be decided

- 11 To establish if the respondents committed the alleged award contraventions the claimant would, in the usual course, be required to prove on the balance of probabilities the Award applied to the respondents and that Mr Zeyrek worked the hours he said he did.
- 12 In the present case, and in the absence of employment records, proof of these matters necessarily required Mr Zeyrek and others to give evidence on both the nature of the work he performed and when he performed it.
- 13 However, what is also relevant, and which required determination, was whether the onus of proving these matters was to be borne by the claimant or whether the respondents, having admitted the record contraventions, were subject to the reverse onus of proof under s 83EB of the IR Act (**reverse onus**).

### Limitation Date

- 14 In addition to the matters referred to the preceding paragraphs [11] - [13] above, a further issue the parties were at odds over was the limitation date that applied to determining the number of award contraventions and the quantum of the claimed

underpayment (**claim period**).

15 On this, s 82A of the IR Act relevantly provides that a breach of an award claim, must be made within six years of the alleged contravention.

16 Notwithstanding this, s 83A of the IR Act states:

**83A. Underpayment of employee, orders to remedy**

(1) Where in any proceedings brought under section 83(1) against a person it appears to the industrial magistrate's court that an employee has not been paid the amount which the employee was entitled to be paid under an entitlement provision, the industrial magistrate's court must, subject to subsection (2), order that person to pay to that employee the amount by which the employee has been underpaid.

(2) An order may only be made under subsection (1) —

(a) in respect of any amount relating to a period not being more than 6 years prior to the commencement of the proceedings; or

(b) if the person concerned appears to the industrial magistrate's court, or has been found under section 83E, to have contravened section 102(1)(a) or (b) by reason of having failed —

(i) to produce or exhibit a record relevant to the proceedings; or

(ii) to allow such a record to be examined; or

(iii) to answer a question relevant to the proceedings truthfully to the best of the person's knowledge, information and belief, as the case requires,

in respect of any amount relating to a period not being more than 6 years prior to that failure.

17 Section 102 of the IR Act provides:

**102 Obstruction etc. prohibited**

(1) A person must not —

(a) being lawfully required to do so fail to produce or exhibit, or allow to be examined, a record; or

(b) being lawfully asked a question by a person under this Act, fail to answer truthfully to the best of the person's knowledge, information and belief; or

...

(2) A person must not —

(a) resist or obstruct a person in the performance of a duty imposed or the exercise of a power conferred by or under this Act; or

(b) wilfully mislead a person in any particular likely to affect the exercise of a power so conferred or the discharge of a duty so imposed.

18 In effect, s 83A(2)(b) of the IR Act allows the Court to extend the six-year limitation period to a date on which a respondent was required to respond to a notice to produce but the respondent fails to either:

i. comply with a notice to produce;<sup>1</sup> or

ii. is found to have either contravened s 102 of the IR Act;<sup>2</sup> or

iii. appears to have engaged in conduct contrary to s 102 of the IR Act.<sup>3</sup>

**Claim periods in issue**

19 In this matter, there are, because of the operation of s 83A(2)(b) and s 102 of the IR Act, two potential claim periods that could apply. The first is a claim period that runs from 27 April 2016 until 31 December 2018 (**primary claim period**).

20 For the primary claim period to apply, I must be satisfied the respondents have or appeared to have engaged in conduct of the type contemplated by s 83A(2)(b) of the IR Act (**failure to comply**). This would allow me to extend the limitation period to six years from the day immediately following the date by which the respondent was required to comply with the Notices to Produce.

21 In the present case the date by which the respondents were required to comply with the Notices to Produce was 26 April 2022 (**compliance date**). Therefore, the first date in the primary claim period would be six years from the day after the compliance date, which was 27 April 2022.

22 The second scenario is a claim period that runs from 19 December 2016 until 31 December 2018. This would be a claim period that commences six years from the date on which the first alleged contraventions within the period allegedly occurred (**alternative claim period**).

23 If I conclude the respondents did not engage in a failure to comply, despite having admitted the record contraventions, the alternative claim period would apply.

**Change in ownership**

24 The parties agreed that on 31 December 2018, there was a transfer in the ownership and control of Newroz, from the respondents to Karakuyu Pty Ltd (**change in ownership**).

- 25 While it is conceded Mr Zeyrek continued to work for Newroz beyond the date on which there was a change in ownership, it was accepted the last date in either claim period, on which it could be alleged an award contravention occurred was 31 December 2018.
- 26 This is because, Mr Zeyrek's employment, following the change in ownership, transferred from the respondents to a national system employer, to which the Award and the provisions of the IR Act no longer applied.
- 27 Therefore, and regardless of the finding I make on the claim period that applies, the last day in either scenario is 31 December 2018.

#### Agreed Facts

- 28 In addition to the change in ownership, the parties agreed upon a series of facts relevant to the issues to be decided. These were presented in a Statement of Agreed Facts the parties filed on 23 June 2023. Relevantly the parties agreed the following:

##### The Premises

From at least 27 April 2016 to 31 December 2018 ... Newroz Kebabs was an establishment at which food was prepared on-site and sold for consumption. The Premises had a cash register, drinks fridge, kebab machines and grill. There were tables and chairs at the Premises.

Newroz Kebabs sold food items including but not limited to burgers, kebabs, fish and chips, nuggets and chips, and seafood baskets. After the shop was renovated in 2017, the range of food offered for sale was increased and included items such as pide, gözleme and bread.

Newroz Kebabs was generally open seven days a week, including public holidays but excluding Christmas Day.

[The] opening hours, on days that were not public holidays, were, at a minimum:

Monday – 09.00 am – 10.00 pm

Tuesday – 09.00 am – 10.00 pm

Wednesday – 09.00 am – 12.00 am

Thursday – 09.00 am – 12.00 am

Friday – 09.00 am – 02.00 am (the following day)

Saturday – 0:90am – 02.00 am (the following day)

Sunday – 09.00 am – 11.00 pm

##### The Complainant

The Respondents employed Şahin Zeyrek for but not limited to the claim period.

Mr Zeyrek's duties included but were not limited to taking orders and payments from customers, preparing orders, handing over completed food orders, and cleaning.

The Respondents paid Mr Zeyrek on a weekly basis in cash.

##### Failure to maintain records per s 49D(2) of the IR

The Respondents were required to maintain records in relation to Mr Zeyrek's employment in accordance with section 49D(2) of the Act (as that section was prior to amendments made by the *Industrial Relations Legislation Amendment Act 2021* on 20 June 2022).

The Respondents contravened section 49D(2) of the Act in relation to Mr Zeyrek's employment.

##### Failure to produce records per s 102(1)(a) of the IR Act

On 14 April 2022, the Respondents were served with a notice to produce records to the Claimant by 26 April 2022 relating to Mr Zeyrek's employment with Newroz Kebabs, as operated by the partnership, including:

- (a) Mr Zeyrek's signed tax file number declaration form with the business;
- (b) PAYG payment summaries for the period 2013 to 2019;
- (c) documents relating to the change in ownership of the business from the Respondents to the Trustee for the Kahraman Family Trust in or about January 2019 (**relevant records**).

The Respondents were lawfully required to produce the relevant records by 26 April 2022 but did not do so.

- 29 In addition to the agreed facts set out, the respondents made other concessions relevant to the application of the Award, including the classification Mr Zeyrek was employed in, to which I will return.
- 30 The respondents' concessions regarding the application of the Award were, however, conditional upon the Court finding the Award applied to the respondents.

#### The Award

- 31 As indicated, to succeed in the award contraventions, the claimant was required to establish that the Award applied. In relation to this, clause 4 of the Award (Scope) relevantly states:

This Award shall apply to all workers employed in the callings described in [c]lause 21 of this award, in Restaurants and/or Tearooms and/or Catering Establishments and/or by Catering Contractors, as defined in [c]lause 6 of this Award.

- 32 Under clause 6 of the Award (**Definitions**), a restaurant or tearoom is relevantly defined as:

- (1) **Restaurant and/or Tearoom** means any meal room, dining room, grill room, coffee shop, tea shop, oyster shop, fish cafe, cafeteria or hamburger shop and includes any place, building, or part thereof, stand, stall, tent, vehicle or boat in or from which food is sold or served for consumption on the premises and also includes any establishment or place where food is prepared and/or cooked to be sold or served for consumption elsewhere.
- 33 Also relevant are the definitions applicable to catering establishments and catering contractors, which are referred to below:
- (2) (a) **Catering establishment** means any building or place where meals and/or light refreshments and/or drinks are served and provided for weddings, parties, dances, social functions, theatres, festivals, fairs, exhibition buildings, cultural centres, convention centres, entertainment centres, racecourses, showgrounds, sporting grounds, and the like.
- (b) **Catering Contractor** means any person, firm, company or corporation carrying on business as a Catering Contractor in the provision of catering and ancillary services for any social, commercial, industrial or other purpose or function.
- 34 The respondents denied that Newroz was a business falling within the definition of a restaurant or tearoom. On this basis the respondents submitted the Award did not apply. The respondents contended that if this submission was accepted, the award contraventions would fall away.

#### **Underpayment of wages claim & relief sought**

- 35 The claimant provided detailed particulars with the Originating Claim (**particulars of claim**), including excel spreadsheets setting out the amounts by which and the dates it was alleged, Mr Zeyrek was underpaid (**underpayment calculations**).
- 36 In her underpayment calculations, the claimant proceeded on the basis that Mr Zeyrek was employed as a Food & Beverage Attendant Grade 2, Kitchen Attendant Grade 2 and Cook Grade 1, each of which are classifications described in the Award.
- 37 The claimant also proceeded on the basis Mr Zeyrek regularly worked 64.5 hours per week according to the following roster:<sup>4</sup>

Day	Hours	Total
Monday	12.00 pm – 11.00 pm	11
Tuesday	Day Off	0
Wednesday	12.00 pm – 12.00 am	12
Thursday	12.00 pm – 12.00 am	12
Friday	12.00 pm – 2.00 am	14
Saturday	5.00 pm – 2.00 am	9
Sunday	5.00 pm – 11.30 pm	6.5
		64.5

#### **Award clauses the respondents allegedly breached**

- 38 The claimant in her particulars of claim and the underpayment calculations, provided details of the clauses of the Award which the respondents were alleged to have breached and the number of occasions on which these contraventions allegedly occurred.
- 39 It was alleged the respondents contravened the Award by failing to pay Mr Zeyrek at the applicable rates, as specified in the following provisions:
- i. clause 9(2) – additional rates for ordinary hours (payment of additional rates where ordinary hours are performed on Saturdays and Sundays);
  - ii. clause 10(2) – overtime (payment at overtime rates for overtime worked Mondays-Fridays and on Saturdays and Sundays);
  - iii. clause 13(1)(b) – meal breaks (payment of the loading that applies where a meal break is not provided);
  - iv. clause 17(1)(a) – public holidays (observing Christmas Day in 2016 and Christmas Day in 2017 as holidays without deduction of pay);
  - v. clause 17(2)(a) – public holidays (payment at the rate of double time and half for work performed on public holidays);
  - vi. clause 18(6) – annual leave (payment of annual leave and leave loading upon termination);
  - vii. clause 21(1) – wages (minimum fortnightly wage payable for a full-time Level 2 employee);
  - viii. clause 26(2) – uniforms and laundering (payment of a fortnightly laundry allowance);
  - ix. clause 27(1) – protective clothing (payment of an allowance where rubber gloves are not provided, when performing particular cleaning tasks and using cleaning agents)
  - x. clause 32(1) – employment records (requirement to keep and maintain employment records).
- 40 I have extracted into a table below, the rates of pay that applied under the Award in the two-year period from 1 July 2016 to 1 July 2018, pursuant to the Award clauses I have referred to (**comparative wages table**).
- 41 The comparative wages table sets out the rates that applied under the Award for work in ordinary hours, as well as for work at night, on weekends, public holidays and at overtime rates.

- 42 The comparative wages table also shows the rate the claimant alleged the respondents paid to Mr Zeyrek for each hour he worked during the respective claim periods; \$20 per hour.

Award rates of pay	01/07/2016	01/07/2017	01/07/2018	Rate Paid Per Hour
Hourly	(\$)	(\$)	(\$)	(\$)
Ord Hrs Mon-Fri	19.40	19.82	20.29	20
Ord Hrs Mon-Fri (<7am&>7pm)	21.06	21.48	21.95	20
Ord Hrs Mon-Fri (>12am<7am)	21.15	21.57	22.04	20
Ord Hrs Sat-Sun	29.09	29.73	30.44	20
OTM* x 1.5 Mon-Fri (<2hrs)	29.09	29.73	30.44	20
OTM x 2 Mon-Fri (>2hrs)	38.79	39.63	40.58	20
OTM x 2 Sat-Sun	38.79	39.63	40.58	20
PH <sup>†</sup> x 2.5 (min 4 hrs) – Ordinary Hours	48.49	49.54	50.73	20
PH x 2.5 (min 4 hrs) – Overtime Hours	48.49	49.54	50.73	20

\* OTM means 'overtime'.

† PH means 'public holiday'.

- 43 The claimant contended that if the primary claim period applies, Mr Zeyrek was by reason of the award contraventions alleged, underpaid the total of amount of \$102,483.74.<sup>5</sup> This sum includes an amount for unpaid annual leave.
- 44 If the alternative claim period applies, the claimant alleged that in addition to an amount for unpaid annual leave, the total sum owing to Mr Zeyrek was \$84,487.86.<sup>6</sup> Either way, the level of underpayment alleged is significant.
- 45 The respondents accepted that if I reached a conclusion that Mr Zeyrek was employed on a full-time basis, then he would be entitled to payment for accumulated annual leave and leave loading. The respondents conceded that Mr Zeyrek never took leave and was not paid for annual leave or leave loading, including upon his termination.<sup>7</sup>
- 46 In addition to orders requiring the respondents pay Mr Zeyrek any amount by which he was underpaid, the claimant also sought orders for the payment of pre-judgement interest and the imposition of pecuniary penalties. The pecuniary penalties sought are for both the alleged award and records contraventions.
- 47 Noting the number of issues requiring determination, even with the respondents having admitted the records contraventions, I have opted to deal with the issue of liability first and to defer the question of penalty for further argument.

#### Number of alleged award contraventions

- 48 The claimant in the particulars of claim and underpayment calculations alleges the respondents, during the primary claim period, committed 513 award contraventions. In the alternative claim period, the claimant alleged the respondents committed 392 separate contraventions.
- 49 Although s 83A(2)(b) of the IR Act allows the Court to extend a claim period so it can make an order requiring an employer to pay an amount an employee was entitled to receive for the duration of the extended claim period, it does not empower the Court to impose a penalty for a contravention that occurs more than six years from the date of the alleged contravention.
- 50 When s 82A of the IR Act is read together with s 83 and s 83A it is clear that penalties may only be imposed, for contraventions that occur within the six-year time limit under s 82A.
- 51 Therefore, if I conclude the primary claim period applies and find the respondents breached the Award 513 times, I can only impose penalties for contraventions that I find were committed within the six-year limitation period. This means the maximum number of award contraventions in respect of which I may impose a penalty is 392.

#### Records contraventions

- 52 The claimant alleged the respondents, during the period 19 December 2016 to 31 December 2018 contravened s 49D(2), as it applied prior to amendments that were made to the IR Act on 20 June 2022, on 738 separate occasions.<sup>8</sup>
- 53 During the claim periods at issue; s 49D(2) of the IR Act relevantly required the respondents to ensure the following employment records (**employment records**) were kept:

- (2) An employer must ensure that details are recorded of —
- (a) the employee's name and, if the employee is under 21 years of age, his or her date of birth; and
  - (b) any industrial instrument that applies; and
  - (c) the date on which the employee commenced employment with the employer; and
  - (d) for each day —
    - (i) the time at which the employee started and finished work; and

- (ii) the period or periods for which the employee was paid; and
  - (iii) details of work breaks including meal breaks;
- and
- (e) for each pay period —
    - (i) the employee's designation; and
    - (ii) the gross and net amounts paid to the employee under the industrial instrument; and
    - (iii) all deductions and the reasons for them;
- and
- (f) all leave taken by the employee, whether paid, partly paid or unpaid; and
  - (g) the information necessary for the calculation of the entitlement to, and payment for long service leave under the Long *Service Leave Act 1958*, the *Construction Industry Portable Paid Long Service Leave Act 1985* or the industrial instrument; and
  - (h) any other information in respect of the employee required under the industrial instrument to be recorded; and
  - (i) any information, not otherwise covered by this subsection, that is necessary to show that the remuneration and benefits received by the employee comply with the industrial instrument.
- 54 In addition, the claimant separately alleged the respondents had breached clause 32 of the Award (Employment Record), which requires employers who are bound by the Award to keep employee records like those described under s 49D(2) of the IR Act.
- 55 In relation to the requirements under s 49D(2), the claimant alleged the respondents did not maintain records that recorded the following information:
- (a) the date on which Mr Zeyrek commenced employment with the Respondent;
  - (b) Mr Zeyrek's classification under the Award;
  - (c) the time at which Mr Zeyrek started and finished work each day;
  - (d) the number of ordinary hours and the number of overtime hours worked each day and the totals for each pay period;
  - (e) the periods for which Mr Zeyrek was paid;
  - (f) details of work breaks including meal breaks;
  - (g) the gross and net amounts paid to Mr Zeyrek for each pay period;
  - (h) all leave taken by Mr Zeyrek whether paid, partly paid or unpaid.<sup>9</sup>
- 56 Noting the respondents in the Statement of Agreed Facts have admitted that they failed to keep employment records for Mr Zeyrek in breach of s 49D(2) of the IR Act, a finding that the respondents breached the requirement to keep employment records as required under clause 32 may also be made if I conclude that the Award applies.

#### Parties' Evidence & Submissions

- 57 Before the proceedings were listed for hearing, the parties each filed witness statements and outlines of submissions on the issue of whether the Award applied to the respondents. The claimant compiled the witness statements into a two volume 1040-page, Court Book (**Court Book**).
- 58 The claimant filed two witness statements in the proceedings with attachments. The claimant's second witness statement was filed in reply to the statements from the respondents' statements.
- 59 In addition, the claimant also filed the following:
- i. A witness statement from Industrial Inspector Brian Ravenscroft (**Mr Ravenscroft**).
  - ii. Three witness statements with attachments from Mr Zeyrek, one of which, was filed in reply to the statements the respondents filed.
  - iii. Two witness statements from Mr Zeyrek's wife, Fener Azbay (**Ms Azbay**) and
  - iv. Three witness statements from former Newroz employee, Yusuf Oruc (**Mr Oruc**).
- 60 Like Mr Zeyrek, Mr Oruc and Ms Azbay both provided additional witness statements in reply to the respondents' evidence.
- 61 The respondents, for their part, filed eight witness statements. As most of these witnesses are members of the Karakuyu family and for the purposes of avoiding confusion, I have with one exception respectfully referred to these witnesses using their first names as follows:
- i. Mr Kahraman Karakuyu, the first respondent (**Kahraman**);
  - ii. Mr Hasan Karakuyu (**Hasan**);
  - iii. Mr Huseyin Karakuyu (**Huseyin**);
  - iv. Ms Nilufer Karakuyu (**Nilufer**);
  - v. Ms Fatma Kara (**Fatma**);
  - vi. Mr Mehmet Mavi (**Mehmet**);

- vii. Mr Mehmet Yasar (**Mr Yasar**); and
- viii. Mr Umut Ozkalfa (**Umut**).

### Hearing of the Claim

- 62 The case was heard across five days, 8 April 2024 - 12 April 2024 (**hearing**). Mr Ravenscroft was the only witness who was not called to be cross-examined. As a result, Mr Ravenscroft's witness statement was accepted into evidence by consent.
- 63 An interpreter was required to assist with the provision of evidence from witnesses for the duration of the hearing. When a providing a summary of the evidence from each witness, I will indicate who required the assistance of an interpreter.
- 64 The claimant was represented throughout the proceedings by the State Solicitor's Office (**SSO**). Counsel John Carroll (**Mr Carroll**) and Isabel Inkster (**Ms Inkster**) from the SSO appeared at the hearing for the claimant. The respondents were represented by counsel, Steven Heathcote (**Mr Heathcote**).

### Onus of Proof

- 65 Before the claimant commenced the proceedings, the IR Act was amended with effect from 22 June 2022 to include the reverse onus under s 83EB, which applies in award contravention cases, where an employer has failed to provide payslips, keep time and wages records or to make them available for inspection.
- 66 Section 83EB provides as follows:

#### **83EB. Employer to have burden of disproving certain allegations by applicant under s. 83**

- (1) In proceedings under section 83, the employer has the burden of disproving an allegation by an applicant in relation to a matter if the employer —
- (a) was required under this Act or the LSL Act to —
    - (i) make or keep a record in relation to the matter; or
    - (ii) give a pay slip in relation to the matter; or
    - (iii) make available for inspection a record in relation to the matter;
 and
  - (b) failed to comply with the requirement.
- (2) Subsection (1) does not apply if the employer provides a reasonable excuse for the failure to comply with the requirement.

### How the reverse onus works

- 67 The reverse onus, which is in similar terms to s 557C the *Fair Work Act 2009* (Cth) was included in the IR Act to make it easier for claimants to prove award contraventions in cases where, as in the present case, an employer fails to keep or maintain employment records.
- 68 The way the reverse onus under s 557C applies in practice was considered by the Federal Court in *Ghimire v Karriview Management Pty Ltd (No 2)* [2019] FCA 1627; (2019) 290 IR 331 (*Ghimire v Karriview*).
- 69 In *Ghimire v Karriview*, Colvin J held that discharging the reverse onus under s 557C of the *Fair Work Act* requires a respondent to affirmatively prove, on the balance of probabilities, that it did not engage in the conduct alleged.
- 70 To discharge the reverse onus, it is not enough that there may be reasons to question the credibility of the accounts provided by the claimant's witnesses. The respondents are required to provide persuasive evidence in support of their position.<sup>10</sup>
- 71 Therefore, if in the context of the present case, I conclude the reverse onus applies, the respondents are required to prove, on the balance of probabilities that Mr Zeyrek did not work the hours he said he did.

### Does the reverse onus have retrospective effect?

- 72 Mr Heathcote submitted the reverse onus under s 83EB(1) did not apply in the present case. He submitted this is because the reverse onus was not in force at the time both the records and the award contraventions, were alleged to have occurred.
- 73 Referring to *Maxwell v Murphy* [1957] HCA 7; (1957) 96 CLR 261 (*Maxwell*), Mr Heathcote submitted that in the absence of some clear statement in the IR Act to the contrary, it is to be assumed the reverse onus in s 83EB(1) does not apply with retrospective effect. On this basis and despite the respondents having admitted the records contraventions, Mr Heathcote submitted the onus of proving the award contraventions fell to the claimant.
- 74 Mr Carroll argued s 83EB of the IR Act applies because it does not purport to retrospectively alter the respondents' rights, liabilities or obligations. Rather, it only changes the way a contravention of those obligations are to be proved in Court.
- 75 Referring to the decision of the Tasmanian Court of Criminal Appeal in *Attorney-General's Reference No 1 of 2004* [2005] TASSC 10 (*A-G Tas CCA*) Mr Carroll submitted the determinative factor is whether s 83EB of the IR Act only affects the manner in which existing rights and obligations are to be determined.
- 76 Mr Carroll submitted that if the section does no more than affect the way in which the case involving compliance with existing rights and obligations is tried, there is no presumption against retrospectivity.

### Law on the retrospective application of statute

- 77 In *Maxwell*, Dixon CJ at 267 when considering whether a statute had retrospective application stated:

The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer

or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events. But, given rights and liabilities fixed by reference to past facts, matters or events, the law appointing or regulating the manner in which they are to be enforced or their enjoyment is to be secured by judicial remedy is not within the application of such a presumption. Changes made in practice and procedure are applied to proceedings to enforce rights and liabilities, or for that matter to vindicate an immunity or privilege, notwithstanding that before the change in the law was made the accrual or establishment of the rights, liabilities, immunity or privilege was complete and rested on events or transactions that were otherwise past and closed. The basis of the distinction was stated by Mellish LJ in *Republic of Costa Rica v Erlanger*.<sup>11</sup>

No suitor has any vested interest in the course of procedure, nor any right to complain, if during the litigation the procedure is changed, provided, of course, that no injustice is done.

78 The question of whether a provision that changed the onus of proof had retrospective application was considered in *A-G Tas CCA*.

79 *A-G Tas CCA* dealt with a case involving a contravention of s 7(1)(a) the *Misuse of Drugs Act 2001 (Tas)* (Misuse of Drugs Act) which created the following offence:

A person must not cultivate a controlled plant –

- with the intention of selling the controlled plant or any of its products.

80 The defendant (Mr Crane) was charged with committing the offence of cultivating cannabis contrary to s 7(1)(a) of the Misuse of Drugs Act. At the time of the alleged offence, s 7(2) contained an onus of proof provision in the following terms:

If it is proved in proceedings for an offence under subsection (1) that the accused cultivated a trafficable quantity of a controlled plant, it is presumed, in the absence of evidence to the contrary, that the accused had the relevant intention or belief concerning the sale of the controlled plant or its products required to constitute the offence.

81 After the defendant was charged but before his case was referred to trial, s 7(2) of the Misuse of Drugs Act was amended as follows:

If it is proved in proceedings for an offence under subsection (1) that the accused cultivated a trafficable quantity of a controlled plant, it is presumed, unless the accused on the balance of probabilities proves otherwise, that the accused had the relevant intention or belief concerning the sale of the controlled plant or its products required to constitute the offence.

82 At trial, the judge at first instance ruled that the amendment to s 7(2) did not apply to the defendant. The issue to be determined by the Court of Criminal Appeal was whether the trial judge had made an error with this finding.

83 In *A-G Tas CCA*, Underwood CJ, with whom Crawford and Evans JJ agreed, reviewed the development of the relevant case law including *Ah Hing v Hough* (1926) 28 WALR 95, *Maxwell*, and *Richardson v Shipp* [1970] Tas SR 105. He also referred to *Rodway v R* [1990] HCA 19; (1990) 169 CLR 515 (*Rodway*) at 521:

But ordinarily an amendment to the practice or procedure of a court, including the admissibility of evidence and the effect to be given to evidence, will not operate retrospectively so as to impair any existing right. It may govern the way in which the right is to be enforced or vindicated, but that does not bring it within the presumption against retrospectivity. A person who commits a crime does not have a right to be tried in any particular way; merely a right to be tried according to the practice and procedure prevailing at the time of trial.

84 Underwood CJ also referred to *Rodway* at 522:

Some procedures at a trial provide fundamental protection against wrongful conviction, but, in conformity with the passage already quoted from the judgment of Dixon CJ in *Maxwell v Murphy*, this ordinarily provides no basis for regarding them as having a retrospective operation simply because the trial concerns events and transactions past and closed. The fact that such procedures are important does not alter the way in which they operate and, if they operate so as to affect no existing rights or obligations but merely the way in which those rights or obligations are to be contested in court, then they do not fall within the presumption against retrospectivity. Fundamental rights, irrespective of whether they should be classified as procedural or substantive, will almost invariably be reflected in the common law and the protection against statutory interference with them, whether prospective or retrospective, lies in another presumption. That is the presumption that the legislature does not intend to affect basic common law doctrines unless it expresses its intention in the clearest of terms: *Potter v Minahan* ((1908) 7 CLR 277, at p. 304); *Baker v Campbell* ((1983) 153 CLR 52, at pp 96-97, 104, 116, 123); *Sorby v The Commonwealth* ((1983) 152 CLR 281, at pp 289-290); *Hamilton v Oades* ((1989) 166 CLR 486 at p 495).

85 After referring to these passages, Underwood CJ at [16] observed:

Of particular relevance to the present issue in the two passages I have just cited are the following two propositions:

- firstly, that there is no right to be tried in a particular way (at least not before the trial begins); and;
- secondly, that the determinative factor is whether the amendment affects only the manner in which existing rights and obligations are to be determined. If it does no more than affect the way existing rights and obligations are to be tried, there is no presumption against retrospectivity.

86 At [17] and [18] Underwood CJ reached the following conclusions:

These propositions are valid even if the amendment affects what might be generally regarded as a fundamental protection against wrongful conviction. Accordingly, it seems to me that *Attorney-General's Reference No 1 of 1988*, *Ah Hing v Hough* and, insofar as it decided to the contrary to those propositions, *Richardson v Ship* can no longer be regarded as

good law. Further, *Newell v R* should be confined to the unusually narrow circumstances of that case, namely, where a procedural amendment came into operation after the formal commencement of the trial.

At the time of the alleged commission of the offence, Mr Crane 'had acquired no right to a particular mode of procedure at his trial', per *Rodway* at 523. The [Misuse of Drugs] Act, s 7(2), before and after amendment, concerned only the nature and extent of the evidence required to establish the offence charged. The amendment did no more than change the manner in which the statutory factual presumption could be displaced. It did not touch Mr Crane's rights, obligations or liabilities that he had acquired, or was subject to, at the date the State alleged he committed the offence charged. Although it might be said that the amendment touched an important protection, or made a fundamental change, it clearly did no more than affect the way the accused's rights and obligations were to be contested in court, and therefore did not fall within the presumption against retrospectivity.

#### Section 83EB applies to the present case

- 87 I have reviewed the authorities the parties referred me to and carefully considered whether the reverse onus under s 83EB(1) of the IR Act is distinguishable from the provision the Court of Criminal Appeal was required to examine in *A-G Tas CCA*.
- 88 Noting the similarity of the reverse onus to s 7(2) of the Misuse of Drugs Act, I accept that s 83EB(1) of the IR Act only affects the way a trial on the respondents' compliance with its existing obligations under the Award is to be conducted.
- 89 It therefore follows that I consider the approach of the Court of Criminal Appeal in *A-G Tas CCA*, applies in the present case. In my view there is no presumption against the retrospective application of s 83EB of the IR Act. I accordingly find that this is a matter to which the reverse onus in s 83EB applies.
- 90 However, despite having reached the conclusion s 83EB of the IR Act applies, there is still one further matter I am required to have regard to before the reverse onus under s 83EB(1) IR Act is engaged.
- 91 Although the respondents have admitted to the records contraventions, under s 83EB(2), I must be satisfied the excuse the respondents provided for their failure to comply was unreasonable.

#### Summary of the Parties' Evidence

- 92 Before dealing with the issue of whether respondents' excuse for their failure to comply was reasonable, it is necessary to provide a summary of the parties' evidence. In providing this summary, efficiency dictates that I summarise the parties' evidence on all the matters at issue in this case.
- 93 In order, I will first describe the evidence from the Department's inspectors, following which I will summarise the evidence that was given by the other witnesses in the case. I will also set out my observations on the evidence each witness provided.

#### Evidence of Brian Ravenscroft

- 94 Mr Ravenscroft was called by the claimant to give evidence on how the respondents conducted themselves in response to the Department's investigation into Mr Zeyrek's complaint.
- 95 As indicated earlier, Mr Ravenscroft provided one witness statement which was accepted into evidence by consent. He was not cross-examined.
- 96 He confirmed that the Department's investigation into Mr Zeyrek's complaint commenced in or around July 2021.

#### Visit to Newroz on 22 July 2021

- 97 Mr Ravenscroft stated that as part of the Department's inquiries, he attended Newroz on Thursday, 22 July 2021 at 6.05 pm, together with two other industrial inspectors, one of whom was Industrial Inspector Higgs (**Inspector Higgs**).
- 98 Mr Ravenscroft said the purpose of the visit was to conduct an unannounced inspection of employee records. Mr Ravenscroft said that before they attended Newroz, he and Inspector Higgs prepared a 'Notice to Produce Employment Records' for all employees employed at Newroz between 10 May 2017 and 22 July 2021 (**NTP1**).
- 99 Mr Ravenscroft attached a copy of NTP1 to his witness statement. The date by which the respondents were required to produce the documents sought by the notice was 5 August 2021.
- 100 Mr Ravenscroft stated that upon his arrival at Newroz, he noted the business provided a takeaway food service, as well as seating for approximately 20 people. He said that as he entered, he observed there were three workers in the shop, one who was taking an order from a customer, one who was making up kebabs in the rear food preparation area and the other who was standing behind the main counter alongside a coffee machine.
- 101 Mr Ravenscroft said he asked one of the men behind the counter if he could speak with the owner or manager of the business. One of the men, who turned out to be Mehmet, told Mr Ravenscroft that he was the manager and that no employment records were kept on the premises.
- 102 Mr Ravenscroft stated that he asked Mehmet to explain how employee start and finish times, rosters and the payment of wages were recorded. He said Mehmet responded by saying he had never seen these types of records at the shop and that he should speak to Huseyin. Mr Ravenscroft said Mehmet told him that Huseyin had gone home shortly before he arrived.
- 103 Mr Ravenscroft said that following this, Inspector Higgs gave NTP1 to Mehmet. He said he then observed Inspector Higgs tell Mehmet to make sure NTP1 was given to the owner of the business as soon as possible.
- 104 Mr Ravenscroft said he asked Mehmet to call Huseyin on his mobile phone. He said Mehmet called Huseyin and handed the phone to him. Mr Ravenscroft said the person he spoke to on the phone identified himself as Huseyin, Kahraman's son. Mr Ravenscroft said Huseyin told him that Kahraman was the owner of Newroz.

- 105 Mr Ravenscroft said he told Huseyin that Mehmet had said that employee records were not kept on the premises. Mr Ravenscroft said Huseyin confirmed this was the case. He said Huseyin told him that some of the records were at his home and that some were with his accountant.
- 106 Mr Ravenscroft gave evidence that he told Huseyin Inspector Higgs had given Mehmet a notice to produce that required Kahraman to provide employment records for all Newroz employees.
- 107 Mr Ravenscroft said Huseyin told him that he would let his father know about the notice to produce, but as his father was elderly and was not good at reading or speaking English, he would attend to the notice himself.

#### **Phone call from Kahraman**

- 108 Mr Ravenscroft said that at 10.54 am on 23 July 2021, he received a telephone call from Kahraman. Mr Ravenscroft stated that he asked Kahraman if Mehmet was a manager for Newroz. He said Kahraman told him that Mehmet was his nephew, and that when Mr Ravenscroft attended Newroz on 22 July 2021, he was the manager in charge of the shop.
- 109 Mr Ravenscroft said Kahraman, who spoke with limited English, wanted him to talk with Huseyin, who Mr Ravenscroft said Kahraman had described as the overall manager for Newroz. Mr Ravenscroft said Kahraman told him that Huseyin could provide him with the information he needed.

#### **Meeting with Newroz accountants**

- 110 Mr Ravenscroft said that on 2 August 2021, Inspector Higgs provided him with a copy of an email that Harry Patel (**Mr Patel**), from accounting firm Lyra Livich (**Lyra Livich**), had sent him the same day. A copy of Mr Patel's email was attached to Mr Ravenscroft's witness statement. In his email, Mr Patel confirmed that he was the accountant for Newroz. He also requested a one-month extension to provide the employment records sought by NTP1.
- 111 Mr Ravenscroft said that on 4 August 2021, he attended the offices of Lyra Livich in Balcatta, together with Inspector Higgs. He said the purpose of the visit was to meet with Mr Patel and to discuss his request for additional time to respond to NTP1.
- 112 Mr Ravenscroft said he and Inspector Higgs met with Mr Patel and Mr Michael Lyra (**Mr Lyra**) on this date. He said Mr Patel told him they did not have any employment records for Newroz because these were kept at the shop in East Perth. Mr Ravenscroft said Mr Patel told him that he only prepared Quarterly Business Activity Statements – Payroll Reports for Newroz (**BAS payroll reports**).
- 113 Mr Ravenscroft said he asked Mr Lyra to show him a copy of a recent BAS payroll report he had prepared for Newroz. He said Mr Lyra responded by handing him a copy of a 2019 BAS payroll report. Mr Ravenscroft said he noted Mehmet's name was recorded as an employee on the report.
- 114 Mr Ravenscroft said he asked Mr Lyra if he had all the BAS payroll reports for Newroz dating back to 2017. He said Mr Lyra told him that he believed he had them and he would provide copies of these, together with any other records he could find by 28 August 2021.
- 115 Mr Ravenscroft said he granted an extension of time for the respondents to respond to NTP1 until 28 August 2021. Following this Inspector Higgs issued Mr Patel with a revised notice to produce with the new date (**NTP2**).
- 116 During his meeting with Mr Patel and Mr Lyra, Mr Ravenscroft said he asked whether they had bank records showing funds being transferred from Newroz to the Australian Taxation Office (**ATO**) for employee tax. Mr Ravenscroft said Mr Lyra told him that Kahraman paid everything in cash.
- 117 Mr Ravenscroft said he told Mr Lyra that he did not believe this would be possible and that he could not imagine anyone walking up to the ATO with a bag of cash, to pay their employees' tax. He said Mr Lyra did not answer or make any further comments when asked about this.

#### **Meeting at Newroz – 4 August 2021**

- 118 Mr Ravenscroft said that following his meeting at Lyra Livich, he drove to Newroz in East Perth with Inspector Higgs. He said that upon his arrival he again spoke with Mehmet, who Mr Ravenscroft said he recognised from his previous visit on 22 July 2021.
- 119 Mr Ravenscroft said he asked Mehmet to show him the employment records Mr Lyra told him were kept at the shop. Mr Ravenscroft said Mehmet reached under the front counter and retrieved what appeared to be a new time and wages record book (**time and wages book**).
- 120 Mr Ravenscroft said he reviewed the time and wages book and noted there was only one complete entry for an employee named Umut Ozkalfa, and that it was dated 4 August 2021. Mr Ravenscroft said he asked Mehmet if Huseyin was available.
- 121 Mr Ravenscroft stated that Mehmet told him Huseyin had gone home and would be back the following morning. Mr Ravenscroft said he responded by telling Mehmet that he would be returning with Inspector Higgs after 9.00 am the following day.

#### **5 August 2021 Visit to Newroz**

- 122 On 5 August 2021, Mr Ravenscroft said he returned to Newroz accompanied by Inspector Higgs. He said they arrived at 10:40 am and were greeted by a male person who identified himself as Huseyin.
- 123 Mr Ravenscroft said he observed another male behind the counter, who was working the coffee machine. He said the male person identified himself as Kahraman, who Mr Ravenscroft said also described himself the owner of Newroz.
- 124 Mr Ravenscroft stated that Kahraman told him he did not speak or understand English very well. He said Kahraman asked if his son Huseyin could assist with interpreting.

125 Mr Ravenscroft said Kahraman invited him and Inspector Higgs to take a seat at a table in the premises. Mr Ravenscroft said he noted that Kahraman spoke reasonable English. He said he then asked Kahraman to tell him about the Newroz business.

126 Mr Ravenscroft said Kahraman told him that Newroz mostly employed family and casual workers and the first time they employed anyone as a full-time worker was when they put Mehmet on the books in February 2021.

127 Mr Ravenscroft said that when he was comfortable that Kahraman could understand English to continue a conversation, he cautioned Kahraman and Huseyin by saying words to the effect of:

We are here to ask you some questions about your employment records. You do not have to answer any of my questions, however, if you choose to do so, I will be making some notes of what you say and the answers you provide may be given as evidence in the Industrial Magistrate's Court at a later date.<sup>12</sup>

128 Mr Ravenscroft said that Huseyin and Kahraman both confirmed they understood the caution they were being given.

129 Mr Ravenscroft said that in the conversation that followed, Huseyin and Kahraman confirmed they had received NTP1. Mr Ravenscroft also said he told them that he had met with Mr Patel and Mr Lyra the day before and they had told him employee records were being kept at the Newroz premises.

130 Mr Ravenscroft stated that Huseyin gave him the time and wages book, which he said now contained an additional (albeit incomplete entry) for Mehmet. Mr Ravenscroft said he asked Huseyin words to the effect of:

This book was not here when we visited on 22 July. It looks brand new – when did you get it?<sup>13</sup>

131 Mr Ravenscroft said Huseyin told him that his accountant had said the business needed to get a wages book, so he had bought one book at Officeworks after Mr Ravenscroft's visit to the Newroz shop on 22 July 2021.<sup>14</sup>

132 Mr Ravenscroft said he observed Inspector Higgs take photographs of the time and wages book; copies of which Mr Ravenscroft attached to his witness statement. He said he asked Huseyin to explain why he had only recently started using a time and wages book. He said Huseyin told him that in the past, he had not kept very good records.

133 Mr Ravenscroft said he asked Kahraman whether he was aware that he was required to keep records of start and finish times for all his workers. Mr Ravenscroft said Kahraman responded by stating that he had been in business for over 20 years and had no idea he had to keep records for all employees.

134 Mr Ravenscroft said he asked Huseyin what other records he kept. He said Huseyin handed him some ruled A4 pages with handwritten notes which showed the hours worked by three Newroz employees for the period January 2021 to March 2021 (**2021 handwritten records**).<sup>15</sup>

135 Mr Ravenscroft said his visit to Newroz ended with Huseyin and Kahraman both telling him they would make sure their accountants provided him with all the records he required.

136 Following this visit to Newroz Mr Ravenscroft said that on 25 August 2021, he received a further email from Mr Patel. Attached to this email were seven pages of BAS payroll reports showing gross wages and taxation deductions in the period commencing 10 May 2017 until 22 August 2021. Mr Zeyrek's name was one of the names that appears in the BAS payroll reports.<sup>16</sup>

#### **Observations about Mr Ravenscroft's evidence**

137 During the hearing, Mehmet, Kahraman and Huseyin were not questioned about their interactions with Mr Ravenscroft or Inspector Higgs.

138 I have therefore proceeded on the basis that Mr Ravenscroft's witness statement, including the evidence about his interactions with Kahraman, Mehmet and Huseyin and their conduct in responding to NTP1 and NTP2 was unchallenged and is not disputed.

#### **The claimant's evidence**

139 The claimant filed two witness statements in the proceedings. The claimant's first witness statement was mostly directed to the following matters:

- (a) her issuance of the Notices to Produce and the response that she received; and
- (b) the methodology she used for the underpayment calculations.

140 I have set out in some detail the claimant's evidence on the methodology she used to make the underpayment calculations. This is because the underpayment calculations show how the claimant has applied the various provisions of the Award to the evidence Mr Zeyrek provided to the Department on the hours he said he worked.

141 As I indicated previously at [35], the underpayment calculations not only provide particulars of the number of award contraventions, but when they occurred and by how much the claimant says Mr Zeyrek was underpaid. They do this by showing how the claimant has applied the various provisions of the Award to the evidence Mr Zeyrek provided to the Department, regarding the hours of work he said he regularly worked at Newroz.

142 In her first witness statement, the claimant said that in March 2022, she commenced investigations into Mr Zeyrek's complaint. As part of her investigation, the claimant reviewed the documents that were provided to Mr Ravenscroft and Inspector Higgs in response to NTP1 and NTP2.

143 At this stage of her investigation the only documents the respondents had provided to the Department were the:

- (a) BAS payroll reports;<sup>17</sup> and
- (b) 2021 handwritten records.<sup>18</sup>

**Notices to Produce**

- 144 The claimant said that on 14 April 2022, after she reviewed the BAS payroll reports and the 2021 handwritten records, she issued three of her own notices to produce employment records for Mr Zeyrek.
- 145 As was set out in the Statement of Agreed Facts, a response to the Notices to Produce was required by 26 April 2022. Copies of the Notices to Produce the claimant issued were attached to her witness statement.
- 146 Noting the claimant and Mr Ravenscroft between them, issued the respondents with five notices to produce, I will, when separately referring to a notice to produce, do so in the order in which they were generated.
- 147 To this end, the claimant issued Notices to Produce as follows:
- (a) To the respondents (or as the claimant described, the partnership) (**NTP3**);
  - (b) to Kahraman Karakuyu in his capacity as company director and company secretary of Karakuyu Pty Ltd as Trustee for the Karakuyu Family Trust (**NTP4**); and
  - (c) to the accountants, Mr Lyra and Toni Livich, in their capacity as company directors of Ltdm Holdings Pty Ltd T/A Lyra, Livich and Associates (**NTP5**).
- 148 The claimant gave evidence that she prepared covering letters that were sent with each one of the Notices to Produce. The claimant said that on 12 April 2022, she emailed the covering letters and copies of NTP3 and NTP4 to Kahraman's personal email address, which she said Hasan provided to her during a prior telephone conversation.
- 149 Copies of the emails and covering letters the claimant sent to the respondents, were attached to her witness statement. In addition to sending emails, the claimant said she also engaged a process server to deliver the Notices to Produce and covering letters to each of the named recipients.

**Response from the accountants**

- 150 The claimant said that on 20 April 2022, she received a telephone call from Mr Lyra who requested an extension of time to respond to NTP5. After the claimant asked Mr Lyra to make his request in writing, Mr Lyra emailed the claimant the same day and sought a 3 - 4 week extension of time.
- 151 The claimant said she responded to Mr Lyra by email on 26 April 2022 and granted him an extension of time until 6 May 2022. Despite this, the claimant said that by 6 May 2022, she had not received a response to NTP3 or NTP4. The claimant also said she had received no further reply from Mr Lyra to NTP5.
- 152 The claimant said that on 8 May 2022, she received an email from Mr Lyra, that attached 'wage records' for Mr Zeyrek. In his email, Mr Lyra stated that Hasan had provided records, for the years 2020 and 2021.
- 153 The claimant said that when she reviewed the records Mr Lyra had produced, she observed they appeared to be weekly time and wage records for Mr Zeyrek from July 2019 to June 2021 (**2019 - 2021 wage records**).<sup>19</sup> The claimant noted the 2019 - 2021 wage records did not however, show the dates of each shift worked or the start and finish times.
- 154 The claimant said she observed the 2019 - 2021 wage records did not relate to the period the respondents were operating the business. Rather, the timeframe for the 2019 - 2021 wage records followed the change in ownership. For this reason, the claimant took the view the respondents had not produced any employment records in response to NTP3.

**Employment records that were not produced**

- 155 I have extracted from NTP4 a list of some of the employment records which the claimant sought from Kahraman and Hasan as directors of Karakuyu Pty Ltd in relation to Mr Zeyrek (Şahin). They relevantly included the following:
- (i) Şahin's:
    - (a) Commencement date;
    - (b) Termination date;
    - (c) Award classification;
    - (d) Job duties;
    - (e) Employment status (casual, part-time or full-time); and
    - (f) Rate of pay (including any changes thereto and the date those changes occurred).
  - (ii) Employment contract, if any
  - (iii) Tax File Number (TFN) Declaration form completed in respect of Şahin's employment with the business
  - (iv) PAYG payment summaries (income statements) prepared for Şahin for each financial year
  - (v) Original payroll records (such as payroll report or payslips) or any other kind of record kept detailing payment of wages to Şahin for each pay period between 1 July 2016 and 31 December 2018 and how those wages were calculated
  - (vi) Original records of start and finish times and breaks taken (such as time and wages records, timecards or rosters) for each pay period between 1 July 201 and 31 December 2018
  - (vii) Original records of total hours worked by Şahin for each week of Şahin's employment
  - (viii) Details of all annual leave taken by Şahin (amounts and when taken)
  - (ix) Details of all sick leave taken by Şahin (amounts taken and when)

- (x) Details of any periods of unpaid leave taken by Şahin (amounts and when taken)
- (xi) Details of any other gaps or breaks in Şahin's period of employment (including when, why and length of time)
- (xii) All correspondence (including emails or text messages) and documentation relating to the employment relationship between Şahin and Newroz Kebabs including, but not limited to:
  - (a) employment commencing;
  - (b) employment ending; and
  - (c) working hours or start and finish times.
- (xiii) Documentary evidence relating to the change in ownership of Newroz Kebabs or Newroz Kebabs and Turkish Bakery in East Perth from D Karakuyu & K Karakuyu (ABN 70 933 285 261) to the Trustee for Kahraman Family Trust (ABN 83 987 259 437) in or about January 2019.

156 The claimant said that because Hasan and Kahraman did not produce any documents in response to the notice, she took the view the respondents had not complied with NTP4.

#### **Documents that were produced**

157 Upon receiving the 2019 - 2021 wage records, the claimant said she compared them with the BAS payroll reports and the 2021 handwritten notes that Mr Ravenscroft obtained during his inspection.

158 The claimant said she observed that in contrast to the BAS payroll reports:

- (a) the 2021 handwritten records showed Mr Zeyrek had regularly worked 20 hours a week and was paid \$500 a week in the period 9 January 2021 - 27 March 2021; and
- (b) the 2019 - 2021 wage records showed Mr Zeyrek worked irregular hours between the same dates with weekly hours varying between 0, 8, 9, 10, 12.5, 14 and 15 hours with no weekly payments being greater than \$375.

159 The claimant said that because of the inconsistencies between the 2021 handwritten records, the 2019 - 2021 wage records and the BAS payroll reports, she formed the view that none of the records the respondents produced for the purpose of determining the true nature of the employment relationship between Mr Zeyrek and Newroz, were reliable.

160 The claimant also formed the view the records the respondents produced in response to the Notices to Produce may have been falsified.

#### **Approach to Mr Zeyrek's evidence for the underpayment calculations**

161 In her statement, the claimant said that because the respondents had not produced any employment records that provided evidence of the date on which Mr Zeyrek commenced work at Newroz, she decided to conservatively apply the evidence he gave to her about his start date.

162 Accordingly, the claimant concluded that Mr Zeyrek commenced employment at Newroz in 2013; 6 months after his arrival in Australia on 31 July 2012 and a couple of months before his fiancé Ms Azbay arrived in Australia on 18 September 2013.

163 The claimant said that because the respondents had not provided any employment records and Mr Zeyrek had advised that he regularly and consistently worked in excess of 76 hours a fortnight, she determined Mr Zeyrek was employed at Newroz on a full-time basis.

164 The claimant also said that because Mr Zeyrek had advised he was paid in cash every Sunday, she had approached his claim on the basis he was paid weekly, rather than fortnightly.

165 In her first witness statement, the claimant explained how she made the underpayment calculations, which included a separate calculation for Mr Zeyrek's entitlement to unpaid annual leave and loading.

166 The claimant proceeded on the basis Mr Zeyrek was usually paid \$1,280 per week (the equivalent of 64 hours per week at the rate \$20 per hour), but for which Mr Zeyrek said he was paid at a daily rate of \$220 for an 11-hour shift.

#### **Excel spreadsheets**

167 The claimant explained that she prepared two Excel spreadsheets for the two different claim periods. They show that 513 award contraventions are alleged to have occurred across 140 separate weekly pay periods during the primary claim period.

168 For the alternative claim period the Excel spreadsheets show that 392 award contraventions are alleged to have occurred across 106 weekly pay periods.

169 The claimant, in her first witness statement and in the Excel spreadsheets, identified the award provisions which she alleged the respondents had breached and the number of contraventions.

170 The claimant said that each Excel spreadsheet is comprised of four sheets. Sheet One identifies the total underpayment amounts and sets out in summary form how these totals were reached.

171 The claimant said Sheet Two records how she allocated ordinary hours, overtime hours, additional rates and a meal break loading to a standard fortnight, based on the minimum of 64.5 hours per week that Mr Zeyrek said he worked. This sheet in effect provides a template on how each hour should be paid per shift pursuant to the relevant provisions of the Award.

172 Sheet Three applies the shift spread template to each of the pay periods Mr Zeyrek said he worked at Newroz during the relevant claim period and compares the weekly amounts it is alleged he was entitled to receive under the Award, with what Mr Zeyrek says he was paid per shift.

173 The claimant said that because Mr Zeyrek said he was paid a daily rate of \$220 for an 11-hour shift, she approached the allocation of this day rate by:

- (a) First allocating the \$220 to the value of any ordinary hours (Monday - Friday) worked in a single shift; and then
  - (b) Allocating the remaining balance to the value of any overtime at time and half rates, before allocating the remainder to the value of any overtime at double time.
- 174 The claimant said she applied a cascading allocation of the \$220 day rate because she considered this approach was not only more reflective of Mr Zeyrek's evidence but was of some benefit to the employer as the entire value of the daily amount Mr Zeyrek said he received was offset against some part of his claimed entitlements under the Award.
- 175 In her underpayment calculations the claimant said she allocated 10 ordinary hours per day (Monday to Sunday), until 76 ordinary hours were reached in a fortnight. The claimant said she did this because clause 8(1)(c) of the Award allowed up to 10 ordinary hours to be worked in a single shift.
- 176 The claimant said that after she recorded 76 ordinary hours for a fortnight, she applied overtime at the rates set out in clause 10(2) of the Award to the balance of hours worked in that particular fortnight. Where more than 10 ordinary hours were recorded as being worked in a single day, she applied the overtime rates in clause 10(2) to the remaining hours worked in excess of 10 ordinary hours.
- 177 The claimant said that where she recorded ordinary hours as being worked after 7.00 pm, and before 7.00 am Monday to Friday, she included the additional rate of \$1.66 per hour in accordance with clause 9(1) of the Award. She said she identified this in Sheet Two as a 'Late Night Penalty'.
- 178 The claimant said that where more than six ordinary hours were recorded as being worked in a single shift, and there was no evidence of a meal break taken, she included the payment meal break loading under clause 13(1)(b) of Award in the amount of 0.5 hours of work. The claimant said she included the meal break loading where more than six ordinary hours were worked in a shift, because there was no evidence Mr Zeyrek took a meal break of half an hour or more.
- 179 The claimant said she capped the meal break loading at 0.5 hours per shift because there was evidence that Mr Zeyrek often received a free meal to eat while he was working, and the time at which Mr Zeyrek had this meal was not known.
- 180 The claimant described Sheet Four as an overview of the monetary value of each different employment entitlement claimed from weekly pay period to weekly pay period and shows the underpayments the claimant identified across each pay period.

#### **Internet and Social Media Searches**

- 181 The balance of the claimant's first witness statement and the contents of her second statement were mostly directed to internet and social media searches that variously showed images of Mr Zeyrek at Newroz, the food served, reviews of the business, opening and closing times and the Newroz premises.
- 182 The claimant was extensively cross-examined by Mr Heathcote about this material. In her answers the claimant confirmed that she was unable to give direct evidence about who took the various images, who authored the various social media posts, reviews and the like or when those materials were prepared.
- 183 As a result, I accept there are limits to the probative value of this material when it is considered alone or in isolation. Rather, I have taken the view this material may be relied upon where a witness can say who took the photograph or made the post, when it was taken or made and a witness is able to provide the context in which it was taken or made.

#### **Observations on the claimant's evidence**

- 184 Like Mr Ravenscroft's evidence, much of what the claimant said in her witness statement regarding her underpayment calculations, her investigation of Mr Zeyrek's complaint and the records the respondents produced in response to the Notices to Produce was not challenged in cross-examination.
- 185 For this reason, I have proceeded on the basis that the majority of the claimant's evidence was unchallenged and is not disputed.

#### **Mr Zeyrek's evidence**

- 186 During the hearing Mr Zeyrek gave evidence with the assistance of an interpreter. He provided three witness statements, each of which were translated from Turkish to English.
- 187 Mr Zeyrek, who is 43 years of age, said that on 31 July 2012 he migrated to Australia on a student visa. He said that upon his arrival in Perth, he purchased a 12-month English course from a language school. Mr Zeyrek said he participated in the course for 2 - 3 months but he did not finish it.
- 188 After leaving the language school, Mr Zeyrek said he worked at two different kebab shops before starting work at Newroz. He said he did not last long in his previous jobs because he did not speak English.
- 189 Mr Zeyrek said he came to be employed at Newroz, after meeting Huseyin and other Newroz employees through the Kurdish Association.
- 190 Mr Zeyrek said he could not remember exactly when he started work at Newroz. He said he believed it was in 2013 about six months after he arrived in Australia. Mr Zeyrek said he was employed at Newroz after he received a phone call from Kahraman.
- 191 Mr Zeyrek said Kahraman offered him a job at Newroz because another employee, 'Umair' was leaving and the business needed staff. Mr Zeyrek said that following Kahraman's phone call, he went into Newroz the following day and met with him.
- 192 Mr Zeyrek said Kahraman told him he would be making and selling kebabs. He also said he would be cleaning the shop. In his statement, Mr Zeyrek said Kahraman told him his working hours would be:

- (a) Mondays from 12.00 pm to 11.00 pm;

- (b) Tuesdays off;
- (c) Wednesdays and Thursdays from 12.00 pm to midnight;
- (d) Fridays from 12.00 pm to 5.00 am or maybe 6.00 am the following day;
- (e) Saturdays from 5.00 pm to 5.00 am or 6.00 am the following day; and
- (f) Sundays from 5.00 pm to 11.00 pm.

- 193 Mr Zeyrek said Kahraman told him that everyone who worked at night had to keep the shop open until the customers, including those from a nightclub nearby, stopped coming.
- 194 Mr Zeyrek said Kahraman never told him whether he was a full-time, part-time, or casual employee. Mr Zeyrek said that before he started working at Newroz, there was never a discussion about whether he was a casual or a full-time employee.
- 195 Mr Zeyrek said that following his arrival in Australia, he obtained a Refugee Protection Visa in May 2016 (**protection visa**). He said the protection visa allowed him to work without restrictions. Mr Zeyrek said that prior to being granted a protection visa, he held a 'bridging visa' which also allowed him to remain and work in Australia.
- 196 Mr Zeyrek described Newroz as a Turkish dine-in and takeaway restaurant. He also said it could be called a 'kebab shop'. Mr Zeyrek said he believed Kahraman was his employer, that Newroz was a family business and that Kahraman was the owner.
- 197 Mr Zeyrek said Kahraman's family included:
- (a) Kahraman's wife – (Döne, the second respondent)
  - (b) Kahraman's two sons – Hasan and Huseyin;
  - (c) his three daughters – Fatma, Nilufer and Aysun;
  - (d) his sons-in-law Ali Ihsan Kara (**Ali Ihsan**) and Ali Dogan;
  - (e) his nephews, Mehmet Mavi and Ibrahim Karakuyu.
- 198 Mr Zeyrek said he believed Kahraman was the owner of Newroz because that was how he introduced himself during their first meeting. He said that while Kahraman and Döne did not work in the shop, Kahraman would often stop by to see how business was going. Mr Zeyrek said Kahraman would usually visit at lunch time and in the evening.
- 199 Mr Zeyrek said he worked regularly with Hasan, Mehmet and Ali Ihsan. He said Hasan and Mehmet worked the whole time he was employed at Newroz. He said Hasan acted like the manager when he was in the shop and dealt with tasks such as placing orders to suppliers, making telephone calls, dealing with the landlord and the paperwork for the accounts. Mr Zeyrek said Hasan came and went as he pleased.
- 200 Mr Zeyrek said Mehmet was more senior because he was employed for longer and was part of the Karakuyu family. He said Mehmet worked set hours.
- 201 Mr Zeyrek said he worked with Ali Ihsan between 2013 and 2018 and Huseyin from 2015. He said family members were not the only people who worked at Newroz. Mr Zeyrek said that when first started, he regularly worked with Mr Oruc.
- 202 Mr Zeyrek gave evidence that in or around February 2017, Newroz was expanded to include a bakery and more customer seating. He said that prior to this expansion, the shop was closed for renovations for a week. Mr Zeyrek said he was not paid while the store was closed.
- 203 Mr Zeyrek described the duties he performed in both his first and supplementary witness statements. His duties included preparing salads and cooking meat for kebabs and burgers, cleaning, taking orders and payments from customers, and serving customers.
- 204 He said that once the bakery was open, he also made pizza, gözleme and pide. Mr Zeyrek said he was not responsible for making bread or dough. Mr Zeyrek said he used the knives and equipment the business provided to prepare food. He said he would clean the shop before closing and after the customers stopped coming in.
- 205 Mr Zeyrek said his cleaning duties included washing dishes, cleaning the floors, hot plate/grill, deep fryer, doner machine and the oven. He said he did more extensive cleaning on Sundays, which included cleaning the build-up of fat off the walls behind the grill and from the exhaust fans. Mr Zeyrek said he was never supplied gloves for cleaning. He said he cleaned without wearing gloves, while using bleach and detergents.
- 206 Mr Zeyrek said he closed the shop each time he worked. To do this, he had a key to the shop. He said closing the shop included counting the takings and locking the doors. Mr Zeyrek said that from around 2016 or 2017, he also took cash from the till to Kahraman's home in Stirling. Mr Zeyrek said he only did this when Kahraman did not come in to collect the money or if Hasan was not in the shop at closing time.
- 207 Mr Zeyrek said he would take money to Kahraman's home even when his shifts ended in the early hours of the morning. Mr Zeyrek said that when he needed to take cash to Kahraman's home, he would either drive there or he would go together with Mehmet.
- 208 Mr Zeyrek gave evidence that when he dropped the money off to the Kahraman's house, a family member would be there to collect it. He said that Kahraman, Döne, one of his daughters or Hasan would be there to take the money. Mr Zeyrek said he would usually stay for about 10 - 15 minutes and talk about the day's trading.
- 209 Mr Zeyrek said there were no rosters, timesheets, or other employment records kept at Newroz. He said he was not given a roster or asked to keep a record of his start and finish times.

- 210 Mr Zeyrek said his regular working days did not change. He said Newroz was open every day of the year except Christmas which was the only day the shop was closed. Mr Zeyrek said between 2016 and 2018, his minimum weekly working hours were:
- (a) Mondays – 12.00 pm to 11.00 pm;
  - (b) Tuesday – off;
  - (c) 12.00 pm to midnight Wednesdays and Thursdays;
  - (d) 12.00 pm to 2.00 am on Fridays;
  - (e) 5.00 pm to 2.00 am on Saturdays; and
  - (f) 5.00 pm to 11.30 pm on Sunday nights.
- 211 Mr Zeyrek said the earliest he finished on Sundays was at 11.30 pm, even if service to customers stopped at 11.00 pm. He said this was because he spent about half an hour cleaning. Mr Zeyrek said he always worked a minimum of 64.5 hours per week.
- 212 Mr Zeyrek stated that he never took a meal or rest break during his employment at Newroz. He said this was because there was always work to be done. He did, however, say he was usually provided with a free meal to eat during his shift, such as a kebab. He said he would have to eat it while standing in the kitchen.
- 213 Mr Zeyrek said he did not realise he was entitled to meal breaks. He said that as his English improved and he became more aware from speaking to people from other workplaces that he was entitled to take breaks. Despite this, he says he was too embarrassed to ask for a break.
- 214 Mr Zeyrek gave evidence that he was required to wear a uniform to work. He said the uniform Kahraman gave him when he first started work was a blue Newroz T-shirt. Mr Zeyrek said he was not required to pay for uniforms. He said the business did not clean his uniforms and that he washed his own T-shirts at home.
- 215 Mr Zeyrek said he was paid a daily rate of \$200 for each day he worked at Newroz, until the beginning of 2016, when Huseyin increased his daily rate from \$200 to \$220 per day. Mr Zeyrek said he was paid this daily rate if he worked around 11 hours at the shop in a single day. If the shop stayed open and he was required to work additional hours, Mr Zeyrek said he was paid \$20 an hour for each extra hour he worked.
- 216 Mr Zeyrek said the hourly rate of \$20 an hour for the extra hours he worked did not increase when his daily rate changed in 2016. He said he was not paid anything extra for the time he spent cleaning, after the shop closed to customers. Mr Zeyrek said that between 2016 and 2018, the corresponding pay he received for the hours he worked was:
- (a) Mondays (11 hours: \$220);
  - (b) Wednesdays and Thursdays (12 hours: \$240 – \$220 plus \$20 for the additional hour worked);
  - (c) Fridays (14 hours: \$280 – \$220 plus \$60 for the additional three hours)
  - (d) Saturdays (9 hours: \$180); and
  - (e) Sundays (6.5 hours was either \$100 or \$120 from what he could remember).
- 217 Mr Zeyrek said the amount he was paid per week varied between \$1,200 and \$1,400. He said he was never paid any additional rates for working at night, for work on weekends or on public holidays. Mr Zeyrek also said he never received any other employment entitlements such as paid leave.
- 218 Mr Zeyrek stated that Kahraman never told him he was entitled to paid leave and it was very difficult to take time off from work at Newroz. Mr Zeyrek said that when his wife had their three children, he only had a few days unpaid leave at the time of each birth.
- 219 He said that while he was working at Newroz, his wife gave birth to three sons, who were born on Sunday, 26 June 2016, Monday, 14 May 2018 and Friday, 3 May 2019. He said he took 2-3 days off work when each child was born but that he was not paid for his time off.
- 220 Mr Zeyrek said he was paid weekly, every Sunday. Mr Zeyrek said he was always paid in cash and he was never asked to sign a record to confirm that he had been paid.
- 221 Mr Zeyrek gave evidence that when he was first employed at Newroz, Kahraman paid him with money he took from the till. He said that while he was mostly paid by Kahraman, he was also paid in cash, by Mr Oruc, Mehmet and Hasan.
- 222 Mr Zeyrek said that after Newroz introduced EFTPOS for customer payments, Kahraman withdrew cash from a nearby ATM when there was not enough cash in the till to pay his wages.
- 223 Mr Zeyrek said he did not keep a record of the cash payments he received or the hours he worked. He said he deposited the money he received directly to his wife's bank account, or he gave her cash so that she could make the deposits herself. Mr Zeyrek attached copies of his bank statements from 22 July 2016 to 24 January 2019 to his first witness statement (**bank statements**).<sup>20</sup>
- 224 Mr Zeyrek said he never deposited the full amount he received into his or his wife's bank account. He said the cash that was not deposited was used to pay for day-to-day expenses. He said he did not receive payslips.
- 225 Mr Zeyrek did, however, provide copies of two payslips that he received in 2019 for two pay periods between 22 August 2019 and 4 September 2019. It is not in dispute the two payslips he received do not contain accurate information. The hours worked, total pay, rate of pay, tax withheld and superannuation are not accurate (**false payslips**).<sup>21</sup>
- 226 Mr Zeyrek said Hasan gave him the false payslips to help him apply for a home loan. He said he asked Hasan for the payslips because he needed evidence of employment and what he earned.

- 227 Mr Zeyrek said that despite being given these payslips, a mortgage broker told him the bank would want to see the same amount of money going into his bank account on a regular basis. Mr Zeyrek said that because he could not provide proof of his earnings from his bank statements, he was not successful in obtaining a home loan.
- 228 Mr Zeyrek gave evidence that he had similar problems when applying for finance to purchase a car. Mr Zeyrek said he asked Kahraman for help to secure finance. He said Kahraman offered to take the loan out on his behalf, on the condition Mr Zeyrek would make the repayments directly to Kahraman. Mr Zeyrek gave evidence that he paid the repayments on the loan from his bank account to a St George Bank loan account in Kahraman's name.
- 229 Mr Zeyrek said he began lodging tax returns relating to his employment at Newroz, in or around 2014. Mr Zeyrek said he had asked Kahraman to be 'put on the books' but this did not happen until after Mr Oruc was injured at work.
- 230 Mr Zeyrek said Kahraman, referred him to Mr Lyra to help him with his tax returns. Mr Zeyrek attached copies of his tax returns to his statement for the financial years ending in June 2016, 2017, 2018, 2019, 2020 and 2021 (**tax returns**),<sup>22</sup> the contents of which I will return to.
- 231 Mr Zeyrek said he set up a superannuation account with Australian Super in July 2015. Despite this, he said no payments were made from Newroz into his superannuation account while he worked there. In support of this, Mr Zeyrek attached a copy of his MyGov records that showed he had not received any superannuation contributions from Newroz.
- 232 Mr Zeyrek said Hasan told him that he was not paid enough to receive superannuation contributions while he worked at Newroz.<sup>23</sup>
- 233 Mr Zeyrek's second and supplementary witness statement was, in comparison to his first statement, quite short. It mostly dealt with what was served at Newroz, the issue of whether table service was provided, both prior to and after the renovation of the shop in 2017, the duties he performed and when the shop was open and closed.
- 234 Mr Zeyrek's third and reply witness statement traversed a number of matters the respondents raised in opposition to his first witness statement. He also provided context to the photos that were attached to his first witness statement and attached additional images that he said he took while he was at work.
- 235 Mr Zeyrek gave evidence about how he commuted to work, his child care and carpooling arrangements. He also provided reply evidence on matters including when he worked with members of the Karakuyu family, the text messages he sent while he was at work to Hasan and Huseyin, when he trained and played soccer, his gambling and when he went to the Crown Casino (**casino**).

#### **Cross-examination of Mr Zeyrek**

- 236 Mr Zeyrek was cross-examined by Mr Heathcote. He challenged Mr Zeyrek on whether it was Kahraman or Hasan who employed him. While Mr Zeyrek accepted that Hasan managed the shop, he maintained his evidence that Kahraman made the final decision to employ him. Mr Zeyrek said that because Hasan was only 18 years old when he was employed at Newroz, he did not believe Hasan had the authority to hire staff.
- 237 Mr Heathcote questioned Mr Zeyrek about his understanding of what a manager at Newroz was required to do. Mr Zeyrek said managers were required to make orders, arrange rosters, give orders to suppliers and directions to staff. Mr Zeyrek stood by his evidence that Kahraman was ultimately in charge of the business, even though he was not involved in the day-to-day running of the shop.
- 238 In his response to questioning from Mr Heathcote about the work Hasan performed, Mr Zeyrek said Hasan was less involved in making kebabs, cleaning the store, lifting meat up to the rotisserie and the like than he was.
- 239 After questioning Mr Zeyrek on whether Hasan had the authority to make decisions within the business, Mr Heathcote asked Mr Zeyrek about his immigration status when he was first employed at Newroz, specifically, whether he was on a student visa or protection visa.
- 240 Mr Heathcote asked Mr Zeyrek why he had sought employment at Newroz on a full-time basis in 2013 when he was on a student visa that limited the number of hours he could work to 20 hours per week. In response, Mr Zeyrek said that he believed he was on a protection visa at the time he commenced work at Newroz.
- 241 Mr Heathcote cross-examined Mr Zeyrek on whether Newroz provided dine-in restaurant service, including suggesting that Newroz never offered table service to customers or provided them with crockery and cutlery to consume their meals. Mr Zeyrek maintained that Newroz did both of these things.
- 242 Mr Heathcote challenged Mr Zeyrek on his evidence that he had seen Kahraman and Döne's names listed on papers that were sent to the shop. Mr Heathcote put it to Mr Zeyrek that his evidence on this matter was untrue. Mr Zeyrek stood by his evidence.
- 243 Mr Heathcote questioned Mr Zeyrek about the duties he performed at Newroz. Mr Zeyrek confirmed his duties included cutting up lettuce and tomato, placing meat for burgers and kebabs on the grill, taking orders and payments from customers, including taking payment for the food, and handing the prepared food to customers.
- 244 Mr Heathcote suggested the cleaning duties Mr Zeyrek performed only involved wiping down benches and tables. Mr Zeyrek maintained the cleaning involved more than this. Rather, he said he was required to clean everything in the shop, including washing the doner machine, cleaning the grill, wiping tables, sweeping and mopping the floor and cleaning grease off the walls. Mr Zeyrek also said that he was required to clean inside the air conditioner and the exhaust canopy.
- 245 Mr Heathcote put it to Mr Zeyrek that cleaning duties were performed by a contractor. While admitting that a contractor was hired to clean the exhaust every two to three months, Mr Zeyrek maintained his evidence that he carried out the cleaning duties he described.

- 246 Mr Zeyrek also accepted that from 2016 onwards, his cleaning duties were changed and that more of this work was done by a contractor. Mr Zeyrek said that after the contractor was hired, he was only required to clean the grill and the salad bar.
- 247 Mr Heathcote cross-examined Mr Zeyrek about his working hours. Mr Heathcote challenged Mr Zeyrek's evidence that he closed the shop 'each time he worked' and suggested to Mr Zeyrek that he had never delivered cash to Kahraman's home. In response to these questions, Mr Zeyrek denied that he was lying about closing the shop or delivering cash to Kahraman's home.
- 248 Mr Zeyrek confirmed in cross-examination that Hasan usually counted the cash from the till, while he cleaned the store together with Mehmet. He said that in the period 2016 to 2017, he only took cash to Kahraman's home a few times and this happened when Hasan was not in the shop at closing time.
- 249 Mr Heathcote questioned Mr Zeyrek about his involvement with the Belmont Villa Soccer Club (**BVSC**), including the times he attended training sessions. He also questioned Mr Zeyrek about his involvement with the Beechboro United Soccer Club (**BUSC**).
- 250 Mr Zeyrek denied that he attended training sessions at the BVSC on Thursdays. He also disputed that training was compulsory for players who were in his team at BVSC. Mr Zeyrek maintained that when he played at BVSC, he was in an amateur league in which there were only eight or nine players, two short of the 11 required to field a team. Mr Zeyrek said the rule that players who did not turn up to training would be left off the playing list, did not apply to his team.
- 251 Mr Heathcote questioned on whether there were nights Mr Zeyrek went to the casino, rather than going to work, Mr Zeyrek maintained his evidence that he only went to the casino on Tuesday nights or after he finished work at Newroz.
- 252 Mr Heathcote questioned Mr Zeyrek about the amounts he was paid. Mr Heathcote confirmed with Mr Zeyrek that he was paid \$20 for each hour that he worked. He also confirmed that at the end of each week, he expected to be paid something in excess of \$1,000 or \$1,200 per week, in cash.
- 253 Mr Heathcote asked Mr Zeyrek if he had received Centrelink benefits while he worked at Newroz in the period 2016 - 2018. Mr Zeyrek confirmed he had received Centrelink benefits but that it was only for a short time.
- 254 Mr Heathcote asked Mr Zeyrek if he had told Centrelink that he had been working 54 or more hours per week. Mr Zeyrek said that although he told Centrelink he was working, he did not mention the number of hours he worked.
- 255 Under further questioning from Mr Heathcote, Mr Zeyrek admitted that he did not tell Centrelink that he was working full-time.

#### **Observations about Mr Zeyrek's evidence**

- 256 Although he was not entirely truthful, Mr Zeyrek in the main presented as a credible witness. He was not shaken in cross-examination and his evidence was corroborated by the other witnesses the claimant called.
- 257 In describing Mr Zeyrek as not entirely truthful I accept that Mr Zeyrek may have overstated some of his evidence (points to which I will return). I do not however regard this as being fatal to the claimant's case. Rather, it is a function of the situation in which Mr Zeyrek has found himself and which continued for the duration of his employment at Newroz.
- 258 By way of example, it does not appear Mr Zeyrek was honest in his dealings with Centrelink or the ATO. It is clear from his evidence that he did not honestly report the number of hours that he was working at Newroz to Centrelink or what he was being paid in cash for his work there.
- 259 Similarly, the earnings he declared to the ATO in his tax returns are well below what Mr Zeyrek says he was paid per week. However, rather than diminishing Mr Zeyrek's credibility as a witness, it is my view that he has made significant admissions against his interest, that make his evidence believable.
- 260 It also appears obvious from Mr Zeyrek's bank statements, that he likely understated his use of online gambling services. It was not however put to Mr Zeyrek in cross-examination that he was being dishonest about this aspect of his evidence.
- 261 Although I am inclined to find Mr Zeyrek was not entirely truthful about the number of times he used online gambling services, this is a view I have reached when reviewing the bank statements he disclosed and not because of something that was unearthed during his cross-examination. In the circumstances, I regard his disclosure as more a source of embarrassment rather than determinative of his character as witness.

#### **Yusuf Oruc**

- 262 Mr Oruc was called by the claimant to corroborate Mr Zeyrek's evidence. He provided two witness statements and gave his evidence with the assistance of an interpreter.
- 263 Mr Oruc said he worked at Newroz between January 2010 and April 2014. He described Newroz as a 'kebab shop that served dine-in and takeaway food.'<sup>24</sup> Mr Oruc described Kahraman as his employer. Whilst he said he was aware Döne was named as a business partner, he never saw her working at Newroz.
- 264 Mr Oruc, who is 43 years old, emigrated to Perth from Türkiye on 23 May 2009. He said he went to Newroz, looking for work because he was having difficulty finding a job. Mr Oruc said he spoke with Ibrahim Karakuyu and Ali Ihsan, who arranged a meeting with Kahraman at Newroz.
- 265 Mr Oruc said that after he met with Kahraman, he was offered work on a trial basis. Mr Oruc said he worked at Newroz on a trial basis for approximately two to three weeks. He said that at the end of this trial period, he was offered employment on a full-time basis.
- 266 Mr Oruc said that when he first started working at Newroz, he worked with Ibrahim Karakuyu and Ali Ihsan. He also said that he worked with Hasan, Huseyin; and Mehmet. Mr Oruc said he occasionally, worked in the shop with Fatma as well.

- 267 Mr Oruc said there were usually five or six staff who worked in the shop per week. He said he normally worked with one other person during his weekday shifts and two other people on the weekends. Mr Oruc said that he worked at Newroz for a few years before Ibrahim Karakuyu and Ali Ihsan stopped working there. He said that after they left the business, he became a shop manager.
- 268 Mr Oruc said Mr Zeyrek started working at Newroz in either 2012 or 2013. He said Mr Zeyrek was still working at Newroz when he finished working there in April 2014. Mr Oruc said that when Mr Zeyrek first started working at Newroz, he had difficulty taking customer orders because he could not understand much in English.
- 269 Mr Oruc said that after he spoke to Kahraman, Mr Zeyrek was given work on the grill cooking meat, frying fish and chips, preparing food in the kitchen (such as chopping tomatoes) and cleaning.
- 270 He said that over time, Mr Zeyrek's English improved so he moved over to taking customer orders and payments. Mr Oruc confirmed that Mr Zeyrek worked full-time at Newroz. By 'full-time', Mr Oruc said he meant working more than 40 hours a week. Mr Oruc said it was easy for Mr Zeyrek to complete 40 hours a week as his usual shifts at Newroz were around 11 - 12 hours a day, excluding Sundays.
- 271 Mr Oruc said that while he was not exactly sure how many days a week Mr Zeyrek worked; he thought it was at least four to five. He also said he remembered that Mr Zeyrek regularly worked with him on Friday and Saturday nights, from 5.00 pm until the shop closed early the following morning.
- 272 Mr Oruc provided detailed evidence of the work he performed at Newroz, including a diagram of the layout of the Newroz premises when he worked there.<sup>25</sup> In both his first and supplementary statements, Mr Oruc described what was involved in preparing and cooking the food, the cleaning tasks, what happened at closing time and who performed this work.
- 273 Mr Oruc said there were at least two to three staff in the shop at lunch time and for the evening meal. Mr Oruc described that a lunch time rush that usually started around 11.45 am and continued until about 2.00 pm and a dinner rush which began at around 5.00 pm continuing until around 8.00 pm at night.
- 274 In his first witness statement, Mr Oruc gave evidence about working with Mehmet. Mr Oruc said Mehmet lived with Kahraman and there were occasions when he gave him a lift home to Kahraman's house after the shop closed because he did not have a driver's licence.
- 275 Mr Oruc said that when he worked at Newroz, the business was open seven days a week including public holidays. He said to the best of his recollection, the only time the shop closed was on New Year's Eve.
- 276 Mr Oruc said he worked a minimum of six days per week, sometimes seven, from around midday until close. He said he usually had Sundays off unless there was not enough staff. Mr Oruc said that when he first started working at Newroz, his shifts commenced at 12.00 pm on weekdays. He said this changed over time and he began starting work at around 11.45 am.
- 277 Mr Oruc said the earliest the shop closed was the advertised time of 10.00 pm. He said Kahraman told him that while customers were still coming in, he should keep the shop open even beyond the shops usual closing time. He said for this reason, the shop often stayed open until the early hours on Saturday and Sunday mornings, to cater for customers from a nearby nightclub.
- 278 Mr Oruc said he often closed the shop to customers at the end of a Friday or Saturday shift between midnight and 4.30 am the next morning, depending on how busy the shop was. Mr Oruc said that on a few occasions the shop stayed open until 5.00 am or 6.00 am.
- 279 Mr Oruc said shop usually closed between Sundays and Thursdays from between 10.00 pm and 12.00 am. He said that when there were events nearby on weeknights, he often closed the shop at 11.00 pm.
- 280 In his first statement, Mr Oruc stated that staff wages were paid weekly in cash, usually by Kahraman, Ali Ihsan or himself. He said wages were paid on the final working day of the week, with the working week running from Monday to Sunday.
- 281 Mr Oruc said staff were usually paid at the end of a Saturday night shift and this generally meant wages were paid to staff on a Sunday morning. He said that when Mr Zeyrek started working on Sundays, he no longer paid Mr Zeyrek's wages because Mr Zeyrek would be paid by the person who was responsible for paying wages on Sundays.
- 282 Mr Oruc said that by the end of his employment at Newroz, he was paid an hourly rate of \$20 per hour, which he said was equivalent to \$200 for a full day and \$100 for a half day. He said the half day rate was paid for five hours of work and the daily rate was paid for ten hours of work. Mr Oruc said he kept a record of the payments he made to each staff member, which he included with the money and paperwork that he took to Kahraman's house after the shop closed.
- 283 Mr Oruc gave evidence that wages were only ever paid in cash. Mr Oruc said no amount was withheld for income tax. Mr Oruc said cash was taken from the till to pay employee wages. Mr Oruc said he would ask Mr Zeyrek how many shifts he worked (days and half days) and then pay him in cash at either the daily or half day rate.
- 284 Mr Oruc said he never received any paid time off for annual leave or when he was sick. He said that if he did not attend work, he would not be paid.
- 285 In his witness statement, Mr Oruc said employees at Newroz did not take set meal or rest breaks. He said that although staff did not get set breaks, being able to eat was no issue. He said that staff were provided food and drinks, which they could have if the shop was quiet.
- 286 Mr Oruc said if there was a customer to serve or work to be done, staff did not stop to eat. Mr Oruc said there were times when the shop was quiet enough for him to sit outside and eat for a few minutes. He said Kahraman did not have a problem with him eating during a quiet period but if the shop was busy and Kahraman was there, he had to work.

- 287 Mr Oruc stated that all employees were required to wear Newroz T-shirts. He said the T-shirts were provided by Schweppes and came in different colours. Mr Oruc said Newroz did not clean his shirts. He said that he had to wash the T-shirts himself.
- 288 Mr Oruc said that he finished working at Newroz after he fractured his left arm in an incident involving an aggressive customer outside the shop. He provided contemporaneous and photographic evidence of his injury in his supplementary witness statement and an explanation as to why he withdrew his workers compensation claim.<sup>26</sup>
- 289 Mr Oruc said he received Centrelink while he was working at Newroz. Mr Oruc also stated that Newroz did not pay any tax on his behalf.

#### **Cross-examination of Mr Oruc**

- 290 The questions Mr Heathcote asked Mr Oruc proceeded on the basis he worked at Newroz in the period between 2010 to 2014. The proposition he never worked at Newroz was not put to him in cross-examination. The significance of this is a point to which I will return in my evaluation of the evidence.
- 291 Mr Heathcote questioned Mr Oruc about whether Newroz provided a dine-in service. He asked if staff were required to wait on customers who took a seat at a table. In response, Mr Oruc confirmed they only provided service to customers who came to the counter.
- 292 Mr Oruc said that while there were occasions when a customer's order was taken to their table, customers usually collected their food when they were called and then left the premises. In further questioning, Mr Heathcote suggested that customers were not served food on plates with cutlery, and that food was only served in single use packaging. Mr Oruc disagreed with this and maintained customers who wanted to dine-in, had their meals served on plates.
- 293 Mr Heathcote challenged Mr Oruc on his evidence that he had worked as a manager at Newroz. Mr Oruc responded by explaining that he was only placed in charge of the shop when a member of the Karakuyu family, which included Kahraman, was not present.
- 294 He also stood by his evidence that he acted as a manager when Kahraman went on holidays to Türkiye. Mr Oruc did not, when challenged, resile from his evidence about the duties he performed when he closed the shop, counted the takings or delivered money to the Karakuyu family home.
- 295 When questioned about employee records, Mr Oruc maintained that he never saw anyone collecting information on the hours that were worked by employees.
- 296 Mr Heathcote cross-examined Mr Oruc about his workers' compensation claim. Under cross-examination, Mr Oruc accepted he withdrew the claim because Mr Zeyrek and Mehmet had declined to provide witness statements that confirmed Mr Oruc was employed by Newroz.

#### **Observations regarding Mr Oruc's evidence**

- 297 Mr Oruc, who was the first witness in the case and gave his evidence before Mr Zeyrek, presented as a credible witness who told the truth. His answers to the questions he was asked under cross-examination did not deviate from the evidence he provided in his first and supplementary witness statements.
- 298 The level of detail about Newroz and how it operated as a business that Mr Oruc provided in both of his witness statements, was in my view, something he could have only obtained from working there.
- 299 The respondents' cross-examination of Mr Oruc regarding his delay in bringing and eventually withdrawing a workers compensation claim, did not impugn his credibility as a witness. In other words, I do not accept that just because Mr Oruc withdrew his workers compensation claim I should find he was a dishonest witness.
- 300 Although I accept Mr Oruc may have had difficulty in establishing liability in his workers' compensation claim, much of this can be attributed to the basis on which the respondents hired him. I also do not attach much weight to Mehmet's and Mr Zeyrek's refusal to give statements in support of his workers' compensation claim either.
- 301 While Mehmet and Mr Zeyrek were not questioned about why they did not provide supporting witness statements, it is reasonable to infer that neither of them would have viewed providing a statement as being in their interests.
- 302 Mr Heathcote's cross-examination of Mr Oruc as to why he had received a sum of \$360 from Mr Zeyrek in November 2020 did not affect his credibility as a witness. When questioned on this topic, Mr Oruc was able to explain that Mr Zeyrek owed him money for a car he purchased from Mr Oruc in or around 2017.
- 303 While it is clear Mr Oruc did not work at Newroz in either claim period, his evidence about how the business operated, the work he performed with Mr Zeyrek and that he worked there, is relevant to, a number of the findings I am required to make.

#### **Evidence of Fener Azbay**

- 304 The claimant called Mr Zeyrek's wife, Ms Azbay to give evidence. Ms Azbay provided two witness statements. During the hearing, Ms Azbay gave her evidence with the assistance of an interpreter.
- 305 Ms Azbay said that when she arrived in Perth from Türkiye on 18 September 2013 on a Student Visa, she was engaged to be married to Mr Zeyrek. She said she moved in with Mr Zeyrek after they were married on 5 November 2013.
- 306 Ms Azbay said that between 2016 and 2018, she lived in Balga with Mr Zeyrek. In or about July or August 2018, they moved from Balga to a residence in Nollamara and remained there until 2020.
- 307 Ms Azbay said that when she arrived in Perth, Mr Zeyrek was already working for Newroz. She said she was certain Mr Zeyrek was working for Newroz before she came to Perth because the day after her arrival, he took her there to meet his colleagues.

- 308 Ms Azbay stated that she regularly visited Newroz to see Mr Zeyrek because it was close to where she was studying English. Ms Azbay said she understood from speaking with Mr Zeyrek that Kahraman was his 'boss' and that Newroz was a family business.
- 309 Ms Azbay said Mr Zeyrek worked long hours at Newroz. She said she was unsure how many hours a week he worked. She did not keep a record. Ms Azbay said that from when she arrived in Perth, Mr Zeyrek regularly worked six days a week and that he had a day off on Tuesdays. She said the only day Newroz was not open was on Christmas Day.
- 310 Ms Azbay said that between 2016 and 2018, Mr Zeyrek left home at about 11.30 am on weekdays, in time to start work at Newroz at 12.00 pm. She said that between 2016 and 2018, Mr Zeyrek often worked into the early hours of Saturday and Sunday mornings.
- 311 Ms Azbay said that on Sundays, Mr Zeyrek would often come home from work at midnight or later if the shop was busy. She said on the nights when Mr Zeyrek was supposed to have left work around 11.30 pm or 12.00 am, it would be about 1.00 am in the morning before he returned home.
- 312 Ms Azbay said it was very difficult for Mr Zeyrek to get time off work. She said she did not know if Mr Zeyrek ever had paid leave. She said, to the best of her recollection, the only time Mr Zeyrek took time off work was around the time she gave birth to their children. Ms Azbay said that other than the birth of their children, Mr Zeyrek did not take any time off.
- 313 Ms Azbay stated she had numerous arguments with Mr Zeyrek about not having holidays together. Ms Azbay said that except for Christmas Day, he worked on public holidays. She said Mr Zeyrek never took time off work when she, or the children were sick.
- 314 Ms Azbay said that Mr Zeyrek was paid weekly in cash, every Sunday or Monday. Ms Azbay said that between 2016 and 2018, Mr Zeyrek usually brought home about \$1,000 per week in cash. She said there were occasions when this went up to \$1,200 per week.
- 315 Ms Azbay said Mr Zeyrek gave this money to her, shortly after he was paid. Ms Azbay stated she deposited the money the couple needed for rent and other bills into her bank account. She said the money Mr Zeyrek gave her was also used for shopping and other living expenses.
- 316 Ms Azbay stated they did not have a joint bank account. If Mr Zeyrek had to pay an instalment of some kind, then part of the money he received was deposited into his bank account. Ms Azbay attached copies of her bank statements for the period 15 August 2017 to 15 April 2019 to her second witness statement (**Ms Azbay's bank statements**).<sup>27</sup>
- 317 Ms Azbay's bank statements show that regular weekly deposits were made to her bank account, close to the sums she said Mr Zeyrek received in cash for wages from Newroz.
- 318 Ms Azbay, in her second witness statement, gave evidence about the care of the couple's three children. More specifically, Ms Azbay provided details of when she collected their children from childcare, and the dates on which she started using one of three childcare centres the couple sent their children to.
- 319 Ms Azbay gave evidence about a Subaru the couple purchased from Joondalup Easy Auto. She said Mr Zeyrek purchased the Subaru after he attended Joondalup Easy Auto with Kahraman. Ms Azbay said that when she went there with Mr Zeyrek, they could not obtain finance because Mr Zeyrek was unable to prove he had full-time work.

#### **Cross-examination of Ms Azbay**

- 320 Under cross-examination from Mr Heathcote, Ms Azbay was questioned on how she knew Mr Zeyrek was working long hours. Mr Heathcote suggested that apart from the times Ms Azbay visited Mr Zeyrek and saw him at work, she did not know where he was after he left home each day.
- 321 In response to this line of questioning Ms Azbay maintained her evidence that Mr Zeyrek was at work six days a week. Ms Azbay said she visited Mr Zeyrek's workplace in the period 2013 to 2016 when she was pregnant with the couple's first son. She also described visiting Mr Zeyrek at the shop in 2016 once or twice a week, after lunch. Ms Azbay said Mr Zeyrek was working when she attended the Newroz store on Christmas Eve and New Year's Eve.
- 322 Mr Heathcote questioned Ms Azbay about Mr Zeyrek's earnings. Ms Azbay confirmed Mr Zeyrek was paid approximately \$1,100 to \$1,150 per week. She said he deposited this money to her bank account.
- 323 Mr Heathcote questioned Ms Azbay about the number of TAB Touch transactions that appeared in Mr Zeyrek's bank statements.<sup>28</sup> Ms Azbay confirmed Mr Zeyrek had told her that he had only gambled once or twice. Mr Heathcote then referred Ms Azbay to Mr Zeyrek's bank statements. It became apparent that Mr Zeyrek had gambled more times than what Ms Azbay was aware of.
- 324 Mr Heathcote questioned Ms Azbay about when Mr Zeyrek attended soccer training. When asked how she knew Mr Zeyrek was attending training, Ms Azbay responded by saying that she knew Mr Zeyrek was there because he had told her where he was going. Ms Azbay also said she saw Mr Zeyrek taking the clothes he needed to play soccer.
- 325 In response to questions about when Mr Zeyrek attended soccer games, Ms Azbay gave evidence that she had attended two to three games between 2016 and 2018. Ms Azbay was unable to say where or when she attended Mr Zeyrek's soccer games.
- 326 When asked about whether she knew about Mr Zeyrek's underpayment of wages complaint, Ms Azbay stated that she was not aware Mr Zeyrek had made a complaint prior to June 2021. She said this was because she was overseas in Türkiye with the couple's children. Ms Azbay explained that their marriage was under strain at the time and she had not discussed any underpayment of wages claim that Mr Zeyrek may have been pursuing.
- 327 Mr Heathcote questioned Ms Azbay on whether she stood to benefit from the outcome of the proceedings. Ms Azbay answered by saying she did not know whether Mr Zeyrek would receive any money from the case.

**Observations about Ms Azbay's evidence**

- 328 While Ms Azbay presented as a reliable witness, I accept that there was limit to the direct evidence she was able to give about the number of hours Mr Zeyrek worked, when he started, finished and the like. This is because she was, in the main, reliant upon what Mr Zeyrek told her about what he was doing from day to day.
- 329 I also similarly accept that Ms Azbay was reliant upon Mr Zeyrek to tell her when he went to soccer training, when he may have gone to the casino, how often he went to the casino and how often he used online gambling services.
- 330 It is reasonable to conclude that Ms Azbay's knowledge of these things, including the amount he spent gambling, depended on what Mr Zeyrek told her. This much became clear when Ms Azbay in cross-examination was shown Mr Zeyrek's bank statements that revealed he was gambling far more than what Ms Azbay described in her witness statement.
- 331 There were however some matters that Ms Azbay was able to give direct evidence on that lend significant weight to Mr Zeyrek's evidence about the amount of time he spent at work. This included the evidence Ms Azbay gave about visiting Mr Zeyrek at work in the afternoon or evenings and on Christmas and New Year's Eve and that he came home from work in sauce-stained uniforms, smelling of food from the kebab shop in the early hours of the morning.
- 332 Ms Azbay's evidence about the money Mr Zeyrek gave her each week which was deposited to her bank account is also consistent with him having regular and ongoing work at Newroz for which he was paid in cash.
- 333 Having summarised the claimant's evidence, I will now provide a summary of the respondents' evidence.

**Respondent's evidence – Kahraman**

- 334 In his capacity as the first respondent, Kahraman filed a three-page witness statement and provided his evidence with the assistance of an interpreter.
- 335 Kahraman, who is 60 years of age and described his occupation as business owner, said he came to Australia as a refugee in 1995. Kahraman said he is of Kurdish origin and came to Australia as a refugee.
- 336 Kahraman confirmed that he is married to Döne and that they have five children:
- (a) Huseyin;
  - (b) Hasan;
  - (c) Fatma;
  - (d) Nilufer; and
  - (e) Aysun Karakuyu.
- 337 He said Hasan, Huseyin, Fatma, Nilufer, Ali Ihsan and Mehmet have all worked at Newroz. Kahraman stated that Mehmet lived in the Karakuyu family home when he arrived from Türkiye in 2012 until he eventually moved out in 2021.
- 338 Kahraman said he opened Newroz in 2001. He said he worked in the business on a full-time basis for many years. He said that in or about 2012 or 2013, Hasan took over the running of the business so that he could 'semi-retire'.
- 339 Kahraman stated that he still helps Hasan out from time to time, but Hasan is now in charge of the business. Kahraman said Hasan became responsible for recruitment once he took over the business. Kahraman said although he had handed the responsibility for running Newroz to Hasan, he continued to attend the shop and still does.
- 340 Kahraman said that from 2012 or 2013 onwards, he was no longer aware of how business records were kept because Hasan was in control of the business.
- 341 Kahraman denied that he hired Mr Zeyrek to work at Newroz. He also denied speaking to Mr Zeyrek about his pay and hours of work or that he gave him a uniform. He suggested that providing uniforms was something Hasan would have done.
- 342 Kahraman said he never saw Mr Zeyrek dropping money to the Karakuyu family home. He said there were lots of family members who were involved in Newroz when he ran the business and he only trusted family members to handle money. He said as far as he knew, Hasan had continued this practice.
- 343 Kahraman admitted taking out a car loan so Mr Zeyrek could purchase a Subaru from Joondalup Easy Auto. He said he did this because Mr Zeyrek had told him his wife was going to divorce him if he could not get a car. Kahraman said that while the loan was in his name, the car belonged to Mr Zeyrek.
- 344 Kahraman denied speaking to Mr Zeyrek about paying tax and not declaring his true income. He said that while he may have given Mr Lyra's details to Mr Zeyrek, he only did this because Mr Lyra is well-known in the Kurdish community and not because Mr Zeyrek had complained about being paid in cash.
- 345 In relation to Mr Oruc's witness statements, Kahraman denied that he ever worked for Newroz.
- 346 During his evidence, I asked Kahraman when Newroz was open for business. He responded by saying Newroz was open seven days a week from 9.00 am in the morning until 10.00 pm at night. He said on weekends the latest Newroz stayed open was 2.00 am (Saturdays and Sundays).

**Cross-examination of Kahraman**

- 347 Kahraman was cross-examined by Ms Inkster. Under cross-examination, Kahraman maintained that by 2012 or 2013 he had handed control of the business to Hasan. Kahraman was however very quick to concede that he never semi-retired.<sup>29</sup>
- 348 He also admitted that until 2019, he continued to attend Newroz multiple times per week. Kahraman said although he was not a 'worker' he continued to work at Newroz and that both he and Döne received wages from the business.<sup>30</sup>

349 When Ms Inkster asked Kahraman about the BAS payroll reports that Mr Patel provided in response to NTP2 that shows Kahraman received wages from Newroz in the second half of the 2018/2019 financial year, he denied having seen these documents before.<sup>31</sup> Kahraman responded with the explanation:

[m]y son was dealing with all this correspondence at that time.<sup>32</sup>

350 Ms Inkster challenged Kahraman's evidence that Mr Zeyrek never delivered cash from the business to the Karakuyu family home because he did not trust him with money. Under cross-examination, Kahraman admitted that although he not did trust Mr Zeyrek with money, he had trusted Mr Zeyrek to repay him for an unsecured car loan.<sup>33</sup>

351 Ms Inkster challenged Kahraman's evidence that Mr Oruc never worked for Newroz. While he maintained Mr Oruc did not work at Newroz, Kahraman stated that Mr Oruc used to attend the shop. He said he would 'drop in' and 'come and go'.<sup>34</sup>

352 At one point, Kahraman stated through the interpreter:

If I am the owner of that shop, I can say that he didn't work there.<sup>35</sup>

#### **Observations regarding Kahraman's evidence**

353 I have difficulty in accepting that Kahraman, who is the most senior figure in the Karakuyu family, with over 20 years involvement and experience in Newroz, lacked an awareness of what was happening in the business from 2012 or 2013, to the extent the respondents have claimed.

354 Kahraman's evidence that he had handed control of Newroz to his son Hasan, was inconsistent with Mr Ravenscroft's unchallenged evidence about his interactions with Kahraman. By his own admission Kahraman said that in the 2018 - 2019 financial year he continued to draw 'wages' from the business. He also said he continues to go into Newroz and that he never actually 'semi-retired'.

355 It is open to find, from the inconsistencies between Kahraman's and Mr Ravenscroft's evidence and the concessions Kahraman made in cross-examination, that he was at all material times, far more involved in Newroz than he was prepared to acknowledge in his witness statement.

356 As the case progressed it became apparent there were inconsistencies between Kahraman's evidence and that which was given by the respondents' other witnesses. These inconsistencies are important because they raised significant doubts in my mind about his credibility as a witness, leading me to conclude that his testimony on critical issues, if not dishonest, was at the very least, unreliable.

#### **Evidence of Hasan Karakuyu**

357 Hasan was the second witness the respondents called to give evidence. He provided a nine-page witness statement. Hasan did not need assistance from an interpreter when giving his evidence.

358 Hasan stated that he is a director of Karakuyu Pty Ltd, the current operator of Newroz. He confirmed that prior to the change in ownership, his parents (the first and second respondents) had operated the business as a partnership. He said he had been actively and substantially involved in the Newroz business his entire adult life.

359 Hasan said he started working at Newroz when he was still at high school. He said at that time, his sister Fatma managed the business. Hasan stated that when he graduated from high school, he was so familiar with the Newroz business that he was able to take it over and become the manager.

360 Hasan said that despite being the manager, he was not required to run the business alone. He said the Karakuyu family provided most of the labour in the business and that everyone in the immediate family and some of the extended family, chipped in to help. He said Newroz needed some employees but not many.

361 Hasan said he was able to combine managing Newroz with studying. He said he went on to complete an undergraduate degree at Curtin University and that when he was not at university, he managed the business.

362 In his witness statement, Hasan said he was shown all the material the claimant had lodged in support of the claim, including Mr Zeyrek's witness statements. Hasan said the information he included in his witness statement was intended to focus on the period from the end of April 2016 to the end of 2018.

363 Hasan said in 2016, the business operated in a much smaller space from which it only sold kebabs, drinks and a few other food items. He said there was not much room for chairs and tables at the premises.

364 Hasan stated there were some tables and chairs for people to sit at while they waited for their orders to be called. He described Newroz as a business that sold well-priced, nutritious fast food to be consumed elsewhere. Hasan said that in 2017, Newroz expanded to include an adjoining premises. He said that while the business remained the same, the shop space and product range were increased.

365 Hasan said that when he first met Mr Zeyrek, he was employed at two other kebab shops. He said he recalled Mr Zeyrek was working the equivalent of full-time hours at the other two stores. Hasan gave evidence that before he commenced work at Newroz, Mr Zeyrek had worked for at least six months at both stores. He said he would not have hired someone who did not have a minimum of three to six months' experience.

366 Hasan said that when he employed Mr Zeyrek in 2013, Kahraman had stepped back and was no longer involved in the day-to-day running of the business. Hasan said his father did not know who was hired or when they worked at the business. He also denied Mr Zeyrek received a job offer from Kahraman.

367 Hasan stated that Mr Zeyrek's work at Newroz did not require anything more than basic food preparation skills. He said everything in the shop was purchased from suppliers and is only ever reheated and re-packaged in the shop.

- 368 Hasan said Mr Zeyrek was hired to work from 9.00 am to 12.30 pm on Mondays, Wednesdays and Fridays. He said at that stage, it was only him and Ali Ihsan who worked full-time in the business.
- 369 Hasan stated Mehmet and Fatma both worked part-time. Hasan said that at one point Mr Zeyrek asked him to increase his working hours. While Hasan says he told Mr Zeyrek he was willing to employ him on a full-time basis, Mr Zeyrek asked to be paid 'under the table' because he did not want to be recorded as a full-time worker. This he said was so Mr Zeyrek could continue to receive financial support from Centrelink and the Red Cross. Hasan said he refused this request.
- 370 Hasan said Mr Zeyrek wanted to be paid in cash. He said he wanted to pay Mr Zeyrek by electronic funds transfer (EFT) to his bank account. Hasan said Mr Zeyrek did not want to be paid by EFT because he did not want a record of money going into his bank account to affect the Centrelink and other benefits he was receiving.
- 371 Hasan said the shop never stayed open past its advertised closing times. He said family members were the only people who were given the responsibility of closing the shop. Hasan said he either closed the shop himself or the task was assigned to Mehmet or another family member.
- 372 Hasan gave evidence to refute the suggestion Newroz was both a dine-in and takeaway restaurant. He said from 2001 to 2017, the premises from which Newroz operated was only 45 square metres and there was only room for three tables and two chairs at each table. Hasan said Newroz could not house any dine-in customers, even if they wanted to.
- 373 Hasan said that while the shop was expanded following the renovation in 2017, Newroz remained a takeaway food store. He said all orders are served in single-use, disposable packaging and if needed, with disposable utensils.
- 374 Hasan said the photographs from various social media posts that were attached to the claimant's and Mr Zeyrek's witness statements that showed meals being served on plates, were organised by Uber Eats and Door Dash. He said a professional photographer was sent by both companies to take photos of food to be used for advertising purposes. He said that despite the photographs, Newroz did not serve food in the manner represented in the photographs.
- 375 In his witness statement, Hasan gave evidence about who he said worked at the shop, when they worked and the roles they performed. He said that from 2011 or 2012, he managed the business and if he was absent, Ali Ihsan was placed in charge. Hasan said if he and Ali Ihsan were both away, then his cousin, Mehmet managed the business. Hasan said most of the workforce were family members, including himself, Ali Ihsan, Huseyin, Mehmet, Fatma, Nilufer and Umut.
- 376 Hasan gave evidence about the work he said Mr Zeyrek performed at Newroz. He said the duties Mr Zeyrek performed were limited. He said Mr Zeyrek's main job was to deal with the counter during the early, quiet part of the day and to help at the start of the lunch rush.
- 377 Hasan said Mr Zeyrek almost never worked at night. He denied that Mr Zeyrek performed any cleaning duties. In his witness statement, Hasan said Mr Zeyrek never closed the shop. He said Mr Zeyrek was hired as a casual to help during the daytime and that Mr Zeyrek's working hours finished well before the shop was closed. He also stated that only family members were given the responsibility of closing the shop.
- 378 He said that from 2008 to 2016, Ali Ihsan cleaned the shop after closing. Hasan gave evidence that Ali Ihsan washed the doner machines, cleaned the grill, swept and mopped floors, cleaned the tables and wiped grease off the walls. Hasan said that from 2016 until present, Newroz engaged a different cleaner who carries out the cleaning duties that Ali Ihsan used to perform.
- 379 Hasan said he usually closed the shop with Mehmet. He said he worked the late shift together with Mehmet who lived at his parents' home. Hasan said Mr Zeyrek never closed the shop. He also said he never delivered cash to the Karakuyu family home.
- 380 In his witness statement, Hasan said he kept business records that recorded working hours and wage payments. He said these records were misplaced or damaged during the renovation of the shop and when he moved house.
- 381 Hasan said if these records had not been lost, they would show that:
- i. the business had always been family-run;
  - ii. Hasan, Mehmet and Ali Ihsan worked full days with Huseyin;
  - iii. Mr Zeyrek only provided assistance in the mornings on a casual basis;
  - iv. Mr Zeyrek was not generally available on a Tuesday, Thursday or Saturday; and
  - v. Mr Zeyrek was not available on Sundays because he played soccer with Huseyin.
- 382 Hasan said there was no roster during Mr Zeyrek's employment because the majority of working hours were all done by family members. He said that Ali Ihsan opened the shop from Monday to Friday. Mehmet came in around 11.30 am and left at 2.00 pm, returning at 6.00 pm to work until closing.
- 383 Hasan said he came in around 12.00 pm noon on Tuesday, Wednesday and Thursday. He said Ali Ihsan finished at around 5.00 pm. Hasan said that after 5.00 pm he worked with Huseyin and Mehmet until close. Hasan said that on weekends he would open the shop and work with Fatma until 5.00 pm. He said Fatma left at 5.00 pm and he then worked with Mehmet until closing.
- 384 Hasan said Mr Zeyrek's job was to help until 12.30 pm or sometimes to 1.00 pm on Mondays, Wednesdays and Fridays. Hasan denied that Mr Zeyrek worked on public holidays or at night. He said his three sisters, Nilufer, Fatma and Aysun Karakuyu performed this work.
- 385 Regarding closing times, Hasan said Newroz did not stay open longer than its advertised trading hours. In support of this, Hasan said the landlord had security patrols and a means of monitoring the shop's opening and closing times. For this reason, he said the business kept to its advertised trading hours.

386 In his witness statement, Hasan denied Mr Zeyrek worked 64.5 hours per week. He said no one in the Newroz business worked the hours Mr Zeyrek claims he worked. He reiterated that between 2016 and 2018, Mr Zeyrek's normal weekly working hours were Monday, 9.30 am to 12.30 pm; Wednesday, 9.30 am to 12.30 pm; Friday, 9.30 am to 12.30 pm.

387 Hasan denied the photographs that Mr Zeyrek attached to his witness statement, provided evidence he worked at Newroz at night. Hasan said Mr Zeyrek took the photos of himself at the shop and sent them to his wife, so she would be led to believe that he was working when he was not.

388 In his witness statement, Hasan admitted Mr Zeyrek was paid \$20 per hour, however, he said this was a net amount Newroz paid to him after tax.

389 Hasan said that Mr Zeyrek took time off for the birth of each of his three children. He said that each occasion his wife gave birth, Newroz continued to pay him even though he was not at work.

#### **Cross-examination of Hasan**

390 In cross-examination, Mr Carroll questioned Hasan about Mr Zeyrek's employment at Newroz as a casual employee. Hasan accepted that Mr Zeyrek regularly worked from 9.00 am to 12.30 pm, Mondays, Wednesdays and Fridays; a total 10.5 hours worked across three days per week, or 21 hours per fortnight.

391 Mr Carroll asked Hasan about whether the hours he said Mr Zeyrek worked meant he was employed on a part-time rather than a casual basis. Mr Carroll also questioned if he was aware Mr Zeyrek would be entitled to paid leave if he was employed on a part-time basis. Initially Hasan responded by saying that he was not aware if Mr Zeyrek was entitled to paid time off. He then said Mr Zeyrek received paid leave.

392 Mr Carroll asked Hasan about the hours Fatma worked. In his witness statement, Hasan said Fatma, who worked a couple of hours per day, one or two days per week was part-time. When questioned about why he considered Mr Zeyrek, who he said regularly worked the same hours on the same days of the week to be a casual and not part-time, Hasan responded by saying he did not know when he prepared his statement there was difference between casual and part-time employment.

393 Mr Carroll asked Hasan if he agreed that it was inconsistent to describe Mr Zeyrek as a casual but Fatma as part-time. Hasan responded by saying the difference was that Fatma was a family member.

394 When questioned about the work Fatma performed in the shop, Hasan said she mostly performed bookkeeping duties. When pressed about the actual number of hours she performed in the shop, Hasan said Fatma worked around one to two hours a day, a couple of days a week in 2013 and that she only worked in the shop to fill gaps.

395 Mr Carroll cross-examined Hasan about the work Ali Ihsan performed in the shop. After confirming Ali Ihsan was Fatma's husband, Hasan said he usually worked between 8.00 am and 5.00 pm, Monday to Saturday with a day off on Sundays.

396 Hasan admitted that Ali Ihsan would have seen Mr Zeyrek at work. He also said Ali Ihsan came back to the shop each evening to perform cleaning duties, seven days per week.

397 Mr Carroll suggested Ali Ihsan performed an extraordinary number of hours at work. He asked Hasan whether he could have been mistaken about the number of hours he worked in the business. Hasan disagreed.

398 When asked as to whether Hasan had any business records to show the number of hours Ali Ihsan worked, Hasan responded by saying these records were lost in 2017 when the shop was renovated. In cross-examination, Mr Carroll challenged Hasan's evidence about the records he said were lost during the renovation. Hasan denied that he had lied about the records being lost.

399 After confirming Mr Zeyrek was paid \$20 per hour after tax, Mr Carroll referred Hasan to, and questioned him about, the contents of the BAS payroll reports. Hasan admitted they showed Mr Zeyrek worked an average of 31.8 hours per week in the period 10 May 2017 to 30 June 2017.

400 When Mr Carroll suggested the BAS payroll reports showed Mr Zeyrek worked a lot more than the 10.5 hours per week Hasan said he worked, Hasan responded by saying that he could not provide a definitive answer. When pressed further, he accepted the BAS payroll reports showed Mr Zeyrek worked three times more hours than what Hasan said he worked between 2016 and 2018.

401 Under cross-examination, Hasan was not prepared to admit that he did not know what hours Mr Zeyrek worked between 2016 and 2018. He was also not prepared to admit that Mr Zeyrek had a better recollection of the hours he had worked.

402 Mr Carroll suggested Mr Zeyrek's usual hours required him to work until 11.00 pm or midnight. Hasan disagreed with this. He said he was certain Mr Zeyrek did not work the hours he claimed to have worked because the business could not afford it. Hasan also refused to agree that Mr Zeyrek worked at night in the shop.

403 Mr Carroll referred Hasan to a text exchange he had with Mr Zeyrek, that appeared in the third witness statement of Şahin Zeyrek as attachment 'SZ 52'. The text exchange shows Mr Zeyrek, who was at work at the shop at 4.58 pm, asking Hasan if he would work from 7.00 pm until 9.00 pm that night.<sup>36</sup> When confronted with this text exchange, Hasan admitted Mr Zeyrek may have worked at Newroz in the evening.

404 During his cross-examination, Mr Carroll referred Hasan to a number of images from the Court Book, which Mr Zeyrek claimed showed him working at Newroz, at times Hasan said he did not work. When questioned about these images, Hasan was unprepared to admit they showed Mr Zeyrek working at Newroz.

405 Mr Carroll asked Hasan to look at the 2019 - 2020 wage records.<sup>37</sup> He asked Hasan if he gave these records to Lyra Livich for them to provide in response to the NTP5. After Hasan accepted that he had provided these records, Mr Carroll asked him if the 2019 - 2020 wage records show that Mr Zeyrek worked at the shop in 2021 five days per week.

- 406 Hasan responded by saying that although Mr Zeyreks name appears on 2019 - 2020 wage records, the entries were made to record hours that Umut worked. Hasan admitted the 2019 - 2020 wage records he provided were not for Mr Zeyrek. He also confirmed that Mr Zeyrek was not working at Newroz in 2021.
- 407 Mr Carroll questioned Hasan about his evidence that it was Mr Zeyrek who asked to be paid in cash. Hasan responded by saying that there were some employees who were paid by EFT. When challenged about this evidence, specifically that everyone who worked at Newroz was paid in cash from 2013 to 2018, Hasan responded by saying:
- Yeah, because we're all family.<sup>38</sup>
- 408 In response to a question that it was the business's choice to pay in cash rather than the employees', Hasan disagreed.
- 409 Mr Carroll asked Hasan if Mr Oruc worked at Newroz. While Hasan confirmed that Oruc was employed at Newroz, he qualified this by saying it was for a 'short period'.<sup>39</sup>
- 410 When asked about Huseyin's working hours on Sundays, Hasan initially said he did not work on Sundays. After Mr Carroll suggested that Huseyin's witness statement confirmed Huseyin worked on Sundays, Hasan accepted that his evidence may have been wrong.
- 411 Mr Carroll returned to questions about Mr Zeyrek's and Huseyin's working hours on Sundays. I have extracted the relevant exchange between Hasan and Mr Carroll:
- If you're mistaken about whether or not [Huseyin] came back to work on Sundays after soccer, could it be the case that you're mistaken about Şahin's hours as well?---No.
- But we established earlier that you really couldn't be sure. You don't really know what hours Şahin worked between 2016 to 2018?---I'm sure about Sundays.
- You're sure about Sundays?---Yeah, because I was always there every Sunday.
- Other than Sundays you're not really sure when he worked?---It could have been mornings, it could have been daytimes, it could have been night times.<sup>40</sup>
- 412 Mr Carroll questioned Hasan's evidence on what Mr Zeyrek was paid. When he asked Hasan to confirm if Mr Zeyrek was paid \$20 per hour in the period 2016 to 2018, Hasan agreed but then said Mr Zeyrek was paid 'bonuses'.<sup>41</sup>
- 413 After Mr Carroll suggested this was inconsistent with his previous evidence and that Mr Zeyrek was only ever paid \$20 per hour, Hasan conceded Mr Zeyrek was paid \$20 per hour but said it was paid as a net amount.
- 414 Mr Carroll challenged Hasan's evidence the business separately remitted money to the ATO for tax and that Mr Zeyrek was paid \$20 per hour as a net amount. Mr Carroll confirmed with Hasan that he was asked to produce PAYG payment summaries for Mr Zeyrek, for each financial year, but that none were provided to the Department.
- 415 Mr Carroll's questioning of Hasan covered a variety of subjects, including the seating that was provided at the restaurant, Mr Zeyrek's duties and whether the business promoted dining in the store. When answering, Hasan was careful to deny the various images that were attached to Mr Zeyrek's and the claimant's witness statements provided evidence customers dined in at Newroz or their meals were served on plates.
- 416 In cross-examination, Mr Carroll asked Hasan further questions, on how the business transferred money to the ATO to pay Mr Zeyrek's tax. During this questioning, Hasan said he had paid superannuation contributions into a government account on Mr Zeyrek's behalf as he claimed Mr Zeyrek had not provided him with details of his superannuation fund.<sup>42</sup>
- 417 Mr Carroll questioned Hasan about his working hours. He said he worked from 9.00 am in the morning until 2.00 am the following day. When he was shown Fatma's witness statement where she stated, '[n]o-one in our business works that many hours,' Hasan drew a distinction between employees in the business and family members.<sup>43</sup>
- 418 During his cross-examination, Hasan admitted that he provided the false payslips to Mr Zeyrek to assist him in applying for a home loan. He accepted that the payslips were not truthful.<sup>44</sup>

#### **Observations about Hasan's evidence**

- 419 As a witness, Hasan did not present as honest or reliable. He threw up answers to questions in cross-examination that were at odds with or not raised in his witness statement. An example of this was when he said Mr Zeyrek was paid bonuses. However, there was no evidence Mr Zeyrek was paid anything other than \$20 per hour.
- 420 A further example was in Hasan's claim that Newroz could not afford to employ Mr Zeyrek for the hours he said he worked. This stands in contrast with his statement that he had offered Mr Zeyrek full-time work.
- 421 In cross-examination, Hasan contradicted his evidence in chief on the hours he said Mr Zeyrek worked. As the exchange I have referred to in the preceding paragraph [411] revealed, Hasan was both unable and I find, unprepared, to truthfully say when Mr Zeyrek usually worked at Newroz.
- 422 Apart from being internally inconsistent, Hasan's evidence on critical points was inconsistent with the respondents' other witnesses. By way of example, Hasan's evidence that Mr Oruc worked at Newroz, was inconsistent with Kahraman's evidence that he never worked there.
- 423 His evidence was also not supported with documentary evidence. In cross-examination Hasan was forced to admit the BAS payroll reports show that Mr Zeyrek worked three times more hours than what Hasan in his witness statement, said he worked.
- 424 Similarly, Hasan was initially adamant that Huseyin did not work on Sundays. However, he was very quick to depart from this evidence when Mr Carroll made him aware this testimony was at odds with Huseyin's witness statement.

- 425 While Hasan in cross-examination said he had paid superannuation contributions on Mr Zeyrek's behalf he did not provide documentary evidence of this. Similarly, Hasan did not, either directly or through the accountants, provide documentary evidence that confirms taxation was properly remitted to the ATO on Mr Zeyrek's behalf.
- 426 The evidence Hasan gave about Mr Zeyrek's working hours did not align with information contained in the BAS payroll reports or in what Mr Zeyrek declared he had earned in his tax returns.
- 427 Hasan had difficulty accepting the contents of text exchanges and photographs which were put to him in cross-examination that showed Mr Zeyrek was working at night, Newroz provided an option to dine-in or that Mr Zeyrek was involved in closing the business.
- 428 Hasan had notice of each of the exhibits prior to the hearing and yet he was unable to provide a plausible explanation as to why Mr Zeyrek's description of these materials should not be preferred.

#### **Evidence of Huseyin Karakuyu**

- 429 The respondents called Huseyin to give evidence. He provided a five-page witness statement. He did not require the assistance of an interpreter.
- 430 Huseyin, who is Hasan's older brother, stated that he did not work at Newroz in the period 2012 to 2016 because he was in prison for drug offences. Huseyin said he was released on parole around the middle of 2016. He said it was a condition of his parole that he was required to live with his parents. Huseyin said that following his release, he worked at Newroz on a full-time basis.<sup>45</sup>
- 431 Huseyin gave evidence that in February 2017, he commenced playing soccer for BVSC. He said training was on Tuesday and Thursday nights from 7.30 pm to 9.30 pm and that games were held on Sundays. Huseyin said that while he only played in the amateur league, players were not allowed to play unless they went to training.
- 432 Huseyin said that Mr Zeyrek joined BVSC with him. He said they sometimes went to games and training together. Huseyin said he did not remember Mr Zeyrek missing any games or training sessions.
- 433 Huseyin gave evidence about the duties that he performed at Newroz. He said his duties generally included:
- (a) opening the shop;
  - (b) food preparation such as chopping tomatoes, lettuce and onions;
  - (c) cooking on the grill;
  - (d) serving customers;
  - (e) closing the shop, which involved counting the day's takings and balancing it against receipts; and
  - (f) delivering the takings to his parents' house in Stirling.
- 434 Huseyin said that only family members were allowed to deliver money to his parents' home. He said there was a very strict rule around this. Huseyin said cleaning did not form a part of his normal duties as there were cleaners who came in after the shop was closed, who did this work.
- 435 Huseyin said that from mid-2016 to early-2017, he generally worked the following hours:
- (a) Monday, 2.00 pm to 10.00 pm;
  - (b) Tuesday, 2.00 pm to 10.00 pm;
  - (c) Wednesday, 2.00 pm to 12.00 am;
  - (d) Thursday, 2.00 pm to 2.00 am;
  - (e) Friday, 2.00 pm to 2.00 am;
  - (f) Saturday, 2.00 pm to 2.00 am; and
  - (g) Sunday, 2.00 pm to 12.00 am.
- 436 Huseyin said that once he started playing for BVSC, he stopped working on Tuesday and Thursday nights. He said he only worked during the day on Tuesdays and Thursdays so he could attend training.
- 437 Huseyin said the hours he worked on Sundays depended on whether he was playing soccer and what time the game was on. He said he would open the shop and sometimes go back to work after the game. He said Mr Zeyrek did not go to work after soccer games.
- 438 Huseyin said in the middle of 2017, his working hours changed. He said he stopped closing the store on weekends. He said he finished earlier so he could spend time with his fiancée. Huseyin stated that Mehmet was then given the task of closing the store.
- 439 Huseyin said that by the middle of 2017, he usually worked:
- (a) Monday, 2.00 pm to 10.00 pm;
  - (b) Tuesday, 8.00 am to 5.00 pm;
  - (c) Wednesday, 8.00 am to 12.00 am;
  - (d) Thursday, 8.00 am to 5.00 pm;
  - (e) Friday, 8.00 am to 10.00 pm;
  - (f) Saturday, 8.00 am to 10.00 pm; and

- (g) Sunday, 8.00 am to 11.00 am or sometimes to close.
- 440 Huseyin said his hours varied. He said that because Newroz was a family business, he sometimes had to fill in for Kahraman, Hasan and other family members who could not perform their shifts.
- 441 Huseyin said the shop would sometimes stay open longer if it was busy but if it was quiet, he would close earlier. Huseyin said this happened a lot during winter because there were less people out in the city.
- 442 Huseyin said that whenever he worked at the shop, he would have a break and sit down and eat a kebab or something else. He said he would usually do this when it was not busy. He said he saw Mr Zeyrek do the same thing when he worked with him.
- 443 Regarding records, Huseyin said he did not have much to do with the paperwork in the business. However, he said that hours of work and pay were recorded in a book and that there was some kind of record kept.
- 444 Huseyin said Mr Zeyrek did not work as many hours as he or other family members did. He said Mr Zeyrek would normally only do four-hour shifts. Huseyin said Mr Zeyrek did not prepare food. He said Mr Zeyrek did not have the knife skills to do it properly or fast enough.
- 445 Huseyin said he asked Mr Zeyrek to work full-time. He said Mr Zeyrek told him he was unable to because he had two children and was receiving Centrelink benefits, which he would lose if he worked any more hours.
- 446 Huseyin said he never saw Mr Zeyrek deliver any money from Newroz to his parents' home in Stirling. He said this was because only family members were allowed to handle money.
- 447 Huseyin gave evidence about Mr Zeyrek's gambling, including evidence the two of them went to the casino together on Friday and Saturday nights. In his witness statement, Huseyin said Mr Zeyrek left his mobile phone at Newroz when he went to the casino.
- 448 Huseyin said Mr Zeyrek did this because he did not want his wife to know that he was going there. Huseyin stated Mr Zeyrek would come into the shop in his uniform and take a photo that he sent to his wife. This was so she would think he was working.
- 449 In his statement, Huseyin said he did not remember working with Mr Oruc. He said Mr Oruc came into the shop sometime in 2017 or 2018. He told Huseyin he was trying to get workers' compensation for something that happened when he still worked at Newroz.

#### **Cross-examination of Huseyin**

- 450 Huseyin was cross-examined by Ms Inkster. Ms Inkster confirmed with Huseyin that he was working over 50 hours per week and from the middle of 2017, seven days per week. After confirming he worked over 65 hours per week, Ms Inkster referred Huseyin to Fatma's witness statement in which she had declared, '[n]one [at Newroz] works that many hours.'<sup>46</sup>
- 451 In response, Huseyin said that he thought Fatma was mistaken in what she said about the number of hours people worked in the business.<sup>47</sup>
- 452 Ms Inkster asked Huseyin about Mr Zeyrek's working hours. In his answers, Huseyin suggested Mr Zeyrek sometimes worked on Tuesdays. He also said Mr Zeyrek worked during the day on Wednesdays and Fridays and that he was called in whenever he was needed.<sup>48</sup>
- 453 Ms Inkster challenged Huseyin's evidence that he had offered Mr Zeyrek full-time work but that he had refused because he did not want it to affect his Centrelink benefits. Huseyin disagreed with the suggestion he may have been mistaken about this evidence and did not accept Mr Zeyrek had asked Huseyin for full-time work.
- 454 Ms Inkster questioned Huseyin about his involvement in the BVSC with Mr Zeyrek. He accepted that team members were only required to attend at least one training session. He also conceded the rules that required team members to attend at least two training sessions before they would be allowed to play depended on the team's age group.
- 455 Ms Inkster cross-examined Huseyin about his knowledge of Mr Oruc's employment at Newroz. After first saying Mr Oruc did not work at Newroz, Huseyin conceded that he could not be sure about who was employed at Newroz when Mr Oruc said he worked there, because he was in prison.<sup>49</sup>
- 456 Ms Inkster questioned Huseyin about a text exchange he had with Mr Zeyrek, a copy of which was attached to Mr Zeyrek's first witness statement.<sup>50</sup> In the exchange that occurred on 30 March 2020, at 7.57 pm, Huseyin told Mr Zeyrek to close the shop at 9.00 pm.
- 457 Ms Inkster suggested to Huseyin the text exchange provided evidence that Mr Zeyrek was working at night at Newroz, until closing time. Huseyin disagreed. He said the text messages between the two were 'made up' so when Mr Zeyrek's wife was shown them, she would think he was working, when in fact he was somewhere else.
- 458 I have extracted below a relevant passage from the transcript which better illustrates Huseyin's explanation to Ms Inkster for his text exchanges with Mr Zeyrek:

So you've asked Şahin to close early that night?---No, I didn't ask him to close early. That was the – he would text me to explain to his wife that he was at work all the time.

You mean he shared this text exchange?---Yeah, I – we had an agreement made between me and him that if he ever messaged me at night that he's told his wife he's at work and I've accepted it that I would actually reply because we were mates.

I put it to you that you've commenced this text exchange with Şahin?---I did reply back to him.

And you didn't – at the start of this text message exchange you say:

Hi bro, how is work, bro?

Are you saying that's not commencing an exchange?---That was – that was between me and him, my agreement with him that I ask him so he can show his wife that he was actually at work while he was out and about.

That's a fabrication, isn't it?---No, it's not fabrication. That's what he would ask me to do. <sup>51</sup>

#### **Observations about Huseyin's evidence**

- 459 Huseyin's evidence on a number of points was inconsistent with the evidence given by the respondents' other witnesses. More importantly, there were significant differences between Huseyin's and Hasan's evidence on the hours Huseyin said Mr Zeyrek worked at Newroz.
- 460 In contrast to Hasan's evidence, Huseyin made no attempt to draw a distinction between family members and employees when describing the number of hours he worked. Huseyin also said Mr Zeyrek worked more hours than what Hasan said he did, including in the evenings for the dinner rush and that Mr Zeyrek would be called in whenever he was needed.<sup>52</sup>
- 461 Huseyin and Hasan were at odds in their evidence regarding Mr Zeyrek being offered full-time work. While Hasan claimed Mr Zeyrek asked for full-time work, he said Mr Zeyrek did not want to be put on the books and insisted that he only be paid in cash. Huseyin, on the other hand, said Mr Zeyrek did not want to work full-time hours because it would affect his Centrelink benefits.
- 462 When cross-examined about the records he gave to Mr Ravenscroft and Inspector Higgs during their inspection of the Newroz premises on 5 August 2021, Huseyin (like Kahraman) was quick to state he knew nothing about the documents he provided.<sup>53</sup>
- 463 However, the matter I have the greatest difficulty in accepting as true, is the explanation Huseyin provided for the text messages and photographs he was shown in cross-examination. If accepted, Huseyin's explanation was as Ms Inkster suggested, 'quite an extensive role-play'.<sup>54</sup>
- 464 During his evidence, Huseyin said that he and Mr Zeyrek were close 'like brothers'.<sup>55</sup> Inherent in his evidence was a suggestion that in building this bond, Huseyin was prepared to engage in dishonesty for Mr Zeyrek.
- 465 The alternative and more plausible view is that the text messages and photographs which Huseyin was shown provide evidence that Mr Zeyrek was entrusted with greater responsibility within the business, which is why he was working at night and seeking instruction from Huseyin on whether he could close the shop.
- 466 In view of the observations I have made about Huseyin's evidence, I am not prepared to accept that Huseyin gave credible and reliable evidence to the Court.

#### **Evidence of Mehmet Yasar**

- 467 The respondent called Mehmet Yasar (**Mr Yasar**) from BVSC to give evidence about when Mr Zeyrek played soccer and attended training. Mr Yasar was called to show that there were times Mr Zeyrek was either playing soccer or attending training when he claimed he was at work.
- 468 Mr Yasar confirmed that Mr Zeyrek was one of his teammates at BVSC and that they played together in 2016, 2017 and 2018.
- 469 Mr Yasar said the normal training times were from 7.00 pm to 9.00 pm on Tuesdays and Thursdays. He said that all team members were required to attend at least one of those training sessions and if a team member did not train, they started their next game on the bench.
- 470 Mr Yasar said Mr Zeyrek was always at training and he started on the field for most matches. Whilst he said he was sure Mr Zeyrek did not attend every training session, he could not recall any occasions Mr Zeyrek missed both sessions in a week.
- 471 Mr Yasar said the team he was in with Mr Zeyrek played their fixtures on Sundays. He said kick-off times varied from 11.00 am to 3.00 pm. He said games ran for about two hours from beginning to end.
- 472 Mr Yasar stated that at the end of a game, team members would typically sit together and have a drink afterwards. He said Mr Zeyrek was a regular at these end-of-game gatherings. In his statement, Mr Yasar said he recalled occasions when Mr Zeyrek stayed behind to watch a game that followed.
- 473 Mr Yasar said BVSC home games were played in Belmont. He said away games were played at a variety of locations, including Mandurah, Baldivis, Wembley Downs, Kwinana, North Perth, Kingsley, Spearwood, Scarborough or Beechboro.

#### **Cross-examination of Mehmet Yasar**

- 474 Ms Inkster cross-examined Mr Yasar about his evidence on the number of training sessions players were required to attend. Mr Yasar said players had to attend training at least once to secure a priority selection. However, he said the application of this rule depended on the number of players who were available to play in the Sunday game.<sup>56</sup>
- 475 Mr Yasar said that if 16 players turned up for training on Tuesdays and Thursdays, they were given priority selection. If, however, there was only 10, Mr Yasar said you did not have to have attended training to be selected for a Sunday game.<sup>57</sup>
- 476 Ms Inkster asked Mr Yasar if it was his recollection that Mr Zeyrek regularly attended one training session. Mr Yasar agreed with this. When questioned about whether he could recall the number of times Mr Zeyrek missed both training sessions, Mr Yasar responded saying:

I never said... he was attending both sessions.<sup>58</sup>

- 477 When pressed about whether Mr Zeyrek regularly attended post-match debriefs, Mr Yasar accepted that he was not always there. In further questioning, Mr Yasar also confirmed players did not have to attend post-match debriefs.<sup>59</sup>

**Evidence of Nilufer Karakuyu**

- 478 The respondent called Nilufer to give evidence. Nilufer provided a four-page witness statement. She did not require assistance from an interpreter.
- 479 Nilufer said that from the year 2000, she worked at Newroz whenever she was needed. She said she was sometimes called in to help manage a rush or to work on weekends and public holidays.
- 480 Nilufer gave evidence that she married in 2013; gave birth to her first child in 2014 and had her second in November 2017. Prior to having her children, Nilufer said she worked around 10 days a month at Newroz. Nilufer said that immediately following the arrival of her children, she was not able to work in the shop as much, but with help from her mother, Döne, and a few days childcare each week, she was able to work more.
- 481 Nilufer described Newroz as a takeaway food store. She said Newroz initially, only sold kebabs but over time the range of foods sold was expanded. Nilufer said that while there were tables and chairs in the shop, the business did not provide table service or provide cutlery and crockery. She said that while customers could eat their meals at one of the tables in the shop, Newroz primarily sold fast food to be consumed elsewhere.
- 482 In her witness statement Nilufer described the work she performed at Newroz. She said whoever worked at the counter took food orders and payments, wrapped kebabs, chopped ingredients, cleaned counters and washed dishes. She said chopping tomatoes and lettuce was done in the morning before the shop became busy.
- 483 Nilufer said two parts of the day were busy: lunchtime and from around 5.00 pm when customers bought their evening meal. She said the workforce at Newroz was mostly made up of family members. Nilufer said there were only a few employees who were not family members.
- 484 Nilufer said the opening hours for Newroz varied. She said there was a wide span of hours and no one worked the whole day. She stated there was a rule that a family member had to be present in the shop at closing time to collect the day's takings and to lock up. Nilufer said a cleaner came in after the shop was closed to make sure it was clean and ready for the following day's trade. She said the arrangement involving a cleaner, who arrived after the shop was closed, commenced around 2013.
- 485 Nilufer said Kahraman or another family member, paid staff in cash each week. She said everyone was paid a flat rate for each hour they worked. She said Kahraman's approach to paying employees was unusual. Nilufer said Kahraman paid each person for their hours worked and paid their tax afterwards. She said the amount they received was in effect 'net-of-tax'.
- 486 Nilufer said Kahraman did not calculate a gross amount to be paid in wages and then deduct tax. She said because of this practice, employees were paid more than what they received in the hand. Nilufer said as far as she was aware, this practice applied up until 2012, before Newroz was taken over by her younger brother, Hasan.
- 487 Nilufer said she met Mr Zeyrek at Newroz. She said he started working there in or around 2014 or 2015. Nilufer said that at or around this time, she sometimes saw Mr Zeyrek at the Mulberry Tree Day Care Centre in Osborne Park (**Mulberry Tree**) both in the morning and in the evening.
- 488 Nilufer said she dropped her children off at the Mulberry Tree on Wednesdays and Fridays and sometimes on Mondays. She said she saw Mr Zeyrek drop his children off at about the same time as she dropped her children off and that she would see him pick his children up at around 6.00 pm.
- 489 Nilufer said she only saw Mr Zeyrek at the shop on weekday mornings. She said she could not recall seeing him at work on a weekend. Nilufer said it was common for Mr Zeyrek to go into the shop even when he did not have to be there for work. She said he sometimes took photos and left his phone at the shop before leaving again.
- 490 Nilufer stated that Mr Zeyrek was receiving assistance from the Red Cross, whose office was nearby. She said Red Cross employees bought their lunch at Newroz. She said for this reason, Mr Zeyrek generally avoided working at lunch times. Nilufer said she remembered Mr Zeyrek running into the kitchen on one occasion to hide from Red Cross staff because she understood that he had not disclosed that he had obtained employment.

**Cross-examination of Nilufer**

- 491 Nilufer was cross-examined by Mr Carroll. In cross-examination Nilufer confirmed that in the period 2016 and 2018, Newroz was open on public holidays except Christmas Day.
- 492 Mr Carroll questioned Nilufer about her evidence that she worked 10 days per month. She conceded that she only worked when the shop needed staff and when she could find someone to look after her children. Nilufer confirmed she did not close the shop in the period 2016 to 2018. She also admitted that she did not often work on weekends.
- 493 Mr Carroll asked Nilufer if it was possible an employee who was not a member of the Karakuyu family worked in the shop until closing time. Nilufer accepted this may have occurred.
- 494 Under cross-examination, Nilufer conceded that she was unable to comment on the cleaning duties Ali Ihsan performed because she did not work at night. Nilufer also accepted that any knowledge she had about the work he performed was because someone else had told her.<sup>60</sup>
- 495 When Mr Carroll asked Nilufer about her evidence that a timesheet was used to record working hours. Nilufer said she believed this did not really start until Hasan took over the business. She said this was because her father (Kahraman) was not good with paperwork.<sup>61</sup>
- 496 Under cross-examination, Nilufer accepted that she was not involved in keeping timesheets. When Mr Carroll suggested that between 2016 and 2018, employees did not fill out timesheets, Nilufer said that as far as she knew, employee timesheets were misplaced when the shop was renovated.<sup>62</sup>

- 497 Mr Carroll questioned Nilufer on when employees were paid in cash. Nilufer stated that the practice of paying employees a net amount in cash happened prior to 2012 before Hasan became the manager. Nilufer said she was unable to provide any evidence to explain whether this practice continued between 2016 and 2018.<sup>63</sup>
- 498 Mr Carroll challenged Nilufer's evidence that she saw Mr Zeyrek collecting his children from the Mulberry Tree in the period 2016 to 2018. While Nilufer was adamant she saw Mr Zeyrek at the Mulberry Tree, she admitted not being able to recall if it was between 2016 to 2018. She also conceded that it may have been outside this period.<sup>64</sup>
- 499 Nilufer was questioned about her evidence that Mr Zeyrek avoided working during the lunch rush because he wanted to avoid being seen by staff from the Red Cross. In response Nilufer said she had only seen this happen once. When Mr Carroll suggested her witness statement indicated this was a more common occurrence, Nilufer answered by saying that what was contained in her witness statement was a mistake.<sup>65</sup>

#### **Observations about Nilufer's evidence**

- 500 In the main, Nilufer's evidence was of more assistance to the claimant's case than the respondents. For example, Nilufer confirmed that it was possible employees other than family members, remained until closing time.<sup>66</sup> She confirmed, contrary to Hasan's evidence, that washing dishes and cleaning counters was work that staff performed.
- 501 Her testimony regarding the length and duration of staff working hours, was at odds with the evidence of Hasan and Huseyin regarding the hours they said they worked. Nilufer stated:
- Our opening hours varied, but it was a wide span, so no-one worked for the whole of any day.<sup>67</sup>
- 502 It was evident from Nilufer's evidence on the hours she worked after having children, that she had little direct exposure to what was happening at Newroz in the period 2016 to 2018. She also accepted that she did not work at night.
- 503 It also became clear during Nilufer's cross-examination that the only way she could attest to much of what was contained in her witness statement was because someone else had told her what to say. An example of this was her evidence regarding the loss of the time and wages records after admitting that she was not involved in keeping timesheets.<sup>68</sup>
- 504 Nilufer's attempt to discredit Mr Zeyrek by stating she saw him collecting his children from the Mulberry Tree fell short after she accepted that she was unable to state when she saw him there. Her concession that she was mistaken about her evidence that Mr Zeyrek avoided working at lunch times so he would not be seen by staff from the Red Cross, was equally ineffectual.
- 505 Noting these observations, it is my view that Nilufer's evidence is of limited probative value. Her answers in cross-examination raised doubts about the reliability of her evidence, that are similar to those I have about the evidence her male siblings have given.

#### **Fatma's Evidence**

- 506 The respondent called Fatma to give evidence. She provided a three-page witness statement. Fatma did not require the assistance of an interpreter to provide her evidence.
- 507 Fatma is Kahraman's second eldest daughter. She is the bookkeeper for Newroz. Fatma said she started working on a full-time basis at Newroz when she finished secondary school at the end of 2012. Fatma said in those days, she 'pretty much [managed] the shop.'<sup>69</sup>
- 508 Fatma said that in 2007 she bought her own kebab shop in partnership with her sister, Nilufer. She said they worked together in their shop until they sold the business in 2009. Fatma said that while she was running her store, she provided bookkeeping services for both businesses.
- 509 Following the sale of the business she operated with Nilufer, Fatma said she continued to manage the books for Newroz. Fatma said she still performs this work and that from time to time, she also works at Newroz, but to only fill gaps.
- 510 Fatma stated that her brother, Hasan took over Newroz when he graduated from secondary school in or around 2011 or 2012.
- 511 Fatma gave evidence about the working hours at Newroz. She said one person typically opens the shop at around 7.30 am or 8.00 am in the morning, at which time the machines are turned on and preparations are made for the day's trading.
- 512 Fatma said that at around 9.30 am, another person usually comes in to deal with customers while the other stays in the kitchen to chop vegetables and other salad ingredients. Fatma said mornings are quiet, so the business needs fewer people in the shop. She said that around 11.40 am the lunch rush begins and continues until about 2.00 pm. During this period, three staff are required.
- 513 She said that between 2.00 pm and 5.00 pm the shop gets quiet and only two people are needed. Fatma said that from 5.00 pm until close, there is a dinner rush. She said the business usually has three people working at this time.
- 514 Fatma said a family member always takes responsibility for closing the shop. She said closing involves collecting the day's takings and delivering them to the family home. Fatma said there is a strict rule that only family members are allowed to close the shop. In her witness statement she said that because Mr Zeyrek was not family, he was not allowed to close. Fatma said that after the store closed, a cleaner arrived to prepare the shop for the following day.
- 515 Fatma said each person's working hours during the week are consistent and almost fixed. She said a record is made of the number of hours each person works and is paid. Fatma said that until recently, all payments were made weekly in cash.
- 516 Fatma said Newroz paid each person a flat amount and tax was not deducted from the payment. She said this was because the business paid any additional amounts that had to be withheld and remitted to the ATO. Fatma said the amount each person was paid in cash was, in effect, a net amount after tax.
- 517 Fatma said she first met Mr Zeyrek in around 2013, when he came to work at the shop. She said he worked 'much the same pattern of hours from the beginning of his employment until the end.'<sup>70</sup> She said he only worked on Mondays, Wednesdays and

Fridays and he did not often work full days or on weekends.

- 518 Fatma said she asked Mr Zeyrek to work on weekends but he refused. She also did not accept Mr Zeyrek worked a minimum of 64.5 hours per week. In her witness statement, Fatma stated:

No-one in our business worked that many hours.<sup>71</sup>

#### **Cross-examination of Fatma Kara**

- 519 Fatma was cross-examined by Ms Inkster. After confirming that she did not regularly work in the shop and only went in to help out when needed, Fatma stated that between 2016 and 2018 she worked every Saturday in the shop from 9.00 am to 5.00 pm.
- 520 When Ms Inkster suggested her answer about the frequency of her work on Saturdays was inconsistent with the evidence in her witness statement that she ‘help[s] out with counter duties [from time to time] but only to fill gaps’, Fatma disagreed.<sup>72</sup>
- 521 In response to questioning from Ms Inkster, Fatma denied that Newroz did not keep time and wages records until the renovation in 2017. When Ms Inkster suggested that time and wages records were not kept after the renovation, Fatma said that to her knowledge, these records were kept.<sup>73</sup>
- 522 When asked about the number of hours family members worked in contrast to employees who were not family members, Fatma sought to draw the same distinction that Hasan drew in his evidence. This was despite her evidence the ‘no-one’ worked as many as 64.5 hours per week.<sup>74</sup>
- 523 When challenged about her evidence that ‘[n]o one but family is allowed to close the shop’ and that family members performed all the tasks involved in closing the store, Fatma admitted that she did not work at night. She said her knowledge of what happened at closing time is because of what her brothers told her and the records she receives as the bookkeeper.<sup>75</sup>
- 524 When asked about where the ‘bookkeeping records’ are kept, Fatma responded by saying they were ‘[w]ith the accountant.’<sup>76</sup> Following this, Ms Inkster showed the 2021 handwritten records to Fatma.
- 525 After Fatma confirmed that she was familiar with the document. Fatma agreed with Ms Inkster that she obtained her information about what was happening at Newroz from documents like the 2021 handwritten records.<sup>77</sup>
- 526 Ms Inkster confirmed with Fatma that the 2021 handwritten records showed that Mr Zeyrek had worked four hours per day, Monday to Friday, in January 2021. However, when Ms Inkster suggested the 2021 handwritten records were inaccurate because Mr Zeyrek no longer worked there at this time, Fatma disagreed.<sup>78</sup>

#### **Observations about Fatma’s evidence.**

- 527 I am unable to accept that Fatma gave reliable evidence in this matter. It was misleading for her to suggest the regular work she said she performed all day on Saturdays was merely filling gaps. Her evidence was also inconsistent with Hasan’s.
- 528 Although not mentioned in his witness statement, Hasan, in cross-examination, suggested the reason Newroz employees were not paid by EFT was a matter of employee choice. In contrast, Fatma said Newroz had always paid its employees in cash, which I understood her to mean that EFT was not utilised at any point.<sup>79</sup>
- 529 As the bookkeeper, her level of knowledge about the records of the business was not to a standard that would reasonably be expected of a person in this role. There was no better illustration of this than Fatma’s evidence regarding the 2021 handwritten records.
- 530 While her evidence regarding the pattern of hours she says Mr Zeyrek worked from the beginning to the end of his employment was not only inconsistent with the 2021 handwritten notes, Fatma was adamant they showed Mr Zeyrek was still employed at Newroz when it was already conceded he no longer worked there.
- 531 In addition, Fatma’s statement that Mr Zeyrek only worked Mondays, Wednesdays and Fridays was inconsistent with Huseyin’s evidence, who said Mr Zeyrek ‘was pretty much on call’.<sup>80</sup>

#### **Evidence of Umut Ozkalfa**

- 532 The respondent called Umut to give evidence. He provided a two-page witness statement. Umut gave his evidence without assistance from an interpreter.
- 533 Umut, who is 27 years old, said he arrived in Australia in 2015 on a student visa. He is currently studying a Bachelor of Psychology at Curtin University and he works at Newroz in Scarborough.
- 534 Umut is of Kurdish descent and travelled to Australia from Türkiye. He speaks Turkish, Kurdish and English. Although not related to the Karakuyu family, he said he had become close to them since arriving in Australia and from working at Newroz. Umut said he lives with Mehmet. He moved in with him about one and a half years ago.
- 535 Umut said he came to study English at the Cambridge International College in East Perth. He said he often went to Newroz for lunch or dinner. This led to him becoming friends with Hasan, Huseyin, Ali Ihsan and Mehmet.
- 536 Umut said Hasan offered him a job at Newroz towards the end of 2016. He said around this time he was studying at university, so he only worked on a casual basis. He said Hasan, Mehmet or Ali Ihsan asked him to fill in if someone was sick or if they needed help during busy periods, like the dinner rush.
- 537 Umut said he did not have a clear memory of the dates and times he worked in the period 2016 to 2018, only that he did not have regular hours. Umut said this changed from the middle of 2018 when he started working more frequently.
- 538 Umut described himself as ‘an all-rounder’. He said he would take orders, wrap kebabs, arrange fries (hot chips), wash dishes and cut meat for kebabs. He said he never closed the shop. He said this was because he was not needed after the dinner rush. He said he never counted the day’s takings or took money to the Karakuyu family home.

- 539 Umut said Hasan paid him in cash. He also said there was a shift book or ‘something like that’ to record his working hours.<sup>81</sup> He said he never worked with Mr Zeyrek. Umut also said he did not often see Mr Zeyrek when he went to Newroz for a meal.
- 540 Umut said he became friends with Mr Zeyrek after he started working at Newroz. Umut said he went to the casino a few times a month with Mr Zeyrek, Mehmet and Huseyin.

#### **Cross-examination of Umut Ozkalfa**

- 541 Umut was briefly cross-examined by Mr Carroll. Under cross-examination Umut said he did not recall working with Mr Zeyrek. He also said he could not recall Mr Zeyrek paying his wages in cash.
- 542 Mr Carroll asked Umut about his working hours after Mr Zeyrek left Newroz in late 2020. Umut agreed that he worked on Mondays, Wednesdays and Fridays from 9.30 am until 12.30 pm.
- 543 When questioned further about his working hours, Umut said he was ‘100% sure’ he did not work five days per week.<sup>82</sup>

#### **Observations about Umut Ozkalfa’s evidence**

- 544 Umut’s evidence-in-chief that he never worked with Mr Zeyrek is quite different to the answer he gave under cross-examination; that he could not recall working with Mr Zeyrek.
- 545 While this inconsistency might be viewed as splitting hairs, the balance of the answers Umut gave during his cross-examination and which he was certain about, were more damaging to the respondents’ case.
- 546 Umut’s answers to the questions Mr Carroll asked him were inconsistent with the evidence Hasan gave about the entries in 2019 - 2020 wage records. They were also inconsistent with the documentary evidence the respondents disclosed in response to the Notices to Produce, which included the 2021 handwritten records.
- 547 It was Hasan’s evidence that some of hours recorded for Mr Zeyrek in the 2019 - 2021 wage records after he had resigned were entered for Umut.<sup>83</sup> If I accept Hasan’s explanation for the entries in the 2019 - 2021 wage records, Umut worked more hours on more days than what he said he did.
- 548 In addition, Umut’s evidence about the hours he worked at Newroz is not consistent with the BAS payroll reports the accountants disclosed to the claimant and to Mr Ravenscroft.
- 549 Although Umut said he worked at Newroz from the later part of 2016, his name does not appear in the BAS payroll reports during the financial years prior to 1 July 2020.
- 550 For the financial year 1 July 2020 - 30 June 2021 and the period 1 July 2021 - 22 August 2021 the entries in the BAS payroll reports for the wages Umut was supposedly paid, do not align with the 2021 handwritten records.
- 551 Noting the inconsistencies between Umut’s evidence and the documentary material I have referred to, the only possible conclusions I can reach about his evidence are either:

- (a) that Umut did not work at Newroz when he says he did; or
- (b) his hours of work were not recorded in a shift book in the way he says they were.

- 552 Either way, I regard the inconsistencies I have identified as significant. The evidence in Umut’s witness statement on these matters was either mistaken or untrue. For this reason, I am not prepared to accept the evidence Umut has provided in this matter is reliable. To the extent Umut’s evidence conflicts with Mr Zeyrek’s, I prefer the evidence from Mr Zeyrek.

#### **Evidence of Mehmet Mavi**

- 553 The respondent called Kahraman’s nephew, Mehmet to give evidence. He provided a two and half page witness statement. Mehmet gave his evidence with the assistance of an interpreter.
- 554 Mehmet, who is 32 years of age, said he came to Australia from Türkiye in 2012. He said from the date of his arrival until 2021, he lived in the Karakuyu family home. Mehmet now works at the Newroz store in Scarborough. Mehmet said he started work as a casual at Newroz at the end of 2013. He said he began working full-time in the business in 2020.
- 555 Mehmet described the duties he performed at Newroz. He said he chopped tomatoes, lettuce and onions, cooked on the grill, served customers, and closed the shop, which included counting the day’s takings and delivering the money to Kahraman. Mehmet said that only family members were allowed to perform this task.
- 556 Mehmet said that until he started working full-time in around 2020, he generally worked around 20 hours per week. He said he usually worked during the day but from time to time, he went in to close the shop. He said he also filled in for other family members when they could not perform their shifts. Mehmet said Hasan paid him in cash and that his hours of work were recorded in a paper record.
- 557 Mehmet said that he first met Mr Zeyrek in 2013 when he started working at Newroz. He said he usually saw Mr Zeyrek when he worked during the day on Mondays, Wednesdays and Fridays. He also stated that Mr Zeyrek never closed the shop or drove him to the Karakuyu family home. Mehmet said he never saw Mr Zeyrek dropping money off while he lived there.
- 558 Like Umut, Mehmet said he attended the casino together with Mr Zeyrek. He said he did this on the weekend, or sometimes on Wednesdays between 8.00 pm to 10.00 pm. He said he would stay with Mr Zeyrek and others for a few hours, depending on how the night went.
- 559 Mehmet said he saw Mr Zeyrek go into Newroz and take photos of himself on his phone even though he was not working. He said Mr Zeyrek sent these photos to his wife. He also said Mr Zeyrek left his phone at the shop, while he went out somewhere else. Mehmet said Mr Zeyrek did this because he did not want his wife to know that he was out gambling.
- 560 Mehmet, like Huseyin, said he did not remember working with Mr Oruc.

### Cross-examination of Mehmet Mavi

- 561 Mehmet was cross-examined by Mr Carroll. Mehmet accepted that one of the jobs he was required to perform at closing was counting the takings. When it was suggested that Mr Zeyrek performed this task when he was not available to close the shop, Mehmet disagreed.<sup>84</sup>
- 562 Mehmet did not agree when Mr Carroll suggested there were occasions when he closed the shop together with Mr Zeyrek. He also did not accept that Mr Zeyrek gave him lifts home after work.<sup>85</sup>
- 563 When Mr Carroll showed Mehmet a photograph of the pair at the shop in the early hours of 29 September 2019, Mehmet denied they were at work. Rather, he responded by saying Mr Zeyrek took the photo so he could tell his wife he was working when he was not really at work.<sup>86</sup>
- 564 Mr Carroll challenged Mehmet's evidence that he used to attend the casino with Mr Zeyrek on Wednesday nights and on weekends between 8.00 pm and 10.00 pm. In response, Mehmet maintained that he attended the casino with Mr Zeyrek at these times.<sup>87</sup>
- 565 Mr Carroll asked Mehmet if he knew Mr Oruc. In reply, Mehmet twice said that he did not know him. Following this, Mr Carroll showed Mehmet a text exchange that was attached to Mr Oruc's witness statement between himself and Mr Oruc on 7 December 2013.<sup>88</sup>
- 566 When Mr Carroll suggested the text exchange showed Mehmet had asked Mr Oruc to bring him a work shirt to Newroz, Mehmet said he could not recall the text exchange.<sup>89</sup>

### Observations about Mehmet Mavi's evidence.

- 567 In his witness statement Mehmet said he did not remember working with Mr Oruc. This is quite different to what he said in cross-examination; that he did not know Mr Oruc.
- 568 The difficulty I have with this part of Mehmet's evidence is that it is contradicted by the text exchange Mr Carroll showed him, which Mehmet had notice of before the hearing. This inconsistency in Mehmet's evidence is not insignificant particularly when Mr Oruc was not challenged in cross-examination about the authenticity of this text exchange or its content.
- 569 In my view, this inconsistency was sufficient to cast doubt on all of Mehmet's evidence. In the absence of an explanation as to why Mehmet was having a text exchange with someone he claims to have not known, it is my view that Mehmet's evidence if not dishonest, was at the very least, unreliable.

### Observations about the Evidence Overall

- 570 To the extent there was a conflict between the evidence from the respondents' witnesses and the claimant's on critical matters, I have preferred the evidence from the claimant and the witnesses she called to give evidence.
- 571 Contrary to the rule in *Browne v Dunn* (1893) 6 R 67, which requires a party in cross-examination to put to their opponent's witnesses, the nature of the case upon which they rely to contradict that witness's evidence,<sup>90</sup> Mr Zeyrek, Ms Azbay and Mr Oruc were not challenged on key parts of their evidence.
- 572 An example of this, was with the respondents' failure to squarely put the proposition in cross-examination to Mr Oruc that he never worked for Newroz. Significant parts of the claimant's evidence were similarly not challenged in this way and Mr Ravenscroft's witness statement was accepted into evidence by consent.
- 573 Also significant was the respondents' failure to call Ali Ihsan, Mr Patel or Mr Lyra to give evidence, and to which the rule in *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298 (*Jones v Dunkel*) applies.
- 574 In *Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11; (2011) 243 CLR 361, Heydon, Crennan and Bell JJ described the rule in *Jones v Dunkel* in the following terms (at [63] - [64]):

The rule in *Jones v Dunkel* is that the unexplained failure by a party to call a witness may, in appropriate circumstances, support an inference that the uncalled evidence would not have assisted the party's case. That is particularly so where it is the party which is the uncalled witness. The failure to call the witness may also permit the court to draw, with greater confidence, any inference unfavourable to the party that failed to call the witness if that uncalled witness appears to be in a position to cast light on whether the inference should be drawn.

The rule in *Jones v Dunkel* permits an inference not that evidence, not called by a party, would have been adverse to the party but that it would not have assisted the case. (footnotes omitted)

- 575 Two examples of the respondents' failure to call witnesses who were material to the proceedings, arose in relation to:
- i. the evidence Mr Zeyrek gave regarding the preparation of his tax returns; and
  - ii. the contents of the BAS payroll reports the respondents disclosed to the claimant and to Mr Ravenscroft.
- 576 A further example arose in relation to the respondents' failure to call Ali Ihsan who Mr Zeyrek and Mr Oruc worked with at night and who the respondents said they engaged to perform the cleaning duties after Newroz closed.

### Mr Zeyrek's Tax returns

- 577 There is no dispute the tax returns Mr Zeyrek submitted to the ATO during the claim period were inaccurate. Mr Zeyrek acknowledged he signed tax declarations that understated his working hours and the income he received. I also note the tax returns contained deductions for work-related expenses including uniforms, shoes and laundry.
- 578 The claimant attributed the blame for these inaccuracies to the Newroz accountants, who Mr Zeyrek said Kahraman sent him to see. Mr Zeyrek stated that when he met with Mr Lyra to prepare his tax returns, Mr Lyra would provide him with a prepared tax return that recorded his personal details, the name of the business, his annual salary and the tax that was withheld.

579 The difficulty the explanation Mr Zeyrek provided for his inaccurate tax returns presented for the respondents, is that it was not contradicted. As Mr Carroll submitted and I accept, Mr Zeyrek was totally reliant upon the accountants to prepare and submit his tax returns and yet neither Mr Lyra nor Mr Patel were called to give evidence to contradict this testimony.

580 Mr Zeyrek said he used Mr Lyra to prepare his tax returns because he had access to Newroz business records to obtain information about his annual salary and the amount of tax that was withheld. It is unsurprising the amounts for income received and tax deducted that were declared in Mr Zeyrek's tax returns were reflected in the BAS payroll reports, the Newroz accountants prepared.

581 The failure by the respondents to call their accountants to give evidence leaves open a *Jones v Dunkel* inference that the evidence Mr Lyra and Mr Patel would have given about these matters would not have assisted the respondents' case.

582 The respondents did not give a reason as to why the Newroz accountants were not called to give evidence. In the circumstances it is appropriate that such an inference be drawn.

#### **The BAS Payroll Reports**

583 It is my view the BAS payroll reports are inaccurate in several ways. Firstly, these documents other than what is declared in Mr Zeyrek's tax returns, do not align with the other employment documents the respondents produced.

584 The BAS payroll reports do not show the names of everyone who worked in the shop and they record Kahraman and Döne as employees when it is the respondents' case they were not actively involved in the business when the accountants prepared these documents.

585 Furthermore, there are periods in the BAS payroll reports where the staff members named in these records, including Mr Zeyrek, are recorded as having received no income when there was evidence from the respondents they had worked at the relevant time. By way of example, Mr Zeyrek was recorded as not receiving any income in quarters three and four of the 2018 - 2019 financial year when there was evidence he had worked at Newroz at this time.<sup>91</sup>

586 Having set out my observations on the evidence overall I will now turn to consider whether the excuse the respondents provided for failing to keep employment records to escape the imposition of the reverse onus is reasonable.

#### **The Respondent's excuse for not providing employment records**

587 The excuse the respondents provided as contemplated under s 83EB(2) of the IR Act for not providing employment records was in two parts. The first was that the responsibility to keep employment records was delegated to Hasan.

588 The second was in the evidence Hasan and Fatma provided. Both said Newroz kept employment records, but they were lost during the renovation in 2017.

#### **Delegation excuse**

589 Regarding the first aspect, it is not disputed that Döne was a silent partner and left the operations of the business to other family members. Similarly, Kahraman says that from 2012 or 2013 he had handed control of the business to Hasan.

590 The respondents submitted that when Mr Zeyrek was employed, Kahraman and Döne were not actively involved in the day-to-day running of the business, in the way a proprietor would normally be. It was contended that because there were other people in charge of the business and the employment records were held either by Hasan or the Newroz accountants, the Court could not be satisfied the respondents had failed to produce employment records they no longer had access to.

591 In reply, the claimant contended that the respondents' submission on this issue should be rejected because they had conceded they employed Mr Zeyrek and there was no evidence before the Court to show they had no control over or were unable to access employment or other records. It was also noted the respondents, despite the change in ownership, are still directors of the company that now runs Newroz.

592 The difficulty I have in accepting that delegation provides a reasonable excuse, is that it ignores that business partners have a responsibility to ensure they take reasonable steps to keep and maintain employment records. I also doubt, given the evidence on his continuing involvement in the business, that Kahraman had relinquished control to the extent claimed.

593 While it may be said that Döne played no real active part in the management of Newroz, the same cannot be said of Kahraman. The evidence of Mr Ravenscroft's and Inspector Higgs's interactions with Kahraman on 23 July and 5 August 2021 show that he retained authority within the business.

594 I also note Kahraman told Mr Ravenscroft and Inspector Higgs during their visit on 5 August 2021 that he owned Newroz. He also told Mr Ravenscroft who to direct their inquiries to regarding the production of records. When questioned about whether Mr Oruc worked at Newroz, Kahraman prefaced his answer by describing himself as the 'owner of [the business]'.<sup>92</sup>

595 Throughout the hearing the respondents were at pains to suggest that Newroz is a family business, in which each of the family members were involved. For this reason, the suggestion that Kahraman was unable to secure access to or had little control over the records of the business is quite disingenuous.

596 Having admitted the respondents employed Mr Zeyrek, it necessarily follows they cannot escape the liability to ensure they took reasonable steps to comply with any duties, responsibilities and obligations that attached to this employment relationship.

#### **Lost records excuse**

597 In relation to the second part, while the loss of documents may in some situations provide a reason as to why employment records cannot be provided, it does not in the present case, explain why the respondents did not keep or maintain these records after the renovation.

598 In addition, Mr Heathcote in his closing submissions, said that even if the respondents had retained the employee records they claimed to have lost during the renovation, it is likely they would have been imperfect.

- 599 It is critical, for the purpose of ensuring, compliance with industrial awards and other workplace obligations, particularly with respect to vulnerable workers without strong language skills, that employers keep and securely retain accurate employee records.<sup>93</sup>
- 600 In view of the importance of this obligation, the reason provided by an employer who is unable to produce such records cannot be considered in a vacuum. In assessing whether the excuse provided by the respondents is reasonable, it is entirely appropriate to have regard to the state of the employee records the respondents did provide.
- 601 On this, the records the respondents produced are not only inaccurate and incomplete, but they are at odds with the BAS payroll records.
- 602 In my assessment of the ‘lost records excuse’, I have had regard to Hasan and Fatma’s credibility as witnesses. As I have concluded they presented as unreliable witnesses, I doubt the excuse they provided for failing to keep employee records can be soundly relied on.
- 603 It is reasonable to expect that Hasan, in his role as the Newroz manager, and Fatma in her role as the bookkeeper, should have ensured accurate employee records were kept and properly maintained. The evidence establishes that neither discharged this task to a reasonable standard.
- 604 In the circumstances, I am not prepared to find the excuse the respondents provided for failing to keep employee records through these witnesses was reasonable. Accordingly, I therefore find that s 83EB(1) is engaged and the reverse onus of proof applies

#### **Which claim period applies?**

- 605 To decide the issue of the claim period that applies under s 83A of the IR Act, I am required to make a finding on whether it appears the respondents, when they were required to produce employment and other records in response to the Notices to Produce, failed to produce a record relevant to the proceedings.
- 606 On this issue, the claimant submitted that the Notices to Produce required the respondents to produce, by 26 April 2022, employment records for Mr Zeyrek including:
- i. Mr Zeyrek’s signed tax file number declaration form;
  - ii. PAYG payment summaries for the period 2013 to 2019; and
  - iii. documents relating to the change in ownership.
- 607 The claimant submitted the respondents failed to provide copies of the employment records sought by 26 April 2022. The claimant contended that by reason of the respondents’ failure to provide these documents, I should find that s 83A(2)(b) of the IR Act applies to the proceedings and the primary claim period applies.<sup>94</sup>
- 608 The claimant submitted the evidential basis for this finding lies in the admissions the respondents made in the Statement of Agreed Facts and the evidence contained in the claimant’s first witness statement, which in the main was unchallenged.
- 609 The respondents opposed the claim period being extended under s 83A of the IR Act with submissions that were broadly consistent with their arguments against the application of the reverse onus in this matter.<sup>95</sup>
- 610 The respondents denied that a finding could be made that they failed to produce employment or other records relevant to the proceedings, thereby enlivening ss 83A(2)(b)(i) and 102(1)(a) of the IR Act because neither Kahraman or Döne were in possession of or had control of the documents the claimant sought with the Notices to Produce.

#### **Primary claim period applies**

- 611 I accept that in the context of the current proceedings, a copy of a signed tax file number declaration form would have likely provided evidence of when Mr Zeyrek commenced employment with the respondents. The PAYG statements were similarly relevant because such documents typically provide evidence on wages paid and the amount of tax withheld.
- 612 For the same reasons, as set out in the preceding paragraphs [589] - [604] I rejected the excuses the respondents gave for failing to keep and maintain employment records, I similarly do not accept that the respondents’ level of involvement in the business provides an excuse for their failure to provide the records the claimant sought pursuant to their Notices to Produce.
- 613 Accordingly, I find that the respondents failed to produce records that were relevant to the proceedings, which they were required to provide pursuant to the Notices to Produce. As a result of this finding, I have concluded the present case is one to which s 83A(2)(b)(i) of the IR Act applies and that it is appropriate the claim period be extended.
- 614 I therefore find that primary claim period applies, which runs from 27 April 2016 to 31 December 2018 and for which there were some 140 weekly pay periods (**claim period**).

#### **Application of the Award**

- 615 When determining if the respondents engaged in the alleged award contraventions, I am first required to make a finding on whether the Award applied during the claim period. In relation to this, s 37 of the IR Act, provides that an award has effect, according to its terms and subject to those terms, operates throughout Western Australia.
- 616 The terms of the Award in the present case required the claimant to establish that Mr Zeyrek was:
- i. Employed in one of the callings/classifications described in clause 21 of the Award (Wages); and
  - ii. Employed in a ‘Restaurant and/or Tearoom’, ‘Catering Establishment’ and/or by a ‘Catering Contractor’ as those terms are defined in clause 6 of the Award (Definitions) that I previously referred in paragraphs [32] - [34] of these reasons.

617 On the first element, the respondents conceded during the hearing, that if I found the Award applied, Mr Zeyrek was employed in a Level 2 classification as set out under clause 21.<sup>96</sup>

**Respondents' submissions on clause 6**

618 On the second element, the respondents contended that Newroz did not fall within the definition of a 'Restaurant and/or Tearoom' as defined in clause 6 of the Award. To this end, the respondents submitted that a 'kebab shop' was not listed within the class or type of businesses that are referred to in the definition of a 'Restaurant and/or Tearoom', as it applied at the time of the alleged contraventions.

619 The respondents also submitted the definition was restricted to businesses that prepare food to be re-sold or served elsewhere but it did not extend to include an outlet that prepared the food it sold to be consumed elsewhere.

620 As I understand the respondents' submissions, the words used in clause 6 confine the definition of a 'Restaurant and/or Tearoom' to those businesses where food is served to be consumed on the premises, where table service is provided.

621 The respondents' submitted that the use of the words 'includes any establishment or place where food is prepared and/or cooked to be sold or served for consumption elsewhere' does not extend the scope of the Award to takeaway food outlets.

622 Rather, these words suggest the Award is confined in operation to restaurants and/or tearooms where table service is provided and catering businesses that prepare food to be supplied to a third party that sells the food for consumption somewhere else.

623 Noting this submission, the respondents went to some lengths to lead evidence that Newroz did not provide table service, that food was not served on plates with cutlery and if customers did use the tables and chairs in the premises, it was more a matter of choice than the function of a dine-in restaurant.

**Claimant's submissions on clause 6**

624 The claimant submitted the respondents' business fell under the definition in the Award of a 'Restaurant and/or Tearoom' because the evidence established:

- i. Newroz was a place where food was prepared and served for consumption on the premises; and
- ii. Newroz also prepared and/or cooked food to be sold or served for consumption elsewhere.

625 In support of this argument, the claimant referred to the decision of the Full Bench of the Western Industrial Relations Commission (WAIRC) in *Jubilee Jackpot Pty Ltd v Federated Liquor and Allied Industries Employees' Union of Australia, Western Australian Branch, Union of Workers* (1989) 69 WAIG 1048 (1988) 68 WAIG 2851 (*Jubilee Jackpot*), which involved an appeal of a decision by an Industrial Magistrate who held the Award applied to a McDonald's franchise in Fremantle.

626 The claimant noted the respondent in *Jubilee Jackpot* had submitted to the Full Bench its business was not a restaurant, but a fast-food outlet (and therefore, not covered by the Award). The respondent contended the Award should be read down in light of the definition of 'fast food' under the *Catering Workers' (Fast Food Operations, Catering and Restaurant) Agreement, 1979 (1979 Fast Food Agreement)*.

627 At first instance, Industrial Magistrate Walsh found that at McDonald's Fremantle:

[F]ood is prepared and cooked to be sold or served on the premises and elsewhere. I am satisfied that on the evidence that has been adduced by the complainant in these proceedings and by the evidence of the proprietor of this actual business – it is quite clear that there was food being prepared on that premises, being consumed on the premises and being taken away.<sup>97</sup>

628 The Full Bench accepted that McDonald's Fremantle was clearly a 'restaurant' for the purpose of the Award and noted that the term should not be read down. In dismissing the appeal, the Full Bench at 1050 observed:

The premises, according to the evidence, were clearly a "meal room" or, at least, a place or building or part thereof in or from which food is sold or served for consumption on the premises. In addition, it is clear that the premises were "an establishment or place where food is prepared and/or cooked to be sold or served for consumption elsewhere".<sup>98</sup>

629 The claimant submitted that *Jubilee Jackpot* was referred to in *Minister for Labour v Como Investments Pty Ltd* (1990) 70 WAIG 3539 at 3542 (*Como Investments*) as authority for the proposition that:

[A] fast food outlet fell under the description of a "meal room" or a "place or building or part thereof in or from which food is sold or served for consumption on the premises"; ...

[A]n establishment or place where food is prepared and/or cooked to be sold or served for consumption elsewhere.

630 The claimant contended that the Full Bench in *Como Investments* considered the definition of a 'restaurant' in the Award and held that it 'clearly contemplates fast-food outlets.'<sup>99</sup>

631 The claimant referred to *Hungry Jacks Pty Ltd v Wilkins* (1991) 71 WAIG 1751 which concerned an appeal to the Industrial Appeal Court (IAC) from a decision of the Full Bench of the WAIRC, affirming a decision from an Industrial Magistrate, who found that a group of fast-food franchises had breached the Award.

632 The claimant submitted the IAC had noted the fast-food franchises in question were all covered by the 1979 Fast Food Agreement, which took precedence over the Award. However, in reaching this finding, the IAC did not disturb the Industrial Magistrate's findings that places of business where 'food is prepared or cooked to be sold or served for consumption elsewhere fell within the definition of a restaurant under the [Award].'<sup>100</sup>

633 The claimant referred to *Nyree Collins, Department of Consumer and Employment Protection v Yule Brook College Parents and Citizens' Association Incorporated* [2003] WAIRC 8476; (2003) 83 WAIG 1787 (*Yule Brook College*), in which

Industrial Magistrate Tarr considered a claim under s 83 of the IR Act, alleging the respondent had failed to comply with the provisions of the Award in relation to its employment of a ‘Canteen Co-ordinator’.

- 634 The claimant submitted that the parties in *Yule Brook College* agreed the Canteen Co-ordinator’s duties relevantly included preparing food for sale, ensuring the canteen was clean, and recording daily sales and orders.
- 635 The canteen itself was described as ‘typical of a school canteen’ which ‘provides food and drinks for the students and staff at morning recess and lunch time’.<sup>101</sup> Generally, the ‘hot food was of a type where the product only required heating and included hamburgers, chiko rolls, hot dogs and pies. Cold meat and salad rolls and sandwiches were also available, together with snacks, sweets and a variety of drinks’.<sup>102</sup>
- 636 It was noted the lunch orders were prepared by the Canteen Co-ordinator or her voluntary helpers. The food the canteen sold was generally consumed on the school grounds.<sup>103</sup>
- 637 The claimant submitted his Honour in *Yule Brook College* described clause 6(1) of the Award as ‘very wide’ and determined that the canteen in question was a ‘place ... in or from which food is sold or served for consumption’.<sup>104</sup>
- 638 The claimant also noted:
- i. His Honour held in *Yule Brook College* that because the canteen was part of the school, it could be said that the ‘food sold is consumed on the premises, albeit not inside the canteen kitchen’; and
  - ii. His Honour continued, ‘[i]n any event clause 6(1) includes “any place where food is prepared and/or cooked to be sold or served for consumption elsewhere.”’<sup>105</sup>

### Why the Award applies

- 639 There are at least three reasons why I consider the Award applied to the respondents. The first lies in the construction of the definition of a ‘Restaurant and/or Tearoom’ under clause 6.
- 640 Relevant to my reasoning on how clause 6 should be construed, are the established principles that apply when interpreting industrial awards and instruments.
- 641 These principles were set out in *Fedec v The Minister for Corrective Services* [2017] WAIRC 00828; (2017) 97 WAIG 1595, Smith AP (as her Honour then was) and Scott CC observed at [21] - [23]:

#### Interpreting an industrial agreement - general principles of interpretation

The approach that is to be applied when interpreting an industrial agreement is well established. This is:

- (a) Industrial agreements are usually not drafted with careful attention to form by persons who are experienced in drafting documents that have legal effect.
- (b) The task of construction of an industrial agreement is to be approached in a way that allows for a generous construction: *City of Wanneroo v Holmes* [1989] FCA 369; (1989) 30 IR 362.
- (c) Industrial agreements are made for industries in light of the customs and working conditions of each industry and must not be interpreted in a vacuum divorced from industrial realities: *George A Bond & Co Ltd (in liq) v McKenzie* [1929] AR (NSW) 498; *City of Wanneroo v Holmes* (378 - 379) (French J).

The general principles that apply to the construction of contracts and other instruments also apply to the construction of an industrial agreement. In *Re Harrison; Ex parte Hames* [2015] WASC 247, Beech J said [50] - [51]:

The general principles relevant to the proper construction of instruments are well-known. In summary:

- (1) the primary duty of the court in construing an instrument is to endeavour to discover the intention of the parties as embodied in the words they have used in the instrument;
- (2) it is the objectively ascertained intention of the parties, as it is expressed in the instrument, that matters; not the parties’ subjective intentions. The meaning of the terms of an instrument is to be determined by what a reasonable person would have understood the terms to mean;
- (3) the objectively ascertained purpose and objective of the transaction that is the subject of a commercial instrument may be taken into account in construing that instrument. This may invite attention to the genesis of the transaction, its background and context;
- (4) the apparent purpose or object of the relevant transaction
- (5) can be inferred from the express and implied terms of the instrument, and from any admissible evidence of surrounding circumstances;
- (6) an instrument should be construed so as to avoid it making commercial nonsense or giving rise to commercial inconvenience. However, it must be borne in mind that business common sense may be a topic on which minds may differ; and
- (7) an instrument should be construed as a whole. A construction that makes the various parts of an instrument harmonious is preferable. If possible, each part of an instrument should be construed so as to have some operation (*Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7; (2014) 251 CLR 640 [35] (French CJ, Hayne, Crennan & Kiefel JJ); *Kidd v The State of Western Australia* [2014] WASC 99 [122]; *Red Hill Iron Ltd v API Management Pty Ltd* [2012] WASC 323 [106] - [112]; *Primewest (Mandurah) Pty Ltd v Ryom Pty Ltd* [2014] WASC 28 [55] (Martin CJ, Pullin & Murphy JJA agreeing)).

These general principles apply in the construction of an industrial agreement (*Director General, Department of*

*Education v United Voice WA* [2013] WASCA 287 [18] - [20] (Pullin J, Le Miere J agreeing), [83] (Buss J)). The industrial character and purpose of an industrial agreement is part of the context in which it is to be construed (*Ancor Ltd v Construction, Forestry, Mining & Energy Union* [2005] HCA 10; (2005) 222 CLR 241 [2] (Gleeson CJ and McHugh J); *Director General v United Voice* [81]; see also *Ancor v CFMEU* 66 (Kirby J), 129 - 130 (Callinan J)).

To these principles, the following observations made by Pullin J in *Director General, Department of Education v United Voice WA* [2013] WASCA 287; (2013) 94 WAIG 1 [18] - [19] should be added:

The Agreement has to be construed to determine what the intention of the parties was at the time the Agreement was entered into. This has to be determined by ascertaining what a reasonable person would have understood the words of the Agreement to mean taking into account the text, the surrounding circumstances known to the parties and the purpose and object of the transaction: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165 [40]; *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; (2004) 218 CLR 451 [22].

Surrounding circumstances may only be taken into account if the ordinary meaning of the words used by the parties is ambiguous or susceptible of more than one meaning: *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24; (1982) 149 CLR 337, 352; *McCourt v Cranston* [2012] WASCA 60 [23].

- 642 In applying these principles, I do not accept that because ‘kebab shops’ are not specifically named in the class of businesses listed under the definition of a restaurant under clause 6, they are excluded from the scope of the Award.
- 643 The construction of clause 6 that was contended for the respondents, is overly narrow and pedantic and therefore at odds with the principles to be applied to the construction of awards and industrial instruments; see *Kucks v CSR Ltd* (1996) 66 IR 182 at 184 referred to in *Ancor Ltd v Construction, Forestry, Mining and Energy Union* [2005] HCA 10; (2005) 222 CLR 241 at [96] (Kirby J).
- 644 In my view, clause 6 of the Award is an inclusive definition and is cast in terms that are sufficiently broad to include food outlets, other than the types specifically named. As the Award provides a minimum safety net of wages and working conditions across the restaurant and catering industry, I find that a reasonable person would have understood clause 6 to have had broad application.

#### Case law on the application of the Award

- 645 Secondly, or assuming that I am wrong with my finding that kebab shops are capable of falling under the types of outlets named in the definition of a ‘Restaurant and/or Tearoom’, a further reason I consider the award applies is because of the case law the claimants referred to and that I have set out, in the preceding paragraphs [625] - [638].
- 646 The Full Bench in *Como Investments* accepted that a dine-in/takeaway food outlet is a ‘*place where food is prepared and/or cooked to be sold or served for consumption elsewhere*’, rather than a place where food is prepared to be taken to be resold somewhere else.<sup>106</sup>
- 647 To this end, I accept the claimant’s submission that a comparison may be readily drawn between Newroz and the McDonalds franchise the subject of the Full Bench’s decision in *Jubilee Jackpot*. A kebab shop, with optional dine-in seating is not materially different in what it does as business, to a McDonald’s or similar takeaway food outlet.
- 648 In my view, therefore, the case law referred to supports a finding that during the claim period, Newroz was a business where food was prepared and/or cooked to be sold or served for consumption elsewhere.

#### Food consumed on the premises

- 649 The third reason I consider the Award applies is because I accept the presence of chairs and tables at Newroz indicates that it was a place where food was consumed on the premises.
- 650 It is not in dispute there were chairs and tables where customers could sit and consume their meals. This was the case both prior to, and to a much greater extent, after the renovation in 2017.
- 651 In my view, it does not matter whether customer orders were taken at the counter, the food was served on plates with cutlery, served as wraps or provided in single use packaging; Newroz, because of the presence of chairs and tables was a place where food was and could be consumed on the premises.
- 652 The fact that customers both prior to and following the renovation had the choice to consume their food on the premises, was enough for Newroz to fall within the definition of a ‘Restaurant and/or Tearoom’ under clause 6 of the Award. For this reason, I consider the Award applied during the claim period.

#### Findings on the Award Contraventions

- 653 Having concluded the Award applies, I will now turn to consider each of the matters that are relevant to establishing whether the alleged award contraventions occurred.
- 654 The first of these is the classification and rates of pay that applied during the claim period. The second is in respect of the hours Mr Zeyrek worked during the claim period.

#### Classification and Rates of Pay

- 655 As a result of the respondents’ concession that Mr Zeyrek was employed in a Level 2 classification under clause 21, it follows the respondents, where applicable, were required to pay the rates and allowances that are contained in the Award.<sup>107</sup>
- 656 In relation to this, I accept the relevant clauses under the Award that I referred in the preceding paragraph [39] applied for the purposes of making the underpayment calculations.

**Hours of Work**

- 657 As the claimant explained in her evidence, the underpayment calculations, which set out the amounts by which it was alleged Mr Zeyrek was underpaid from week to week, rely upon the evidence that Mr Zeyrek and Ms Azbay provided.
- 658 While the respondents, through their witnesses, attempted to discredit Mr Zeyrek's evidence and to a lesser extent, the evidence Ms Azbay gave, I am not satisfied the evidence the respondents' witnesses provided, rose to the level that was necessary to affirmatively prove on the balance of probabilities that Mr Zeyrek did not work the hours he said he worked.
- 659 Noting the observations I have made about the evidence from each of the respondents' witnesses, I am not satisfied they gave reliable accounts regarding the hours Mr Zeyrek worked. The respondents' evidence was also not supported by reliable documentary evidence.
- 660 The evidence establishes that Mr Zeyrek commenced employment with the respondents in or around 2013. I accept that around the time he commenced employment with the respondents, Mr Oruc was working at Newroz.
- 661 While Mr Zeyrek initially may not have worked as many hours as the claimant alleged, I accept Mr Oruc's evidence that Mr Zeyrek's working hours increased as he became more experienced and competent in his job. I also accept that by the time Mr Oruc finished working at Newroz, Mr Zeyrek was working more than 40 hours per week.
- 662 As I have preferred Mr Zeyrek's and Ms Azbay's evidence to that of the respondents' witnesses, I find Mr Zeyrek, typically worked, and was paid for working, a minimum of 64.5 hours per week. I also find that Mr Zeyrek's working hours were performed in a regular pattern that included the 76 ordinary hours per fortnight, contemplated under of cl 8 of the Award (Hours of Work), plus overtime. The evidence establishes that for performing the minimum hours described, Mr Zeyrek was paid \$1,280 per week, cash in hand.
- 663 In finding Mr Zeyrek performed the same number of hours per week in accordance with a standard roster as set out in the preceding paragraph [37], I do not accept that he was employed on a casual basis.

**Immigration status**

- 664 The respondents submitted that if I concluded Mr Zeyrek was untruthful in his evidence, it would lead me to find that he did not work the hours he said he did. In the paragraphs that follow, I have addressed particular matters which the respondents submitted raised doubts about the reliability of Mr Zeyrek's evidence.
- 665 The first of these matters was in relation to Mr Zeyrek's evidence about his immigration status. The respondents contended that I should find that it was unlikely that Mr Zeyrek, in or around 2012 or 2013, would have sought full-time employment at Newroz because he knew he was on a 'student visa' that placed a limit on the number of hours he could work.
- 666 I am not however convinced the evidence established this. Mr Zeyrek said he was on a bridging visa at or around the time he commenced work at Newroz, a point that was supported by Exhibit 'C16'. On this evidence, which was not contradicted, there was no limit on the number of hours Mr Zeyrek was permitted to work.

**Requests to work full-time hours**

- 667 The second of these matters was in relation to requests that were made on the respondents' behalf for Mr Zeyrek to work full-time. There were three different variations on the evidence of these requests, each of which were raised to impugn Mr Zeyrek's credibility.
- 668 I do not accept Hasan's evidence that he refused a request from Mr Zeyrek to work full-time on the condition that he was not placed on the books or paid by EFT so he could avoid declaring his true earnings to the ATO or Centrelink.
- 669 I am also not prepared to accept Huseyin's and Fatma's evidence in which they both said they offered additional hours to Mr Zeyrek, but he declined out of a concern the increased working hours would have resulted in his Centrelink benefits being reduced.
- 670 The evidence from Hasan, Huseyin and Fatma as to why they said Mr Zeyrek was not employed on a full-time basis was inconsistent and contradictory.
- 671 When this is weighed together with the respondents' failure to keep employment records and Mr Oruc's evidence that he was paid in cash and received Centrelink while he was working at Newroz, I am not convinced the testimony from the respondents' witnesses on this point holds true.

**Mr Zeyrek's soccer commitments**

- 672 The third of these matters was in relation to the evidence from the respondents regarding Mr Zeyrek's soccer commitments. To this end the respondents called Mr Yasar to give evidence. However, I am not persuaded there was evidence to show that Mr Zeyrek's soccer commitments, with either the BVSC or the BUSC, conflicted with the times he said he was working.
- 673 Mr Yasar's evidence under cross-examination differed from the content of his witness statement. He insisted that he did not say Mr Zeyrek attended training on Tuesdays and Thursdays. Mr Yasar also conceded that Mr Zeyrek's attendance at both training sessions was not mandatory. These concessions invite the conclusion that Mr Zeyrek only trained on Tuesdays, which was on his day off.
- 674 While I accept the time for Mr Zeyrek to get from his soccer games to work on Sunday evenings may have been tight, there was insufficient evidence from the respondents to show that Mr Zeyrek was unable to get to work after he played soccer. I also note from Huseyin's evidence that he did not have difficulty getting to work on Sunday nights.
- 675 Mr Yasar's evidence regarding the post-match gatherings did not rise to the level necessary to convince me that Mr Zeyrek was a regular participant in these meetings to the extent it prevented him from going to work at Newroz.

**Working hours of family members**

676 An important reason I find Mr Zeyrek worked the number of hours he said he worked is because Hasan and Huseyin both gave evidence they needed to work this many hours to cover the times that Newroz was open for business. This is despite Fatma declaring:

No-one in our business worked that many hours.

677 When he was asked about Fatma's statement and how it compared with his working hours, Hasan sought to draw a distinction between staff and family members. I do not, however, accept there was a distinction between employed staff and family members, with the extended hours confined to family members.

678 It is my view this distinction is the product of a recent invention. It was thrown up to provide an explanation as to why there was inconsistency between Hasan's evidence and what was contained in Fatma's witness statement. Huseyin, who gave his evidence immediately after Hasan, did not draw the same distinction. On the contrary he said he thought Fatma was mistaken in her evidence.

679 While Fatma, in her evidence, sought to qualify her evidence by raising the distinction on the hours family and non-family staff members worked, noting my finding about the reliability of her evidence and that her qualification was thrown up the day after Hasan gave his evidence, I am not prepared to accept that working long hours was something that only family members did.

**Advertised trading hours**

680 It is of note the hours Mr Zeyrek said he worked fell within the range that Kahraman said the shop was open. Despite argument from the respondents' counsel about the amount of weight I should attach to the trading hours as they appeared in social media posts and online menus that were attached to the claimant's and Mr Zeyrek's witness statements, they were broadly consistent with the trading hours that Hasan and Kahraman described in their evidence.

681 While Mr Zeyrek, Mr Oruc and Huseyin all gave evidence there were times the shop stayed open for longer, and it is possible Newroz followed its advertised trading hours after the nearby night club closed in 2014, it is still open to find Mr Zeyrek worked 64.5 hours per week.

682 This is because the claim for overtime in the underpayment calculations does not include hours worked outside the advertised trading hours or when Mr Zeyrek took cash to the Karakuyu family home.<sup>108</sup>

683 I therefore find the hours of work that Mr Zeyrek said he worked, are referable to the usual trading hours of the business.

**Staff numbers**

684 From the evidence, it is clear that during a normal working day, there were two clearly definable rush periods; one at lunch time and the other for the evening meal. It is also clear there were usually 2 - 3 staff members in the store at any one time, with three staff required during the lunch and evening rush periods.

685 On both occasions Mr Ravenscroft went to Newroz, there were at least two staff in the shop. When Mr Ravenscroft visited Newroz on 22 July 2021, it was close to the evening meal. On this occasion there were three staff members in the store.

686 From my observations of the evidence, it seems entirely plausible that Mr Zeyrek was required to work the hours he said he worked so staffing levels at Newroz could be maintained.

**Relationship between the parties**

687 In reaching my findings, it cannot be ignored the relationship between the parties in this matter endured over a seven to eight year period from 2013 to 2020. Although it was not directly put by either party, I was able to infer from the evidence, including from the exhibits, that the parties were at one time close.

688 During the hearing, there was some evidence Mr Zeyrek socialised with Mehmet and Huseyin and that he attended Huseyin's engagement party with Ms Azbay. Mr Zeyrek also played soccer with Huseyin at the BVSC.

689 There was evidence Kahraman took out a loan so Mr Zeyrek and his wife could purchase a car. Hasan even went as far as to provide the false payslips to Mr Zeyrek so he could apply for home loan.

690 It is relevant to make this observation about the parties' relationship because it potentially provides an explanation as to why Mr Zeyrek did not raise the issues the subject of these proceedings sooner. It also provides a context as to why it appears Mr Zeyrek did not properly inform Centrelink about how many hours he was working or why he did not declare his true income to the ATO in his tax returns.

691 However, while Mr Zeyrek by his conduct, may not have objected to being paid a flat hourly rate of \$20 per hour in cash while he was working at Newroz, it does not provide a lawful excuse for the respondents' failure to pay penalty, overtime and other rates as they applied under the Award or to keep and maintain employment records.

**Vulnerable worker**

692 In this matter, I accept that regardless of how close he may at one time have been to the Karakuyu family, Mr Zeyrek was still vulnerable. He had limited English, and as a result, fewer employment options. Also relevant is that Mr Zeyrek was in Australia on a refugee protection visa. Each of these attributes placed him in a position where he was in an unequal bargaining relationship with his employer that was open to abuse.

693 For this reason, I have difficulty in accepting that Mr Zeyrek was in a position to demand he not be placed on the books and only be paid in cash so he could mislead either Centrelink or the ATO on the true state of his earnings. I am also not prepared to find that he similarly refused to be paid by EFT for the same reason.

- 694 If I had found it was Mr Zeyrek who was the principal architect of his employment arrangements with the respondents, I would be accepting the respondents in this matter lacked any real ethical authority or control over the way they managed their staff.
- 695 In addition, such a finding does not help the respondents as I would still be concluding they were prepared to engage in contravening conduct, even if it was at Mr Zeyrek's request. The prohibition against contracting out under s 114 of the IR Act (Contracting out from awards etc, prohibited) is absolute and without exception.
- 696 In this matter, the evidence overwhelmingly establishes that it was the respondents who set the scene for the award and records contraventions that followed. The evidence, in my view, establishes the respondents determined the basis upon which all staff would be hired and paid, including that they would only be paid a flat hourly rate in cash.
- 697 The practice of paying staff cash in hand at a flat hourly rate and failing keep to employment records was not confined to Mr Zeyrek. It was a practice that was used when Mr Oruc worked at Newroz and I find, continued during Mr Zeyrek's employment.

#### **Alternative finding on hours worked**

- 698 During the hearing, it became clear even from the respondents' evidence that Mr Zeyrek worked more than 10.5 hours per week. As the parties made their closing submissions, I invited them to consider whether I could make a finding Mr Zeyrek worked 'somewhere in between' 64.5 and 10.5 hours per week
- 699 While Mr Heathcote conceded the evidence established Mr Zeyrek worked more than 10.5 hours per week, he submitted the hours Mr Zeyrek said he worked were not believable either. He instead argued that I should rely upon the declarations Mr Zeyrek made in his tax returns and the BAS payroll reports and find Mr Zeyrek worked somewhere between 20 and 30 hours per week.
- 700 In reply, Mr Carroll submitted the underpayment calculations were already based on a number that was both conservative and 'somewhere in between'. He submitted this was because the underpayment calculations did not include any hours Mr Zeyrek worked beyond the advertised closing time.
- 701 Mr Carroll submitted that reaching a finding on a number 'somewhere in between' would essentially be like throwing a dart at a dartboard.
- 702 Having considered both parties submissions on this point, I am not persuaded that I could safely conclude Mr Zeyrek worked somewhere between 20 and 30 hours per week. I have formed this view because Mr Zeyrek's tax returns and the BAS payroll reports do not provide a reliable evidentiary basis upon which I could make findings on the hours of work that Mr Zeyrek performed at Newroz.

#### **Entitlement to Meal Breaks**

- 703 The claimant's underpayment calculations include a claim to a meal break loading, for meal breaks Mr Zeyrek said he did not receive (**meal break loading**). The entitlement to meal breaks and the payment of the meal break loading when a meal break cannot be taken, arises under clause 13(1)(b) of the Award (Meal Breaks) which relevantly provides:
- Where it is not possible for the employer to grant a meal break on any day, the said meal break shall be treated as time worked and the employee shall be paid at the rate applicable to the employee at the time such meal break is due, plus fifty per cent of the prescribed ordinary hourly rate applying to such employee, until such time as the employee is released for a meal break.
- 704 This part of the claimant's award contravention case relies upon Mr Zeyrek's evidence that although he was given food during a shift, he did not get an uninterrupted meal break as required under clause 13(1). As a result, the claimant alleged the respondents contravened clause 13 of the Award on 140 separate occasions.
- 705 The respondents addressed the issue of meal breaks in their witnesses' evidence by claiming Mr Zeyrek did not work enough hours to trigger the entitlement under clause 13 of the Award. I suspect this is why the respondents did not, contrary to the rule in *Browne v Dunne* directly cross-examine Mr Zeyrek about this matter.
- 706 On the evidence, it appears entirely plausible there were times when Mr Zeyrek could have had an uninterrupted break. As I have already found, there were two quite defined daily rush periods, with down times in between. Huseyin, in his evidence said there were times when he saw Mr Zeyrek sitting down to have a kebab. It is therefore reasonable to infer there would have been an opportunity between these rush periods to schedule a break.
- 707 In addition, Mr Oruc gave evidence to the effect that there were times the shop was quiet enough for him to sit outside and eat for a 'few minutes.' He said Kahraman did not take issue if he saw him eating when it was quiet. He also said if it was quiet and Kahraman was not in the store, he organised with the staff (which included Mr Zeyrek) to take turns eating.<sup>109</sup>
- 708 Although Mr Oruc was not working at Newroz during the claim period, there is no evidence the respondents' approach to taking breaks changed after his departure.

#### **Claim for meal break loading**

- 709 The evidence in support of the claim for meal break loading under cl 13 of the Award in the absence of the reverse onus, was on the margin. Despite this, I have concluded the claimant has established that Mr Zeyrek should have been paid the meal break loading for the following reasons.
- 710 Firstly, in the absence of any employment records for the claim period, the respondent cannot show that Mr Zeyrek had meal breaks. In this respect, the reverse onus operates in the claimant's favour. Contrary evidence that Mr Zeyrek had meal breaks as required could only be provided with the first respondent's witness testimony which I have found to be unreliable.

- 711 As I have decided to prefer Mr Zeyrek's evidence, which includes his testimony that he did not have proper breaks, it necessarily follows that I consider Mr Zeyrek was both entitled to be paid the applicable loading under clause 13(1)(b) when he did not get those meal breaks.
- 712 Secondly, because Mr Zeyrek was not, contrary to the rule in *Browne v Dunne*, directly challenged about his evidence that he did not take any meal breaks, his testimony on this point is to be accepted.
- 713 Thirdly, the evidence from Mr Oruc that I have referred to was qualified in that he said he was only permitted to stop and eat if the shop was quiet. He stated that if the shop was busy and Kahraman was there, he was required to work.<sup>110</sup>
- 714 Having found Mr Zeyrek did not receive the meal breaks that he was entitled to receive, the inclusion of the meal break loading in the underpayment calculations, is in my view, warranted. I therefore find the respondents contravened the requirement under clause 13(1)(b) the Award to pay the meal break loading 140 times.

#### **Protective clothing allowance**

- 715 Clause 27 of the Award (Protective Clothing) requires an employer to pay an allowance of \$3.90 per fortnight to employees who may be required to wash dishes or to use various cleaning agents and detergents where the employer does not provide rubber gloves (**protective clothing allowance**).
- 716 The claimant included a claim for the payment of the protective clothing allowance in the underpayment calculations. In doing so, it was alleged that Mr Zeyrek was entitled to receive payment for this allowance, each fortnight he worked, because he washed dishes and performed cleaning duties that required him to wear rubber gloves, which the employer did not provide.
- 717 The claimant alleged that, by failing pay Mr Zeyrek the protective clothing allowance, the respondents, during the claim period, contravened the Award on 70 separate occasions in the amount of \$273.
- 718 In cross-examination, Hasan maintained that Mr Zeyrek did not perform any cleaning duties. While he said gloves were provided for cooking and to handle food, he said gloves for dishwashing and cleaning were not provided because they did not wash dishes at Newroz, and this work was performed by an external contractor.
- 719 The testimony from Hasan I noted in preceding paragraph, was inconsistent with Nilufer's evidence. As I have preferred Mr Zeyrek's evidence that he performed these tasks ahead of Hasan's and noting the inconsistency with Nilufer's evidence on this point, I find these contraventions proved.

#### **Uniforms**

- 720 There was no dispute the respondents provided Mr Zeyrek with a special uniform to wear to work in the form of coloured Newroz T-shirts that he washed at home. The claimant alleged that because the respondents did not launder these items, Mr Zeyrek was entitled to be paid the \$7.20 fortnightly laundry allowance that applies under clause 26 of the Award.
- 721 On this basis, the claimant alleged the respondents contravened the Award on 70 separate occasions during the claim period by failing to pay this allowance. The total amount claimed on Mr Zeyrek's behalf was the sum of \$504.
- 722 This part of the claimant's case did not face any challenge. As there was no contest the respondents supplied Mr Zeyrek with a special uniform that he had to wash, I find these contraventions proved. I also note that even if I had decided Mr Zeyrek had worked fewer hours, this allowance would still have been payable.

#### **Rate paid was not sufficient to comply with the Award**

- 723 On the evidence, while Mr Zeyrek was paid a daily, as well as a half-day rate, which the claimant applied when she made the underpayment calculations, there is no dispute he was paid \$20 per hour for each hour worked and that he was paid in cash.
- 724 It was not in issue that in the event of a finding the Award applied then the rate of pay Mr Zeyrek received for each hour worked was not sufficient to comply with the requirements under the Award to pay overtime, penalty rates and the like. As the comparative wages table shows, outside of ordinary hours between Monday – Friday in 2016 and 2017, the payment of \$20 per hour would not have been enough to discharge the respondents' obligations under the Award.
- 725 To this end, the respondents' counsel quite correctly did not take issue with the claimant's underpayment calculations, which represent the difference in the wages Mr Zeyrek was paid and what he should have received under the Award if I found the claimant had proved Mr Zeyrek worked the hours he said he did.
- 726 As I have held the Award applies and noting the findings I have made, regarding the hours Mr Zeyrek worked, I also find the respondents have engaged in the Award contraventions which the claimant has particularised in the underpayment calculations. On this basis, I am prepared to make an order for the total amount of \$102,483.74 which the claimant has alleged Mr Zeyrek was underpaid during the claim period, as set out in the claimant's particulars of claim and the underpayment calculations.

#### **Declarations to Centrelink**

- 727 Earlier, I observed that it appears Mr Zeyrek in his dealings with Centrelink during the claim period understated the number of hours he worked at Newroz and the income he received.
- 728 During his closing submissions Mr Carroll indicated that Mr Zeyrek is aware that even if I make orders requiring the respondents to pay him the amount by which the claimant says he was underpaid, he acknowledges that he may be required to make a repayment to Centrelink.
- 729 The issue of whether Mr Zeyrek was entitled to receive Centrelink benefits while he was working at Newroz is outside my jurisdiction. As a matter of public interest, it is something I am obliged to report. That said, by failing to keep accurate employment records the respondents, whether consciously or otherwise, have enabled a situation where Mr Zeyrek could understate his earnings and the hours he worked.

730 To ensure this matter is properly reviewed and considered in context I will arrange for a copy of my reasons to be sent to Centrelink.

**Information to be provided to the ATO**

731 Similarly, there is no dispute the tax returns Mr Zeyrek submitted to the ATO during the claim period are inaccurate. However, there is a difference between the inaccuracies in Mr Zeyrek's tax returns and the representations he made to Centrelink. This is because the respondents and their accountants were more directly involved in the preparation of these documents and the information that was contained in Mr Zeyrek's tax returns.

732 In addition to the issue I have highlighted, regarding Mr Zeyrek's tax returns, the evidence suggests the respondents have not made any superannuation contributions on Mr Zeyrek's behalf.

733 While allegations involving the non-payment of superannuation contributions and the accuracy of Mr Zeyrek's tax returns are matters within the ATO's remit, evidence of this conduct is not something I can ignore.

734 It is my view these matters are, as matters of public interest, of sufficient gravity to warrant my reasons being sent to the ATO for further investigation.

**Proof of the allegations if the reverse onus does not apply**

735 In his closing submissions, Mr Carroll submitted that even if I was not satisfied the reverse onus applies, and the onus of proving the award contraventions falls to the claimant, there is sufficient evidence for me to be satisfied the claimant has on the balance of probabilities, proved the award contraventions.

736 I accept that in some matters where an employer has not kept employee records that it may be more difficult to prove underpayment of wages allegations. In such cases, proof of the allegations will to a much greater extent, rely on direct testimony from witnesses.

737 In this matter, the claimant produced evidence to corroborate Mr Zeyrek's account. Mr Zeyrek's evidence of his weekly earnings was partially corroborated by the regular deposits that were made to Ms Azbay's bank account.

738 There were also text messages and photographs that show Mr Zeyrek was at work at the times he said he was. Ms Azbay's evidence that she visited him at Newroz while he was working, supports Mr Zeyrek's account, as do the times at which Ms Azbay said he arrived home wearing stained shirts and smelling of food from the kebab shop.

739 More importantly, the respondents' failure to keep employment records has significance on another level. It is not, in my view, a huge leap to find that because the respondents failed to comply with important statutory requirements to keep employment records, it is likely that they would have also engaged in the breaches of the Award the claimant alleged.

740 It is trite that an employer who underpays an employee in breach of an award, will obtain an unlawful windfall. It is also trite that an employer who makes it difficult for an employee to prove any alleged non-compliance by failing to keep or properly maintain employment records is engaged in the same or similar conduct.

741 It is my view the respondents' failure to keep and maintain accurate employment records is an entrenched business practice. This practice, as Nilufer's evidence confirmed, commenced when Kahraman was involved in Newroz to a much greater extent. In my view, the evidence establishes this practice has continued on Hasan's watch.

742 In forming a view Mr Zeyrek could not discharge the onus of proving that he was underpaid because he was unable to produce an independent diary of his working hours and the like, I would be allowing the respondents to prosper from an unlawful practice.

743 There is no doubt the respondents relied upon the absence of employment records to dispute liability in Mr Oruc's workers' compensation claim by denying that he was an employee at Newroz. In the present case, the respondents have similarly relied upon the absence of employment records to dispute that Mr Zeyrek worked the hours he said he did.

744 In other words, I accept that because of the respondents' failure to keep employment records as required, they have put themselves into a position where they could argue there was no evidence Mr Zeyrek received what he said he was paid or worked the hours he said he did.

745 The respondents' conduct in this regard is relevant to considering whether the evidence, even without the reverse onus, is sufficient to discharge the usual onus to prove the award contraventions, on the balance of probabilities.

746 While I have concluded the reverse onus applies and the respondents were unable to prove on the balance of probabilities that they did not engage in the award contraventions alleged, it is my view that with the exception of the claim for a meal break loading, a shift in the onus of proof would not likely change the outcome.

747 The evidence the claimant has provided in support of the case against the respondents is comprehensive and, in my view, with the one potential exception I have referred to, sufficient to prove on the balance of probabilities the respondents engaged in the conduct alleged.

**Conclusion**

748 For all the reasons set out in the preceding paragraphs I have concluded the respondents have engaged in the contraventions alleged.

749 These contraventions include the records contraventions, which involve 738 separate breaches of the requirements to keep employment records under s 49D(2) of the IR Act.

750 It includes the award contraventions comprising of 513 breaches of the Award that occurred during the claim period, as described in the claimant's particulars of claim and in the underpayment calculations.

751 I also consider the respondents have breached clause 32 of the Award (Employment Records) by failing to keep employment records.

752 As a result of the award contraventions, I have found the respondents underpaid Mr Zeyrek in the manner alleged and by the amounts set out, in the claimant's particulars of claim and the underpayment calculations.

753 I have concluded the claimant has proved the total amount by which Mr Zeyrek was underpaid during the claim period was the gross sum of \$102,483.74 (**underpayment amount**).

754 Having reached this decision, I will make an order that Mr Zeyrek be paid the underpayment amount. In addition to making this order, I intend to hear from the parties on the following matters:

- (a) the timeframe in which the respondents will be required to pay the underpayment amount;
- (b) whether I should make an order requiring the respondents to pay interest on the underpayment amount and the quantum of any pre-judgment interest to be paid;
- (c) whether and on what basis I should make an order for the payment of the claimant's disbursements; and
- (d) The penalties the Court should impose for both the award and the records contraventions the respondents have committed.

## T. KUCERA

### INDUSTRIAL MAGISTRATE

<sup>1</sup> This is where a contravention of s 102(1)(a) of the IR Act has been found by the Court to have occurred.

<sup>2</sup> This is where the Court has found contravention of s 102(2) of the IR Act has occurred.

<sup>3</sup> This is where the Court concludes a respondent appears to have engaged in conduct of the type for which the Court may impose a civil penalty under s 83E of the IR Act for a breach of ss 102(1) or 102(2).

<sup>4</sup> Originating Claim dated 15 December 2022 (**Originating Claim**), paragraph [14].

<sup>5</sup> Originating Claim, [57].

<sup>6</sup> Originating Claim, [70].

<sup>7</sup> ts 328.

<sup>8</sup> Claimant's Aide-Mémoire – Number of Alleged Records Contraventions.

<sup>9</sup> Originating Claim, [39].

<sup>10</sup> *Ghimire v Karriview Management Pty Ltd (No 2)* [2019] FCA 1627 at [15] - [16] (Colvin J).

<sup>11</sup> *Republic of Costa Rica v Erlanger* (1876) 3 Ch3 D3, at p. 69.

<sup>12</sup> Witness Statement of Brian Edward Ravenscroft, paragraph [84].

<sup>13</sup> Witness Statement of Brian Edward Ravenscroft, paragraph [96].

<sup>14</sup> Witness Statement of Brian Edward Ravenscroft, paragraph [97].

<sup>15</sup> Witness Statement of Brian Edward Ravenscroft – Attachment 'BER 15'.

<sup>16</sup> Witness Statement of Brian Edward Ravenscroft – Attachment 'BER 18'.

<sup>17</sup> See the Witness Statement of Jillian Denise Dixon (**claimant's first statement**) – Attachment 'JDD 3'; see also the Witness Statement of Brian Edward Ravenscroft – Attachment 'BER 18'.

<sup>18</sup> See claimant's first statement – 'JDD 4'; see also the Witness Statement of Brian Edward Ravenscroft – Attachment 'BER 15'.

<sup>19</sup> Claimant's first statement – Attachment 'JDD 16'.

<sup>20</sup> See Witness Statement of Şahin Zeyrek – Attachment 'SZ 20'.

<sup>21</sup> See Witness Statement of Şahin Zeyrek – Attachment 'SZ 21'.

<sup>22</sup> Witness Statement of Şahin Zeyrek – Attachment 'SZ 27'.

<sup>23</sup> Witness Statement of Şahin Zeyrek – Attachment 'SZ 28'.

<sup>24</sup> Witness Statement of Yusuf Orcun Oruc, paragraph [5].

<sup>25</sup> Second Witness Statement of Yusuf Orcun Oruc – Attachments 'YO 1' – 'YO 2'.

<sup>26</sup> Third Witness Statement of Yusuf Orcun Oruc – Attachments 'YO 4' – 'YO 7'.

<sup>27</sup> Second Witness Statement of Fener Azbay – Attachment 'FA 7'.

<sup>28</sup> Witness Statement of Şahin Zeyrek – Attachment 'SZ 20', statements 27 November 2016 – 19 September 2017.

<sup>29</sup> ts 136.

<sup>30</sup> ts 136 - 137.

<sup>31</sup> ts 138.

<sup>32</sup> ts 139.

<sup>33</sup> ts 140.

<sup>34</sup> ts 140 - 141.

<sup>35</sup> ts 141.

<sup>36</sup> Third Witness Statement of Şahin Zeyrek – Attachment ‘SZ 52’.

<sup>37</sup> 2019 - 2020 wage records enclosed in the claimant’s first statement – Attachment ‘JDD 16’.

<sup>38</sup> ts 164.

<sup>39</sup> ts 164.

<sup>40</sup> ts 168.

<sup>41</sup> ts 169.

<sup>42</sup> ts 187; see also ts 193.

<sup>43</sup> ts 194.

<sup>44</sup> ts 197 - 199.

<sup>45</sup> Witness Statement of Huseyin Karakuyu dated 11 September 2023.

<sup>46</sup> Witness statement of Fatma Kara at [39].

<sup>47</sup> ts 213.

<sup>48</sup> ts 214.

<sup>49</sup> ts 217.

<sup>50</sup> Third Witness Statement of Şahin Zeyrek – Attachment ‘SZ 64’.

<sup>51</sup> ts 219.

<sup>52</sup> ts 214.

<sup>53</sup> ts 224.

<sup>54</sup> ts 221.

<sup>55</sup> ts 221.

<sup>56</sup> ts 233 - 234.

<sup>57</sup> ts 234.

<sup>58</sup> ts 235.

<sup>59</sup> ts 235.

<sup>60</sup> ts 243.

<sup>61</sup> ts 243.

<sup>62</sup> ts 244.

<sup>63</sup> ts 244.

<sup>64</sup> ts 245.

<sup>65</sup> ts 246.

<sup>66</sup> ts 242.

<sup>67</sup> Witness Statement of Nilufer Karakuyu, paragraph [30].

<sup>68</sup> ts 243 - 244.

<sup>69</sup> Witness statement of Fatma Kara, paragraph [12].

<sup>70</sup> Witness statement of Fatma Kara, paragraph [34].

<sup>71</sup> Witness Statement of Fatma Kara, paragraph [39].

<sup>72</sup> ts 251 - 252.

<sup>73</sup> ts 252.

<sup>74</sup> ts 252 - 253.

<sup>75</sup> ts 253.

<sup>76</sup> ts 253 - 254.

<sup>77</sup> ts 253 - 254.

<sup>78</sup> ts 255.

<sup>79</sup> Witness Statement of Fatma Kara, paragraph [31].

<sup>80</sup> ts 214.

<sup>81</sup> Witness Statement of Umut Ozkalfa at [20].

<sup>82</sup> ts 257.

<sup>83</sup> ts 207, referring to the 2019 - 2020 wage records enclosed in the claimant’s first statement – Attachment ‘JDD 16’.

<sup>84</sup> ts 259.

<sup>85</sup> ts 259.

<sup>86</sup> ts 259.

<sup>87</sup> ts 260.

<sup>88</sup> Third Witness Statement of Yusuf Orcun Oruc, attachment ‘YO 12’; the text exchange is in Turkish.

<sup>89</sup> ts 260.

<sup>90</sup> See also *Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation (Cth)* [1983] 1 NSWLR 1; (1983) 70 FLR 447 at [16].

<sup>91</sup> See Witness Statement of Jillian Denise Dixon – Attachment ‘JDD 3’.

<sup>92</sup> ts 141.

<sup>93</sup> *Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd* [2012] FMCA 258 at [66] - [67]; see also *Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)* [2017] FCA 557 at [548] (Katzmann J) and *Fair Work Ombudsman v South Jin Pty Ltd (No 2)* [2016] FCA 832 at [55] (White J).

<sup>94</sup> Claimant’s closing submissions, ts 273.

<sup>95</sup> Respondent’s closing submissions, ts 310.

<sup>96</sup> ts 134; see also ts 267.

<sup>97</sup> *Federated Liquor and Allied Industries Employees’ Union of Australia, Western Australian Branch, Union of Workers v Jubilee Jackpot Pty Ltd trading as McDonald’s Family Restaurants* (1988) 68 WAIG 2851 at 2851.

<sup>98</sup> *Jubilee Jackpot v Federated Liquor and Allied Industries Employees’ Union of Australia, Western Australian Branch, Union of Workers* (1989) 69 WAIG 1048 at 1050.

<sup>99</sup> *Minister for Labour v Como Investments Pty Ltd* (1990) 70 WAIG 3539 (*Como Investments*) at 3543

<sup>100</sup> Claimant’s submissions at [33].

<sup>101</sup> *Nyree Collins, Department of Consumer and Employment Protection v Yule Brook College Parents and Citizens’ Association Incorporated* [2003] WAIRC 8476; (2003) 83 WAIG 1787 (*Yule Brook College*) at [10].

<sup>102</sup> *Yule Brook College* at [10].

<sup>103</sup> *Yule Brook College* at [11].

<sup>104</sup> Claimant’s submissions at [38].

<sup>105</sup> *Yule Brook College* at [12].

<sup>106</sup> *Como Investments* at 3543.

<sup>107</sup> ts 134; see also ts 267 - 268.

<sup>108</sup> Claimant’s closing submissions, ts 332.

<sup>109</sup> Witness Statement of Yusuf Orcun Oruc, paragraphs [142] - [147].

<sup>110</sup> Witness Statement of Yusuf Orcun Oruc, paragraphs [142] and [145].

2025 WAIRC 00030

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

**CITATION** : 2025 WAIRC 00030  
**CORAM** : INDUSTRIAL MAGISTRATE R. COSENTINO  
**HEARD** : TUESDAY, 10 DECEMBER 2024  
**DELIVERED** : ON THE PAPERS  
**FILE NO.** : M 139 OF 2024  
**BETWEEN** : ROBERT ARNOLD

**CLAIMANT**

AND

FLETCHER INTERNATIONAL WA (ABN 50878814356)

**RESPONDENT**

**CatchWords** : PRACTICE AND PROCEDURE – Small Claims matter – leave to be represented – factors for consideration – leave granted.  
**Legislation** : *Fair Work Act 2009* (Cth).  
**Instrument** : *Meat Industry Award 2020*  
**Case(s) referred to in reasons:** : *Al Jorany v AHG Services (WA) Pty Ltd* [2019] FCCA 2598

***Cangemi v Specialist Diagnostic Pathology Services Pty Ltd T/As Western Diagnostic Pathology*** [2014] FCCA 187

***Annese v General Crane Services Pty Ltd*** [2019] FCCA 266

**Result** : Application granted

**REASONS FOR DECISION**

- 1 The respondent, Fletcher International WA (Fletcher) has applied for leave to be represented by a lawyer in this small claim proceeding, under s 548(5) of the *Fair Work Act 2009 (Cth)* (the FWA).
- 2 The claimant, Mr Robert Arnold (Mr Arnold), has not opposed the application.
- 3 Judge Kendall set out the principles that apply in applications of this type in *Al Jorany v AHG Services (WA) Pty Ltd* [2019] FCCA 2598 at [9]-[12]:
  9. There are no mandatory considerations when determining whether leave to be represented should be granted pursuant to s.548(5). ... the following factors for consideration are relevant (though not definitive):
    - a) the objects and purposes of the Small Claims Division and also of this Court to provide quick, informal and just resolutions of disputes without undue technicality;
    - b) the complexity of the matters that arise on the face of the application, be it factual or legal, and whether a lawyer by reason of their training and expertise, might be of assistance to the Court;
    - c) whether the other party (here the applicant) is represented by a lawyer and any prejudice or unfairness the other party may suffer if leave is granted;
    - d) the familiarity, and competence, of the proposed legal representatives to provide assistance to the Court on the complexities or technicalities that arise; and
    - e) whether the party seeking leave to be represented has an in-house lawyer or employee capable of conducting the matter satisfactorily.

(*Cangemi v Specialist Diagnostic Pathology Services Pty Ltd t/a Western Diagnostic Pathology* [2014] FCCA 187 (“*Cangemi*”); *Renouf v RAC Finance Limited* [2017] FCCA 142; *Corcoran v Bansley Pty Ltd* [2011] FMCA 440)
  10. Section 548(5) of the FW Act is an “exception” to the norm. Leave for a lawyer to appear in the Small Claims division in most cases will not be necessary and will be assumed not to be required.
  11. These provisions are designed to enable self-represented litigants greater access to the legal system and to provide more accessible procedures that operates informally and without regard to legal forms and technicalities: FW Act, s.548(3).
  12. Overall, the respondent must satisfy the Court that it is necessary for the Court to exercise the discretion to grant leave in circumstances where the intention of the small claims procedure appears to be that legal representation is normally not necessary.
- 4 The starting point and default position is that legal representation is assumed to be unnecessary. Fletcher must satisfy me that there is a reason for me to exercise my discretion to grant it leave to be legally represented.
- 5 Fletcher’s grounds for seeking leave are set out in an affidavit in support made by Fletcher’s Human Resources Manager, Matthew Nelson. Mr Nelson deposes that:
  - a. The paid agent who Fletcher proposes to engage to represent it in these proceedings is Mr David Bates (Mr Bates). Mr Bates is a lawyer as defined by s 12 of the FWA as he is admitted to the legal profession in New South Wales, but he does not have a current practicing certificate.
  - b. Mr Bates has over ten years’ experience in the provision of workplace relations consulting services and has been providing workplace relations consulting to Fletcher for about five years.
  - c. Mr Bates is familiar with Mr Arnold’s employment and his current claim.
  - d. While Mr Bates’ usual place of business is in New South Wales, he is prepared to attend in person in Perth in any hearings, as directed by the Industrial Magistrates Court.
  - e. Mr Arnold has made a number of formal complaints or claims against the respondent in the past which has resulted in Fletcher having committed significant time and resources in attempts to resolve those matters.
  - f. For this reason, Fletcher no longer wishes to conduct these proceedings directly, but seek to do so with Mr Bates’ assistance.
- 6 The facts in this matter appear to be largely uncontentious. Fletcher employs Mr Arnold in a meat processing plant. It is common ground that he is covered by the *Meat Industry Award 2020* (the Award). It is also common ground that Mr Arnold works Saturday and Sunday night shifts.
- 7 Mr Arnold’s claim is that Fletcher is in breach of the Award, and therefore has contravened s 45 of the FWA by:
  - a. Failing to pay permanent night shift loading for work he performed under cl 23.3 of the Award; and
  - b. Failing to pay penalty rates for work he performed under cl 24.1 of the Award.<sup>1</sup>
- 8 Mr Arnold’s claim also refers to Fletcher agreeing to an increase in his pay, and this being achieved by his night shift loading being increased, but his normal pay decreasing. He says “the minimum wage applies to the rate of pay for the loading and not

my rate of pay which should have remained the same.”

- 9 Fletcher has denied Mr Arnold’s claim. Its defence is that it has at all times paid Mr Arnold at least the Award minimum rates of pay, including night shift loading under cl 23.3, and, that where an employee is paid the night shift loading under cl 23.3, cl 24.1 penalty rates do not apply.
- 10 One key issue for determination is, therefore, whether cl 24.1 of the Award applies to Mr Arnold’s work. This raises a question of the correct construction of the Award. Another issue involves the interaction between Mr Arnold’s employment contract conditions, and how they interact with the claimed award entitlements.
- 11 The correct construction of the Award is a question of law. In both *Cangemi v Specialist Diagnostic Pathology Services Pty Ltd T/As Western Diagnostic Pathology* [2014] FCCA 187 and *Annese v General Crane Services Pty Ltd* [2019] FCCA 266 the Federal Circuit Court of Australia characterised issues about the construction of collective agreements and the interaction between them and the contract of employment, amongst other issues, as having sufficient complexity to warrant representation. Similarly, the nature of the issues in this case is such that the Court would benefit from thorough and considered arguments by a representative who is legally trained. This weighs in favour of leave being granted.
- 12 Fletcher has, in my view, shown that the representative it proposes to engage is familiar with proceedings of this nature, and skilled and competent in them.
- 13 Mr Arnold has not submitted that he will be prejudiced by the granting of leave. I do not consider Mr Arnold would be prejudiced as, if Mr Arnold remains unrepresented, the Court is able to assist him to participate in the proceedings meaningfully and fairly.
- 14 For these reasons, I am satisfied that leave to be represented should be granted to the respondent. I will make orders accordingly that:
- (1) Pursuant to s 548(5) of the *Fair Work Act 2009* (Cth), the respondent has leave to be represented by a lawyer until further order.

**R. COSENTINO**  
INDUSTRIAL MAGISTRATE

<sup>1</sup> Transcript 10/12/24

## UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2025 WAIRC 00046

### UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**CITATION** : 2025 WAIRC 00046  
**CORAM** : COMMISSIONER T B WALKINGTON  
**HEARD** : MONDAY, 4 NOVEMBER 2024  
**DELIVERED** : THURSDAY, 30 JANUARY 2025  
**FILE NO.** : U 10 OF 2022  
**BETWEEN** : GARBRIELLA BLUME  
 Applicant  
 AND  
 HILLVIEW GOLF COURSE  
 Respondent

**CatchWords** : Unfair dismissal claim – Applicant's lack of communication – Application dismissed for want of prosecution  
**Legislation** : *Industrial Relations Act 1979* (WA) s 27(1)  
*Industrial Relations Commission Regulations 2005* (WA) reg 24(2)(d) and reg 25(3)  
**Result** : Application dismissed for want of prosecution  
**Representation:**  
**Applicant** : No appearance  
**Respondent** : No appearance

**Case(s) referred to in reasons:**

*The Australian Workers' Union, West Australian Branch, Industrial Union of Workers v Barmenco Pty Ltd – Plutonic Project* (2000) 80 WAIG 3162

*Reasons for Decision***Background**

- 1 Ms Gabriella Blume (the applicant) filed an unfair dismissal claim on 21 January 2022.
- 2 On 2 February 2022 the representative of the respondent telephoned the Registry to advise that he believed the claim ought not be accepted because it concerned the COVID-19 mandate and that he was recording the phone conversation and was planning to discuss the matter on radio later that day. The respondent advised that he did not intend to respond to the claim.
- 3 On 11 February 2022 the respondent emailed the Commission to confirm he would not participate in proceedings.
- 4 Following further communications from the respondent, on 22 February 2022 the Commission emailed the respondent to inform him that his communications were threatening and not appropriate and he should desist from conducting himself in this manner.
- 5 A conciliation conference was scheduled for 30 March 2022.
- 6 The respondent informed the Commission he was unable to attend the conciliation conference.
- 7 Considering the various communications received by the Registry and the Commission from the respondent, the Commission formed the view that conciliation would not assist the resolution of the application.
- 8 A directions hearing was listed for 13 April 2022.
- 9 Following the directions hearing the following orders ([2022] WAIRC 00154) were issued:
  1. THAT the applicant file an amended application by 27 April 2022;
  2. THAT the respondent may file a response to the amended application by 2 May 2022;
  3. THAT the applicant file and serve any outlines of witness evidence and documents upon which she intends to rely by no later than 17 August 2022;
  4. THAT the respondent file and serve any outlines of witness evidence and documents upon which they intend to rely by no later than 21 September 2022;
  5. THAT the applicant file and serve an outline of submissions and any list of authorities upon which she intends to rely by no later than 5 October 2022;
  6. THAT the respondent file and serve an outline of submissions and any list of authorities upon which they intend to rely by no later than 19 October 2022;
  7. THAT the matter be listed for hearing on a date not before 26 October 2022;
  8. THAT the parties have liberty to apply on short notice.
- 10 The applicant did not file an amended application.
- 11 On 3 May 2022 the Commission emailed the parties to confirm the applicant had not filed an amended application and sought the applicant's advice on how she wished to proceed.
- 12 The Commission sought the applicant's advice on how she wished to proceed again and emailed the parties on 27 May 2022, 19 August 2022 and 23 April 2024.
- 13 On 2 August 2024 the Commission notified the parties that the matter was listed for a show cause hearing on Monday, 4 November at 10:30 am. The parties were informed the show cause hearing is listed for the applicant to **show cause** why this matter ought not be dismissed pursuant to s 27(1) of the *Industrial Relations Act 1979* (WA) (**IR Act**).

**The law**

- 14 The Commission can dismiss a matter under s 27(1)(a) of the *Industrial Relations Act 1979* (WA):

**27. Powers of Commission**

- (1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —
  - (a) at any stage of the proceedings dismiss the matter or any part thereof or refrain from further hearing or determining the matter or part if it is satisfied —
    - (i) that the matter or part thereof is trivial; or
    - (ii) that further proceedings are not necessary or desirable in the public interest; or
    - (iii) that the person who referred the matter to the Commission does not have a sufficient interest in the matter; or
    - (iv) that for any other reason the matter or part should be dismissed or the hearing thereof discontinued, as the case may be;

- 15 In *The Australian Workers' Union, West Australian Branch, Industrial Union of Workers v Barmenco Pty Ltd – Plutonic Project* (2000) 80 WAIG 3162 (*Barmenco*) the Full Bench set out the principles to consider when deciding whether to dismiss

an application for want of prosecution. They include the length of the delay, the explanation for the delay, the hardship to the applicant if the application is dismissed, the prejudice to the respondent if the action is allowed to proceed, and the conduct of the respondent in the litigation: *Barmingo* at [3162].

**Consideration**

- 16 The applicant did not appear at the show cause hearing. The Commission has the power to proceed to hear and determine the matter in the absence of any party who has been duly served with notice of the proceedings: s 27(1)(d) of the IR Act. Service on the applicant in this matter may be effected by leaving the notice at, or sending it by pre-paid post to, the applicant’s usual or last known place of abode: reg 24(2)(d) *Industrial Relations Commission Regulations 2005* (WA) (**IR Regulations**). Alternatively, service can be effected on the applicant by sending the notice of hearing as an attachment to an email sent to the email address that the applicant has provided to the Commission: reg 25(3) of the IR Regulations. In circumstances where my associate emailed the notice of hearing to the email address the applicant provided to the Commission, I am satisfied that the applicant has been duly served with notice of these proceedings and the Commission may proceed with the hearing in her absence.
- 17 My associate clearly explained in writing to the applicant by email that the application would be listed for a show cause hearing on 4 November 2024, and that at that hearing she must show cause why her application should not be dismissed and if she did not do so her application would be dismissed.
- 18 I consider that the applicant has had ample opportunity to show that she wants to continue with her unfair dismissal application. She has not done so. The applicant has not provided any reason for failing to comply with the Commission’s directions and requests. There is no evidence before the Commission about the hardship to the applicant if her application is dismissed, nor about the prejudice to the respondent if the application is allowed to proceed. Whilst the respondent’s conduct in these proceedings has been uncooperative and at times aggressive, this does not negate the need for the applicant to progress her claim. The applicant has not raised any concerns about the conduct of the respondent in proceedings. In the circumstances, I find the applicant has failed to prosecute her case and it should be dismissed.
- 19 For these reasons, an Order under s 27(1)(a) of the IR Act dismissing this matter will issue.

2025 WAIRC 00047

**UNFAIR DISMISSAL APPLICATION**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

GARBRIELLA BLUME

**APPLICANT**

-v-

HILLVIEW GOLF COURSE

**RESPONDENT**

**CORAM**

COMMISSIONER T B WALKINGTON

**DATE**

THURSDAY, 30 JANUARY 2025

**FILE NO/S**

U 10 OF 2022

**CITATION NO.**

2025 WAIRC 00047

**Result** Application dismissed for want of prosecution

**Representation**

**Applicant** No appearance

**Respondent** No appearance

*Order*

HAVING convened a Show Cause Hearing on 4 November 2024 and there being no appearances on behalf of either party, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders:

THAT application U 10 of 2022 is dismissed.

(Sgd.) T B WALKINGTON,  
Commissioner.

[L.S.]

2025 WAIRC 00058

**UNFAIR DISMISSAL APPLICATION**  
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**CITATION** : 2025 WAIRC 00058  
**CORAM** : COMMISSIONER C TSANG  
**HEARD** : ON THE PAPERS  
**DELIVERED** : FRIDAY, 7 FEBRUARY 2025  
**FILE NO.** : U 47 OF 2024  
**BETWEEN** : KERENSA LEANNE MCGRANE  
 Applicant  
 AND  
 SARAH JANE ANDERSON AS THE TRUSTEE FOR THE RUBY BAY TRUST,  
 TRADING AS RUBY BAY CATERING  
 Respondent

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**CatchWords** : Industrial Law (WA) – Whether Commission has jurisdiction over unfair dismissal claim – Whether applicant employed as a casual employee  
**Legislation** : *Industrial Relations Act 1979* (WA)  
**Result** : Jurisdictional objection upheld; Application dismissed  
**Representation:**  
**Applicant** : Ms K L McGrane (on her own behalf)  
**Respondent** : Ms S J Anderson (on her own behalf)

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**Cases referred to in reasons:**

*Balagopalan v South Metropolitan Health Service* [2022] WAIRC 00692  
*Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1  
*EFEX Group Pty Ltd v Bennett* [2024] FCAFC 35  
*WorkPac Pty Ltd v Rossato* [2021] HCA 23

*Reasons for Decision***Background**

- 1 On 17 May 2024, the applicant (**Ms McGrane**) lodged a *Form 2 – Unfair Dismissal Application (Form 2)* against her former employer, the respondent (**Ms Anderson**), claiming unfair dismissal from her position as Canteen Assistant on 19 April 2024.
- 2 On 24 July 2024, Ms Anderson filed a *Form 2A – Employer Response to Unfair Dismissal Application*, raising a jurisdictional objection that Ms McGrane is not eligible to make a claim of unfair dismissal as she was employed as a casual employee (**Jurisdictional Objection**).
- 3 On 26 September 2024, Directions ([2024] WAIRC 00854) were issued for the Jurisdictional Objection to be determined on the papers, and for the parties to file affidavits, sworn or affirmed in accordance with ss 8–9 of the *Oaths, Affidavits and Statutory Declarations Act 2005* (WA), testifying to the matters that they sought to rely upon in support of, or objecting to, the Jurisdictional Objection.

**Principles**

- 4 The Commission can only hear an unfair dismissal claim if there has been a dismissal.
- 5 There is no dismissal when the employment relationship between a casual employee and their employer ends in accordance with the terms of the contract and industrial agreement at the end of each period of engagement: *Balagopalan v South Metropolitan Health Service* [2022] WAIRC 00692 (*Balagopalan*) [52], [54]–[57]:
  52. Following the statements of the High Court in [*Rossato*] and *Personnel Contracting* referred to above, the answer to this question must be sought in the terms of the legally enforceable instruments which determine the parties' respective rights and obligations rather than in their subsequent conduct or performance of the contract. ...
  54. More relevantly, the employment contract indicates in several ways that the casual employment was in the nature of several and distinct engagements rather than ongoing employment. It refers to 'any period of casual work', 'possible placements', 'at the time of any and each casual arrangement' and 'any employment periods'.
  55. Finally, the contract expressly states that any employment periods are governed by the Industrial Agreement. I have set out the relevant terms of the Industrial Agreement above. The nature of casual employment under the Industrial Agreement is such that there is no scope to understand casual employment as being in the nature of ongoing or

continuous employment. Each engagement must be for a period of less than one week. As SMHS points out, the very nature of casual employment, as defined by the Industrial Agreement, is that it cannot be said to be continuing or to support a subsisting relationship outside the periods of work themselves.

56. I accept SMHS's submission that the Industrial Agreement operates on the underlying principle that each occasion of casual employment, even if only one shift, is a separate, freestanding contract of employment such that the employment relationship ends at the end of a shift.
  57. The practical consequence of the nature of the casual employment is that Mr Balagopalan was not entitled to be engaged for future shifts and was not in an ongoing employment relationship with SMHS. If he was precluded from accessing further shifts from 16 February 2022, or indeed any later point, it is not a dismissal at law. The employment relationship between him and SMHS ceased pursuant to the terms of the contract and the Industrial Agreement at the conclusion of each separate period of engagement.
- 6 In *Balagopalan*, the Commission applied the High Court's principles from *WorkPac Pty Ltd v Rossato* [2021] HCA 23 (*Rossato*) and *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 (*Personnel Contracting*) to find that rostering arrangements are not a relevant factor in determining the nature of casual employment. Instead, the focus is on the written employment contract, which, along with the terms of the industrial agreement, explicitly disavows the notion that Mr Balagopalan's casual employment is akin to ongoing or continuous employment.
  - 7 In *Rossato*, the High Court ruled that employment is not considered casual if there is a 'firm advance commitment' to ongoing work. The Court clarified that any irregularity, uncertainty, discontinuity, intermittency or unpredictability, indicates no such commitment. The Court emphasised that the determination of a firm advance commitment must be based on the agreement between the parties, rather than their expectations or understandings in the performance of the agreement: [49], [57], [89], [96] (Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ).
  - 8 In *Rossato*, despite Mr Rossato being rostered up to a year in advance to work regular, full-time hours according to a fixed pattern of work, the High Court concluded that there was no firm advance commitment to ongoing work: [95]–[96] (Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ).
  - 9 The High Court found that the parties' express agreement to pay Mr Rossato a casual loading in lieu of entitlements available to ongoing employees, such as paid annual leave, was a compelling indication that their relationship did not include a commitment for an ongoing working relationship: [97] (Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ).
  - 10 In *Personnel Contracting*, the High Court emphasised that the nature of an employment relationship is determined by the terms of the contract, not by the practical performance of that contract: [59]–[62] (Kiefel CJ, Keane and Edelman JJ); [185]–[189] (Gordon J, Steward J agreeing at [203]).
  - 11 The majority of the Full Court of the Federal Court in *EFEX Group Pty Ltd v Bennett* [2024] FCAFC 35 (*EFEX*) outlined the applicable principles where there is no written employment contract: [7]–[11] (Katzmann and Bromwich JJ):
    - 7 This case did not involve any written contract at all, much less a comprehensive written contract. It was a wholly oral contract, with sparse details of the agreement reached expressed in the lead up to its formation. In the absence of a written contract and no evidence of a particular conversation during which the contract was made, "evidence of the parties' conduct must necessarily be considered in order to draw inferences as to whether the meeting of minds necessary to create a contract has occurred and what obligations they have thereby undertaken": *Personnel Contracting* at [177] per Gordon J (Steward J agreeing), as summarised in *Chiodo v Silk Contract Logistics* [2023] FCA 1047 at [9].
    - 8 As Kennett J explained in *Chiodo* at [8]–[9], where there is no written contract, the identification of the parties' contractual rights "must proceed somewhat differently but the fundamental task is the same: the parties' contractual rights and obligations are to be ascertained and characterised"; and the focus is on the ascertainment of the legal rights and obligations of the contracting parties, "rather than how they behaved in the performance of their contract".
    - 9 The terms of an oral contract may be able to be inferred from the circumstances, including in whole or in part from the parties' conduct or a course of dealing between them, or implied where necessary for business efficacy: *Realestate.com.au Pty Ltd v Hardingham* [2022] HCA 39; 406 ALR 678 at [21]–[22] per Kiefel CJ and Gageler J.
    - 10 Thus, whether the [contract] is written or not, or is oral in whole or in part, the characterisation of the relationship between the parties depends on their contractual rights and not on circumstances, facts or events that do not affect those rights. It follows that a "wide-ranging review of the entire history of the parties' dealings" is neither necessary nor appropriate for the purpose of characterising the relationship: *Personnel Contracting* at [59] per Kiefel CJ, Keane and Edelman JJ; see also [185]–[189] per Gordon J (Steward J agreeing).
    - 11 The principles of contract interpretation also apply to the terms of an unwritten contract that are able to be ascertained, inferred or implied. They allow regard to be had to circumstances surrounding the making of the contract and events and matters, known to the parties at the time of contracting, which assist in identifying the object or purpose of the contract. The nature of the work contracted for and the arrangements of the supply or provision of any tools or equipment to the putative employee may also be relevant. Generally, things said or done after a contract was made are not legitimate aids to its construction. In a case such as this, for a matter with no necessary connection to the contractual obligations of the parties to have any bearing on the characterisation of their relationship, "it must be concerned with the rights and duties established by the parties' contract, and not simply an aspect of how the parties' relationship has come to play out in practice": *Personnel Contracting* at [61] (Kiefel CJ, Keane and Edelman JJ).

#### The evidence

- 12 On 24 October 2024 and 19 December 2024, Ms McGrane filed affidavits, stating:
  - (a) On Friday, 23 February 2024, she was interviewed for the position of canteen assistant by Ms Anderson. During this interview:
    - (i) Ms Anderson said her permanent work shifts would be on Fridays of each school term to fill the gap in the weekly roster, after someone else had resigned.
    - (ii) Ms Anderson also mentioned the opportunity to cover shifts for other staff when needed, and scope for

additional permanent shifts if they became available.

- (iii) Ms Anderson did not mention that she was being employed on a casual basis.
  - (iv) The only mention about the 'award' was \$30 an hour and superannuation.
- (b) During her employment (27 February 2024 to 19 April 2024):
- (i) She worked a consistent work pattern of Fridays of each week, except for the Good Friday public holiday and school holiday Fridays.
  - (ii) She worked all shifts allocated to her, including permanent shifts on Fridays, shifts to cover other staff members 'on multiple occasions' when asked, and a catering shift early in her employment.
  - (iii) She did not receive a written employment contract or a position description.
  - (iv) She discovered she was a casual employee when she saw it written on her payslip.
- 13 On 21 November 2024 and 16 January 2025, Ms Anderson filed affidavits, stating:
- (a) She has operated school canteens since July 2021 and has employed a total of 22 staff. All staff have been employed as casuals under the same award and written employment contracts as each other. She has never employed anyone in any capacity other than as a casual, due to the nature of her business.
  - (b) On Wednesday, 21 February 2024, Ms McGrane contacted her via Messenger, stating that she was looking for work. At the time, there was no position advertised. However, she agreed to meet with Ms McGrane because she was wanting someone who could help 'cover some shifts'.
  - (c) On Friday, 23 February 2024, she interviewed Ms McGrane for a casual canteen assistant position. During this interview, she explained to Ms McGrane the nature of the role, and told Ms McGrane what her rate of pay would be and that this rate included the casual loading under the relevant award.
  - (d) At no time during the interview, or at any time afterwards, did she offer Ms McGrane a permanent position.
  - (e) Ms McGrane started work on Tuesday, [27] February 2024. She was absent from site on this day as she was receiving medical treatment. However, Ms McGrane was treated and trained in the same way as every other staff member.
  - (f) Ms McGrane received her first pay on Wednesday, 6 March 2024, and was emailed her payslip, which listed her pay rate and that she was a casual. At no time did Ms McGrane question her casual status or indicate that she thought that she was actually a permanent employee.
  - (g) Between Tuesday, [27] February 2024 and Friday, 19 April 2024, Ms McGrane worked a variety of shifts, on a variety of days, covering shifts as required.
  - (h) Ms McGrane was part of the 'Canteen Chat 2024' Messenger group, where all staff could swap shifts, add shifts to cover others, and state when they were unavailable for work, as is the nature of casual employment.
  - (i) Ms McGrane's payroll records show that:
    - (i) She was paid a casual loading in her weekly pay as per the award.
    - (ii) She did not work a consistent work pattern.
    - (iii) She was not paid for any day that she did not work, as per the conditions of a casual employee.
    - (iv) There were three weeks that Ms McGrane did not work. Two of these weeks were during school holidays, and the other week was when Ms McGrane was not required. In these three weeks, Ms McGrane was not paid any holiday pay, as this was included in her hourly rate as a casual employee.
  - (j) She has never suggested verbally or in writing that Ms McGrane was employed other than as a casual.
  - (k) She never made a firm advance commitment as to the duration of Ms McGrane's employment or the days or hours that Ms McGrane would work.
- 14 Ms Anderson also filed four affidavits of former and current staff members, in which they state that they previously were, or currently are:
- (a) Employed as a canteen assistant.
  - (b) Employed as a casual, and to the best of their knowledge, all canteen staff are employed as casuals.
  - (c) Part of the Messenger group 'Canteen Chat 2024' where they could add, swap, or change shifts with other staff, and that Ms McGrane was also a part of this group.

### Consideration

- 15 From the evidence, it is not disputed that:
- (a) Ms Anderson is in the business of operating school canteens and employing canteen assistants. All other canteen assistants, due to the nature of her business, have been or are currently employed on a casual basis, under the same award and pursuant to a written employment contract in the same terms: [13(a)], [14(a)–(b)] above.
  - (b) Ms McGrane contacted Ms Anderson for work. Ms Anderson had not advertised to employ a canteen assistant but agreed to interview Ms McGrane because she was wanting someone to help 'cover' the shifts of the canteen assistants: [13(b)] above.
  - (c) Ms Anderson interviewed Ms McGrane on Friday, 23 February 2024 for a canteen assistant position: [12(a)], [13(c)]

above.

- (d) During the interview, Ms Anderson explained to Ms McGrane the nature of the position: [13(c)] above. This included ‘filling a gap’ in the weekly roster, following the resignation of another canteen assistant, by working Fridays during the school term: [12(a)(i)] above. Ms Anderson also informed Ms McGrane that she had the opportunity to cover the shifts of other canteen assistants and to work additional shifts as they became available: [12(a)(ii)] above.
- (e) Ms Anderson employed Ms McGrane following the interview, and Ms McGrane commenced employment on Tuesday, 27 February 2024: [13(e)] above.
- (f) Ms McGrane was employed from Tuesday, 27 February 2024 to Friday, 19 April 2024. During this period, Ms McGrane worked Fridays during the school term: [12(b)(i)] above. She also covered the shifts of other canteen assistants and worked a catering shift: [12(b)(ii)], [13(g)] above.
- (g) The business has a Messenger group, titled ‘Canteen Chat 2024’, in which canteen assistants can swap shifts, add shifts to cover others, and indicate when they are unavailable for work. Ms McGrane was part of this Messenger group: [13(h)], [14(c)] above.
- (h) Ms Anderson issued Ms McGrane with weekly payslips, the first of which was dated Wednesday, 6 March 2024: [13(f)] above.
- (i) Ms Anderson attached to her first affidavit the payslips issued to Ms McGrane. These indicate the following:
  - (i) Pay Frequency: Weekly.
  - (ii) Position: Casual Canteen Staff.
  - (iii) Pay Rate: \$30 per hour.
  - (iv) Superannuation is paid in addition to the Pay Rate.
  - (v) Ms McGrane worked the following hours:

Week ending	Payment Date	Hours worked
3 March 2024	6 March 2024	15 hours
10 March 2024	13 March 2024	9.5 hours
17 March 2024	20 March 2024	5.5 hours
24 March 2024	27 March 2024	5.75 hours
31 March 2024	3 April 2024	
7 April 2024	10 April 2024	
14 April 2024	17 April 2024	
21 April 2024	24 April 2024	16.25 hours

- (j) Ms McGrane discovered that she was a casual employee from her payslip: [12(b)(iv)] above. At no time did Ms McGrane query her casual status with Ms Anderson: [13(f)] above.
  - (k) Ms Anderson did not issue Ms McGrane a written employment contract: [12(b)(iii)] above.
- 16 Applying *Rossato*, *Personnel Contracting*, and *Balagopalan*, the nature of Ms McGrane’s employment relationship is determined by the terms of her contract of employment.
  - 17 Given [15(k)] above, and applying *EFEX*, it is necessary to first consider whether there is ‘evidence of a particular conversation during which the contract was made’: *EFEX* [7].
  - 18 As outlined at [15(c)] and [15(e)] above, there is no dispute that Ms Anderson interviewed Ms McGrane for a canteen assistant position on Friday, 23 February 2024, following which Ms Anderson employed Ms McGrane.
  - 19 From the evidence, there appears to be a dispute about what was said at the interview. Ms McGrane says that Ms Anderson did not inform her that she was being employed on a casual basis: [12(a)(iii)] above. Ms Anderson says that she informed Ms McGrane that her rate of pay included the casual loading under the award: [13(c)] above. Ms McGrane says that the only mention Ms Anderson made about the award was that she would be paid an hourly rate of \$30 per hour plus superannuation: [12(a)(iv)] above.
  - 20 Ms McGrane says that during the interview, Ms Anderson informed her that her ‘permanent work shifts’ would be Fridays during the school term: [12(a)(i)] above. Ms Anderson says that neither at the interview, nor afterwards, did she offer to employ Ms McGrane in any capacity other than as a casual employee: [13(d)] above. Ms Anderson says that she has never suggested to Ms McGrane, whether verbally or in writing, that Ms McGrane was employed in any capacity other than as a casual: [13(j)] above. Ms Anderson further says that she made no firm advance commitment to Ms McGrane regarding the duration of Ms McGrane’s employment, or the days or hours that Ms McGrane would work: [13(k)] above.
  - 21 In circumstances where there is no written employment contract and no evidence of a particular conversation during which the contract was made, the terms of the contract may be inferred from the circumstances, including in whole or in part from the parties’ conduct or a course of dealing between them, or implied where necessary for business efficacy: *EFEX* [9].
  - 22 Furthermore, regard may be had to the circumstances surrounding the making of the contract and events and matters known to the parties at the time of contracting, which assist in identifying the object or purpose of the contract. The nature of the work

contracted for may also be relevant: *EFEX* [11].

- 23 Relevant to the consideration of the matters at [17] and [21]–[22] above, are the matters outlined at [15(a)–(d)] above.
- 24 Considering the matters at [15(a)–(d)] above, and despite the matters at [19]–[20] above, I find that the terms of Ms McGrane’s employment provided that her employment was on a casual basis, for the following reasons.
- 25 There is no evidence that Ms Anderson raised any topics at the interview that could suggest Ms McGrane’s employment was to be ongoing, such as an entitlement to annual leave or personal leave.
- 26 On the contrary, and as outlined at [15(d)] above, I find that Ms Anderson expressly discussed the nature of the canteen assistant position with Ms McGrane at the interview, including the variability in her work. I find this variability akin to the irregularity, uncertainty, discontinuity, intermittency or unpredictability discussed in *Rossato* (at [7] above), as indicating a lack of a firm advance commitment to ongoing work.
- 27 Ms Anderson does not admit or deny informing Ms McGrane that her ‘permanent work shifts’ would be Fridays during the school term. Given the variability of work that was offered (as outlined at [15(d)] and discussed at [26] above), I consider it more likely that had Ms Anderson used the word *permanent*, that it was a reference to Ms McGrane *regularly* working a Friday shift, as opposed to Ms McGrane being employed on a permanent basis to work each Friday. However, given that the High Court in *Rossato* found that a firm advance commitment to ongoing work does not exist, even with a work roster set a year in advance to work regular, full-time hours according to a fixed pattern of work, I do not consider it necessary to make any findings on this point.
- 28 In circumstances where Ms Anderson’s business was the operation of school canteens and for the duration of this business she has only employed canteen assistants on a casual basis, the surrounding circumstances, the parties’ conduct and business efficacy would infer or imply into the oral contract between Ms Anderson and Ms McGrane that Ms Anderson was offering to employ McGrane on a casual basis.
- 29 It is not disputed that Ms Anderson employs all other canteen assistants under the same award that governed Ms McGrane’s employment. It is also not disputed that Ms Anderson entered into a written employment contract with all other canteen assistants which states their casual status.
- 30 At the directions hearing, Ms Anderson explained the reasons why she did not issue Ms McGrane with a written employment contract: (ts 3)
- ... So during the time that this was all happening, I was actually not there the day that she started because I was undergoing treatment for [redacted]. So unfortunately, there are a whole number of things that occurred the day that she started and the week that she started where I said I would get her paperwork through to her. I also had my laptop stolen from my car, and I can prove that through police records.
- So I had – where – as well as health concerns and treatment concerns, I was also dealing with the fact that my laptop was gone, so I, from memory, thought that she had actually signed it and it was available, and now in hindsight, I can see that she hasn’t actually got a signed copy of it, and I don’t have a signed copy of it in – in my records ...
- 31 I accept the matters at [30] above and that Ms Anderson’s personal circumstances at the time Ms McGrane commenced employment, led to Ms Anderson’s oversight in issuing to Ms McGrane a written employment contract.
- 32 I accept that had Ms Anderson issued to Ms McGrane a written employment contract, that it would have been identical to the contracts issued to her other staff; and stated Ms McGrane’s employment status as a casual.
- 33 I note that the written employment contract that Ms Anderson issues to all other staff members contain the following terms:
- Letter of engagement**
- I am pleased to offer you casual employment in the position of Canteen Assistant with us at Ruby Bay Catering (‘the employer’) on the terms and conditions set out in this letter.
- 1. Position**
- 1.1 Your employment will be on a casual basis, as required.
- 1.2 Each occasion that you work will be a separate contract of employment which ceases at the end of that engagement.
- 1.3 As a casual employee, there is no guarantee of ongoing or regular work.
- 1.4 The duties of this role are in the **attached** position description. On each occasion that you work you will be required to perform these duties and any other duties the employer may assign to you, having regard to your skills, training and experience.
- ...
- 3. Remuneration**
- 3.1 You will be paid at the rate of \$30.00 per hour, including the applicable casual loading.
- 34 I find that the terms of Ms McGrane’s employment provided for her to be paid \$30 per hour plus superannuation. I find that this rate included the casual loading that Ms McGrane was entitled to receive as a casual employee.
- 35 It is undisputed that the terms of Ms McGrane’s employment were governed by an industrial award, as a matter of law.
- 36 Ms Anderson attached to her second affidavit the rates of pay as at 1 July 2023 under the *Restaurant, Tearoom and Catering Workers’ Award (Award)*.
- 37 Clause 12 of the Award states:

## 12. - PART-TIME EMPLOYEES

- (1) A part-time worker shall mean a worker who, subject to the provisions of Clause 8. - Hours, regularly works no less than twenty ordinary hours per fortnight nor less than three hours per work period.
- (2) A part-time worker shall receive payment for wages, annual leave, holidays, bereavement leave, and sick leave on a pro-rata basis in the same proportion as the number of hours worked each fortnight bears to seventy-six hours.
- (3) Notwithstanding any other provision of this award, the employer and the worker may, by agreement, increase the ordinary hours to be worked in any particular pay period to a maximum of seventy-six ordinary hours. Such extra hours shall be paid for at ordinary rates of pay.

38 Clause 12(1) of the Award defines a part-time worker as one who regularly works no less than 20 ordinary hours per fortnight. Given there is no evidence that Ms McGrane was offered to work, nor indeed worked, a minimum of 20 hours a fortnight, I find that Ms McGrane was not employed as a part-time employee under the Award.

39 Clause 11 of the Award states:

## 11. - CASUAL EMPLOYEES

- (1) A casual employee shall mean an employee engaged and paid as such and whose employment may be terminated by either the employer or the employee giving not less than 1 hours notice or the payment or forfeiture, as the case requires, of 1 hours pay.
- (2) A casual employee shall not be engaged for less than 2 consecutive hours each shift.
- (3) A casual employee shall be paid only an hourly base rate of pay that is an amount not less than 1/76th of the fortnightly rate prescribed in Clause 21. - Wages Rates for the relevant classification for any work performed.
- (4) In addition to the hourly base rate of pay prescribed in subclause (3) of this clause, a casual employee shall also be paid the following loading –

DAY	% PENALTY RATE
Monday to Friday	25
Saturday & Sunday	50
Public Holiday	125

- (5) Where a shift commences on one day and ceases on the following day, for each hour worked on that shift the employee shall be paid at the rate applying to the day on which that hour of work is actually performed.
- (6) A casual employee is to be informed, before they are engaged, that they are employed on a casual basis and that there is no entitlement to paid sick leave or annual leave.

40 I find that Ms McGrane was employed as a casual employee under the Award, despite her dispute that Ms Anderson did not inform her of her casual status before she was engaged, as required by clause 11(6) of the Award.

41 I find that the nature of casual employment under the Award is such that there is no scope to view Ms McGrane's casual employment as ongoing or continuous employment.

**Conclusion**

42 For the preceding reasons, I find that Ms McGrane was employed as a casual employee, and that her employment ended in accordance with her casual employment.

43 Therefore, the Commission lacks jurisdiction over Ms McGrane's unfair dismissal application.

44 Consequently, application U 47 of 2024 will be dismissed.

2025 WAIRC 00060

**UNFAIR DISMISSAL APPLICATION**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

KERENSA LEANNE MCGRANE

**APPLICANT**

-v-

SARAH JANE ANDERSON AS THE TRUSTEE FOR THE RUBY BAY TRUST, TRADING AS RUBY BAY CATERING

**RESPONDENT****CORAM**

COMMISSIONER C TSANG

**DATE**

FRIDAY, 7 FEBRUARY 2025

**FILE NO/S**

U 47 OF 2024

**CITATION NO.**

2025 WAIRC 00060

<b>Result</b>	Application dismissed
<b>Representation</b>	
<b>Applicant</b>	Ms K L McGrane (on her own behalf)
<b>Respondent</b>	Ms S J Anderson (on her own behalf)

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*Order*

HAVING heard from Ms K L McGrane on her own behalf and Ms S J Anderson on her own behalf, and reasons for decision having been delivered on 7 February 2025, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT application U 47 of 2024 be dismissed for want of jurisdiction.

[L.S.]

(Sgd.) C TSANG,  
Commissioner.

**2025 WAIRC 00033**

**CONTRACTUAL BENEFIT CLAIM**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

<b>CITATION</b>	:	2025 WAIRC 00033
<b>CORAM</b>	:	COMMISSIONER T B WALKINGTON
<b>HEARD</b>	:	FRIDAY, 31 MAY 2024
<b>DELIVERED</b>	:	FRIDAY, 24 JANUARY 2025
<b>FILE NO.</b>	:	B 61 OF 2023
<b>BETWEEN</b>	:	SUZANNE GALLOWAY
		Applicant
		AND
		SIGNCRAFT (AUST) PTY LTD
		Respondent

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CatchWords	:	Denied contractual benefits – entitlements under a contract of employment – probation – casual – annual leave accrued – personal and carer’s leave – public holidays – national employment standards – clean hands – misconduct of employee – breach of employment contract
Legislation	:	<i>Fair Work Act 2009</i> (Cth) <i>Industrial Relations Act 1979</i> (WA)
Result	:	Application dismissed
<b>Representation:</b>		
Applicant	:	Ms Suzanne Galloway
Respondent	:	Mr Gregory Morgan

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**Case(s) referred to in reasons:**

*Belo Fisheries v Dennis Terence Froggett* (1983) 63 WAIG 2394;

*Charles (Carmelo) Parrella v FBM Corporation Pty Ltd* [2012] WAIRC 00903; (2012) 92 WAIG 1988

*Civil Service Association of Western Australia Incorporated v Director General, Ministry of Justice* [2003] WAIRC 08587; (2003) 94 WAIG 215

*Lai Corporation Pty Ltd v Steinberg* (1986) 28 AILR 492

*Matthews v Cool or Cosy Pty Ltd & Anor* [2004] WASCA 114; (2004) 84 WAIG 2152

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

*Reginald Simons v Business Computers International Pty Ltd* (1985) 65 WAIG 2039

*Waroona Contracting v Usher* (1984) 64 WAIG 1500

*Reasons for Decision*

- 1 Ms Suzanne Galloway (the applicant) brings a claim for denied contractual benefits. The applicant claims \$4,560.00 being for one month pay in lieu of notice, \$1,140.00 being for 38 hours carers leave and \$1,527.63 being for 50.92 hours annual leave accrued but not taken. The applicant also claims that she was underpaid by \$2.00 per hour in the first week of her employment and seeks payment of \$80.00. The total amount claimed is \$7,307.63.
- 2 The respondent, Signcraft (Aust) Pty Ltd (Signcraft) is the applicant's former employer. It opposes the claim and says the applicant was paid her entitlements due under the terms of the contract of employment. The respondent also says the applicant misconducted herself and was in breach of her employment contract and contends that in the circumstances of the applicant's misconduct, it would be unfair to grant the applicant's claim.

**Factual background and Evidence**

- 3 The applicant was employed by the respondent as a signwriter from 28 February 2023 until the employment relationship ended on or around 28 July 2023.
- 4 The respondent wrote to the applicant on 23 January 2023 offering her a position of Signwriter/Installer starting on 13 February 2023. The terms of the employment set out in the letter stated the position was casual, then full time after three months' probation. The letter further stated that the applicant's 'employment is on a contractual basis for a period of three months subject to renewal'.
- 5 The parties agree that the applicant was subsequently employed under a written contract dated 20 March 2023. The contract terms provided she was full time and was appointed for a probationary period of three months from the commencement date of 24 February 2023 during which time the employment may be terminated by the employer with two weeks' notice. The terms of the contract provided four weeks annual leave, ten days paid personal or carer's leave accrued on a pro-rata basis per year, and up to two days unpaid carer's leave for each occasion an immediate family or household member required care or support because of personal illness or injury or an unexpected emergency, and one months' notice of termination of the employment. The contract operated from 24 February 2023.
- 6 The respondent says that the applicant was employed on a casual basis and commenced full time employment on 20 May 2023. The respondent contends that the applicant was not entitled to annual leave and paid sick leave prior to 20 May 2023 because she was a casual employee at that time. Therefore, the applicant's claim for any accrued leave and personal leave accrued prior to 20 May 2023 are not entitlements which have been denied.
- 7 The parties disagree on the circumstances of the termination. The applicant says she was dismissed at the initiative of the respondent, and she is entitled to payment of notice. The respondent says the applicant effectively resigned without notice.
- 8 The respondent's evidence is that on the morning of 28 July 2023 the applicant was swearing, behaving angrily and aggressively to staff and customers, and being disruptive. The applicant was informed that her behaviour was not acceptable, and to go home and adjust her attitude when she returned to the workplace on Monday. The applicant left the workplace and then shortly after returned and removed her Signcraft uniform T-shirt, threw it on a bench and demanded a separation certificate and her final pay.
- 9 The respondent's evidence is that later that day the applicant contacted Signcraft staff and insisted on receiving a separation certificate and payment of her final pay. On the same day the applicant visited the principal of the respondent, Mr Morgan, at his home, and spoke to his partner in an aggressive manner demanding to speak with Mr Morgan.
- 10 Later that day, Mr Morgan emailed the applicant stating that she is not to phone or return to the office.
- 11 On 1 August 2023, Signcraft emailed the applicant advising that it accepted her resignation and had paid her entitlements and provided her a separation certificate as she had requested.
- 12 After the applicant had left the workplace, it was noticed by one of the staff that the cameras in the print room were not working. On investigating the cause of the dysfunction, it was found that grease had been smeared over the camera lenses.
- 13 The camera recordings made on 27 July 2023 were submitted into evidence and the recordings show the applicant smearing the camera lenses. The respondent contends that the applicant's actions were deliberate and were done to prevent observation of her subsequently using the business equipment for her own personal use.
- 14 The applicant says that she did not intentionally smear the cameras with grease and that she was cleaning the cameras.
- 15 A camera was damaged and replaced at a cost of \$465.00 to the respondent.
- 16 I find that the Ms Galloway deliberately smeared grease on the cameras. I do not find the applicant to be credible when she says that she was instructed to clean the cameras and somehow mistakenly used grease to do so. The recordings show that after applying the grease to the camera lenses, the applicant observed the display monitors. It is clear from the video recording of her observing the camera's video display, that she would have noticed the display for each camera was obscured. Her reaction is not consistent with that of a person realising a significant problem had occurred, if the purpose of the applicant had been to clean the camera lenses.
- 17 I therefore find that this was a deliberate act by the applicant to prevent the observation and recording of her subsequent activities in the print work areas.
- 18 The respondent says that the applicant used one of the printers to undertake private work. The respondent says that the applicant had been told that she was not to undertake private work using Signcraft equipment unless she had prior approval. The respondent says that previously the applicant had been told not to use the printer and that she was not trained on the equipment. The respondent says the applicant damaged the printer and the repair cost \$6,088.50.

- 19 On the balance of probabilities, I find that the applicant used a specialised printer for her personal use. I find that the contract of employment clearly states that using equipment for personal use is grounds for termination of employment without notice, unless the use was agreed. Given this, the applicant must have understood that she needed to have approval to use the printer. I find that the applicant deliberately obscured the camera lenses so that she would not be observed using the equipment for personal use.
- 20 The respondent's evidence is that on 3 August 2023 he received an email from Kent Knight of Image Sign Group Pty Ltd, informing him that the applicant had contacted him to undertake work for him that had been sourced through his communications with Signcraft. Mr Knight had understood that the work undertaken by the applicant was being done as part of Signcraft's services. It was only discovered that the work had been undertaken by the applicant directly and independently of Signcraft, when Mr Knight requested that Signcraft rectify issues with the installation of the signs by the applicant.
- 21 The applicant says that she was engaged directly by Mr Knight following her response to a general invitation by Mr Knight to a number of service providers.

### Consideration

- 22 The jurisdiction to enquire into and deal with an industrial matter is conferred by s 23(1) of the *Industrial Relations Act 1979* (WA) to hear and determine a claim. Section 29(1)(b)(ii) of the Act provides standing to an employee to bring a claim concerning entitlements under a contract of employment: *Matthews v Cool or Cosy Pty Ltd & Anor* [2004] WASCA 114 (2004) 84 WAIG 2152.
- 23 The Full Bench in *Reginald Simons v Business Computers International Pty Ltd* (1985) 65 WAIG 2039 found that the jurisdiction of the Commission in matters pursuant to s 29(1)(b)(ii) of the Act is judicial:
 

The jurisdiction of the Commission which is founded by proceedings brought under section 29 (b) (ii) of the Act is judicial. It is not arbitral or legislative. The Commission's jurisdiction is thus limited to the ascertainment of existing rights by a determination of whether or not an employee has been denied a benefit, not being a benefit under an award or an order, to which the employee is entitled under a contract of service.
- 24 An applicant making an application pursuant to s 29(b)(ii) of the Act must, therefore, establish that their claim is for a benefit to which he/she is entitled under his/her contract of employment. The Commission must determine the terms of the contract of employment and decide whether the claim constitutes a benefit which has been denied under this contract, having regard to the obligations of the Commission to act according to equity, good conscience, and the substantial merits of the case (see *Belo Fisheries v Froggett* 63 WAIG 2394 ; see also *Waroona Contracting v Usher* (1984) 64 WAIG 1500 and *Perth Finishing College Pty Ltd v Watts* (1989) 69 WAIG 2307).
- 25 The meaning of 'entitled' in the context of the section must mean entitled as a matter of legal right, because it refers to benefits under the contract: *Perth Finishing College Pty Ltd v Watts* at 2313.
- 26 To establish that there is a claim for a benefit under the contract the terms of the contract must be considered.
- 27 The parties agree that there was a written contract dated 20 March 2023 and this document sets out the terms of employment of the applicant.
- 28 I am satisfied that the applicant has established that a written contract of employment applied and contained the following express terms:
  - a. The written contract of employment commenced on 24 February 2023;
  - b. The rate of pay is \$30.00 per hour;
  - c. A probation period of three months from 24 February 2023 until 23 May 2023;
  - d. 20 days paid annual leave per year of service to be taken within one year of falling due;
  - e. 10 days paid personal or carer's leave per year of service accrued on a pro-rata basis and any portion not taken is carried over each year; and
  - f. Additional two days' unpaid carer's leave per occasion an immediate family or household member requires care or support because of personal illness or injury or unexpected emergency.
- 29 It is the evidence of Signcraft that the term probation was understood to mean that the applicant was employed on a casual basis during a period of probation. The payslips show that the category of employment as 'casual' from 18 February 2023 to 26 March 2023 and then the employment category recorded on the payslips changes to 'full time' from 3 June 2023.
- 30 The employment contract is dated 20 March 2023. The commencement date of the contract is back dated to 24 February 2023. The express terms of the written contract under the clause entitled 'Employment Conditions' on page 2, state that the applicant was engaged as a full time employee from the commencement date of 24 February 2023.
- 31 The applicant's evidence is that she regularly raised the matters of the payslips stating she was 'casual' and not full time. The applicant says she also raised the issues of the payslips omitting annual leave accruals, she was not paid for public holidays nor paid personal leave at the time of receiving the relevant payslips or taking the personal leave.
- 32 The respondent says that the applicant was told that she was employed as a casual and knew she was engaged on a casual basis during the three months of her probationary period.
- 33 Probation and casual are not synonyms. An employee may be engaged on a permanent or ongoing employment contract and be on a period of probation.
- 34 The express terms of the written contract made between the parties on 20 March 2023 supersedes the contract made on 23 January 2023.

- 35 I find that in accordance with her contract of employment dated 20 March 2023 the applicant was entitled to paid annual leave per year of service. The terms of the contract do not refer to an entitlement to the progressive accrual of the annual leave, nor do they refer to an entitlement to be paid any portion of annual leave accrued and not taken at the termination of the employment contract.
- 36 In *Lai Corporation Pty Ltd v Steinberg* (1986) 28 AILR 492, the Supreme Court held that a contractual entitlement to annual leave cannot be converted to a cash entitlement unless there is an express term in the contract that provides for the payment.
- 37 The applicant has not established that her contract of employment expressly provided for access to pro rata annual leave before completing one year of service, nor that annual leave may be paid out.
- 38 The *Fair Work Act 2009* (Cth) (**Fair Work Act**) provides for annual leave minimum standards of employment and s 90 specifically sets out that any unused annual leave must be paid out at the end of employment. The terms of the written contract do not provide for the provisions of the Fair Work Act to be read into the terms of the contract. As such, it has not been established by the applicant that there is an entitlement or benefit under the contract of employment to annual leave prior to completing one year of service, nor to payment of any portion of leave untaken, that she has been denied. The Commission does not have jurisdiction to enforce the provisions of the Fair Work Act.
- 39 The express terms of the written contract do not include any reference to public holidays. The Fair Work Act provides for minimum standards for public holidays and s 116 specifically sets out the circumstances in which an employee absent from duty on a public holiday is to be paid. The terms of the written contract do not provide for the provisions of the Fair Work Act to be read into the terms of the contract. As such, it has not been established by the applicant that there is an entitlement or benefit under the contract of employment to payment of public holidays. The Commission does not have jurisdiction to enforce the provisions of the Fair Work Act.
- 40 In the claim for personal and/or carer's leave, I find that the contract of employment provided for paid leave to care for an immediate member of the applicant's family or for the applicant's illness and inability to attend the workplace.
- 41 Regarding the claim for payment in lieu of notice, I have listened to the evidence of the applicant and the respondent carefully. I prefer the evidence of the respondent. I find that the respondent advised the applicant to leave the workplace and return on the following working day with an adjusted attitude. I find the applicant responded by effectively resigning and demanding her termination pay and a separation certificate. The respondent subsequently discovered the applicant had misconducted herself in a manner that was in breach of her contract of employment during her employment. The terms of her employment contract provided for her employment to be terminated without notice.
- 42 I am not satisfied that the applicant was entitled to be paid, but was denied, a contractual benefit by way of four weeks' pay in lieu of notice. I find the applicant effectively resigned from her employment on 31 July 2023 without notice. In any event, the respondent had the ability to terminate her employment without notice given the misconduct of the applicant.
- 43 However, despite the applicant partly establishing she may have an entitlement to at least some benefit under her contract, and that with the submission of further evidence, established this benefit was denied, I do not consider I ought to make the orders sought by the applicant. In my view the applicant's conduct disqualifies her from the remedy she seeks because she does not come with 'clean hands'.

#### Unclean Hands

- 44 The doctrine of unclean hands means that a party who seeks equitable relief and has themselves acted unconscionably in connection with the same subject matter out of which they claim a right to relief may be denied the relief sought because of that conduct.
- 45 In *Civil Service Association of Western Australia Incorporated v Director General, Ministry of Justice* [2003] WAIRC 08587; (2003) 94 WAIG 215 (*CSA v Ministry of Justice*), a matter concerning disciplinary proceedings concerning a government employee, the Commission considered the issue of whether the Commission's jurisdiction has general equitable jurisdiction. Kenner C said:

[55] In relation to the nature of the Commission's jurisdiction, in response to submissions by the applicant, counsel for the respondent also submitted that the Commission's jurisdiction is statutory and there is no general equitable jurisdiction conferred upon the Commission or the Commission constituted as an Arbitrator under the Act. Whilst it is trite to observe that the Commission is not a court of equitable jurisdiction, in my view, given that the touchstone of the Commission's jurisdiction is to enquire into and deal with industrial matters "in accordance with equity, good conscience and the substantial merits of the case" under s 26(1)(a) of the Act, it is appropriate for the Commission to have regard to relevant equitable principles, as part of "inquiring into and dealing with" an industrial matter.

[56] The injunction in s 26(1)(a), governs the manner of the exercise of the Commission's jurisdiction, and somewhat tritely, is not a source of power in itself. However, what it does permit is the departure from strict legal entitlement, in circumstances where the equity and good conscience compels such a conclusion. For example, in a contractual benefits claim, in circumstances where the applicant may be strictly entitled to a benefit under his or her contract of employment, but the circumstances of the case reveal that the applicant engaged in some form of misconduct or deceit in relation to the matter the subject of the claim, the Commission is empowered in my opinion, pursuant to s 26(1)(a), to deny an applicant relief. This approach would appear to accord with the two important maxims of equity, they being that "he who seeks equity must do equity and that "he must also come with clean hands". In my opinion, there is nothing inconsistent with the Commission's jurisdiction, for the application of these broad principles, having regard to s 26(1)(a) of the Act.

46 In *Charles (Carmelo) Parrella v FBM Corporation Pty Ltd* [2012] WAIRC 00903; (2012) 92 WAIG 1988 (*Parrella*), in a claim for a denied contractual benefit, the Commission considered the question of an applicant’s conduct that caused loss and damage to an employer. Beech C said:

[9] Whether Mr Parrella acted in breach of his contract of employment will be an important consideration in both this Commission and in the Supreme Court proceedings. It is directly raised in FBM’s Notice of Answer in this matter and it is central to the action taken by FBM in the Supreme Court. Although this Commission will decide whether Mr Parrella has not been allowed by FBM benefits to which he is entitled under his contract of employment, his claim for an order that FBM pay him any benefits will be decided according to equity, good conscience and the substantial merits of the case (*Sargant v Lowndes Lambert Australia Pty Ltd* (2000) 81 WAIG 311; and the appeal which was dismissed: [2001] WAIRC 02603; (2001) 81 WAIG 1149). This means that if Mr Parrella did act in breach of his contract of employment and caused loss and damage to FBM, he does not come here with clean hands. The Commission would be slow to order FBM to pay him a benefit due under the very contract of employment of which he himself was in breach which caused loss and damage to his former employer.

47 The terms of the applicant’s employment contract specifically addressed the issue of using the equipment of the business for personal work:

**Termination**

...

The company may terminate your employment at any time without notice if:

- ....
- ....
- Using company equipment for personnel [sic] use unless agreed otherwise with myself (Greg Morgan).

48 The contract of employment specifically references the use of company equipment for personal purposes. The severity of the consequences for using company equipment without the agreement of the principal of the company clearly conveyed to the applicant the significance of such conduct.

49 The behaviour of the applicant in obscuring the lenses of the cameras and confirming the outcome of her efforts demonstrates the applicant’s concern should her subsequent activities in the print room be discovered. The applicant went to considerable lengths to avoid detection and to deceive the respondent. I find that the applicant’s conduct is not consistent with an employee’s duty of good faith to an employer.

50 In the matter of the use of confidential information by the applicant, I have listened carefully to the witness testimony of both the applicant and the respondent, and I have considered the documentary evidence submitted by the parties. I prefer the evidence of the respondent and find that the applicant deliberately directed work meant for Signcraft to her own business operations.

51 The contract of employment expressly provides that information relating to the business is confidential and is the sole property of Signcraft. The contract states that the applicant shall not either during or after employment divulge or use confidential information for her own benefit or another benefit without the prior consent of the respondent. The applicant’s use of confidential information of the respondent to procure a benefit for herself and her action are clearly in breach of the expressed terms of the contract of employment.

52 I find that the applicant engaged in misconduct in breach of the terms of the contract of employment and, consistent with the decisions in *CSA v Ministry of Justice* and *Parrella*, ought to be denied relief sought.

53 Given this conclusion I hereby dismiss the application.

2025 WAIRC 00035

**CONTRACTUAL BENEFIT CLAIM**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

SUZANNE GALLOWAY

**APPLICANT**

-v-

SIGNCRAFT (AUST) PTY LTD

**RESPONDENT**

**CORAM**

COMMISSIONER T B WALKINGTON

**DATE**

FRIDAY, 24 JANUARY 2025

**FILE NO/S**

B 61 OF 2023

**CITATION NO.**

2025 WAIRC 00035

**Result** Application dismissed  
**Representation**  
**Applicant** Ms Suzanne Galloway  
**Respondent** Mr Gregory Morgan

*Order*

HAVING HEARD from the applicant on their own behalf and Mr Morgan on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders:

THAT application B 61 of 2023 be, and by this order is, dismissed.

(Sgd.) T B WALKINGTON,  
Commissioner.

[L.S.]

**2025 WAIRC 00031**

**UNFAIR DISMISSAL APPLICATION**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**CITATION** : 2025 WAIRC 00031  
**CORAM** : COMMISSIONER T B WALKINGTON  
**HEARD** : THURSDAY, 5 SEPTEMBER 2024, WEDNESDAY, 4 SEPTEMBER 2024  
**DELIVERED** : FRIDAY, 24 JANUARY 2025  
**FILE NO.** : U 79 OF 2023  
**BETWEEN** : THOMAS GHIGO  
 Applicant  
 AND  
 PICARD, AURELIE ESTELLE  
 Respondent

**CatchWords** : Video and audio recording made without knowledge and consent – admissibility into evidence – reasonably necessary – protection of lawful interests  
**Legislation** : *Surveillance Devices Act 1998* (WA)  
**Result** : Admission of Evidence is Refused  
**Representation:**  
**Applicant** : Mr Thomas Ghigo  
**Respondent** : Ms Aurelie Picard

*Reasons for Decision*

- 1 During the hearing of an application for unfair dismissal the applicant sought to submit video recordings he made on his mobile of the events on 27 September 2023.
- 2 The respondent objects to the video recordings being admitted. The respondent says the recordings were made without the knowledge and without the consent of the other persons being recorded. The respondent says the recordings were made in breach of the *Surveillance Devices Act 1998* (WA) (**Surveillance Act**) and should not be admitted into evidence. The respondent says that the applicant deliberately provoked another person into reacting when the applicant knew that he was covertly recording their exchange. The respondent submits that the recordings do not capture all the events of that day and omit vital information. The respondent says she believes the recording was premeditated and planned because the applicant had engaged in similar conduct with former employers.
- 3 The applicant acknowledges that the recordings were made without the knowledge and consent of the those recorded. However, the applicant says that the admission of the recordings into evidence is permissible under s 9(1) and s 9(2) of the *Surveillance Act*. The applicant says that the recordings dispassionately depict the events. The applicant admits that he has previously covertly recorded exchanges with former employers and that he records to protect himself.
- 4 At the directions hearing on 4 April 2024 the applicant referred to material that he wished to provide at the hearing but was reluctant to provide some material prior to hearing in accordance with preparatory steps. The applicant submitted that the provision of the material would enable the respondent to change her story, and the applicant wanted to let the respondent lie and then show that the respondent changed her story. The applicant was advised that the purpose of each party providing an

outline of evidence along with any supporting documents or material was to ensure a fair and efficient hearing. The applicant was informed at the directions hearing that any material he sought to tender into evidence at the hearing, that he had not previously provided in accordance with the directions issued, may result in an adjournment of the hearing, a decision that the material may not be admitted, or dismissal of his application.

- 5 On 6 May 2024 the applicant filed outlines of witness evidence and documents, including photographs, he intended to rely upon at the hearing. The applicant did not provide the recordings.
- 6 At the hearing on 5 September 2024, the applicant sought to tender into evidence the recordings. The respondent objected to the admission of the recordings.
- 7 The Commission determined that the recordings were prima facie about matters relevant to the issues raised in the claim. Therefore, the Commission ought to hear the evidence for the purposes of determining whether the recordings should be admitted. Under the Surveillance Act, to be admissible, the Commission needs to find that the communication of the recordings was a communication not more than is reasonably necessary for the protection of the lawful interests of the person making the communication.
- 8 The recordings are video recordings made on the applicant's mobile phone. The applicant says he had put his mobile phone device in his pocket when recording. The video image is black, and the recording is audio only. The audio recording is of dialogue spoken in the French language. Consequently, a transcription of the dialogue into English was required.
- 9 The transcription service describes the quality of the audio as poor and notes that there were difficulties in transcription because of overlapping speech and poor sound quality.
- 10 Section 5(1)(b) and s 5(3)(d) of the Surveillance Act provides:

(1) Subject to subsections (2) and (3), a person shall not install, use, or maintain, or cause to be installed, used, or maintained, a listening device –

...

(b) to record a private conversation to which that person is a party.

(3) Subsection (1)(b) does not apply to the installation, use, or maintenance of a listening device by or on behalf of a person who is a party to a private conversation if —

...

(d) a principal party to the private conversation consents expressly or impliedly to that installation, use, or maintenance and the installation, use, or maintenance is reasonably necessary for the protection of the lawful interests of that principal party.

Further s 9(1) and s 9(2)(a)(ix) and s 9(3)(a)(i) and (iii) and s 9(3)(b) provides:

(1) Subject to subsection (2), a person shall not knowingly publish or communicate a private conversation, or a report or record of a private conversation, or a record of a private activity that has come to the person's knowledge as a direct or indirect result of the use of a listening device or an optical surveillance device.

...

(2) Subsection (1) does not apply —

(a) where the publication or communication is made —

...

(ix) in the course of any legal proceedings;

...

(3) Subsection (2) only provides a defence if the publication or communication —

(a) is not more than is reasonably necessary —

(i) in the public interest;

...

(iii) for the protection of the lawful interests of the person making the publication or communication;

(b) is made to a person who has, or is believed on reasonable grounds by the person making the publication or communication to have, such an interest in the private conversation or activity as to make the publication or communication reasonable under the circumstances in which it is made;

- 11 Clearly the law prohibits publication and communications of recordings of conversations made without the knowledge and consent of those being recorded except in limited circumstances. I must be satisfied that there is a compelling reason to admit recordings made without the knowledge and consent of the other persons.
- 12 The applicant submits that the recordings are relevant and important for his case because the recordings provide the truth of the events that occurred on 27 September 2023. The applicant says the recordings tell the truth of the events.
- 13 The parties substantially agree on the events on 27 September 2023. It is not in dispute that the applicant took the keys from the vehicle and would not return them when requested. It is not in dispute that the applicant was physically tackled, pushed to the ground and held down on the ground to retrieve the motor vehicle keys. The applicant says that it was he who was assaulted.

- 14 The parties do not disagree that both people involved in the altercation were injured. Each party has submitted photographic evidence of the injuries sustained.
- 15 It is not in dispute that the applicant threw a bottle in the direction of another employee. The parties do not agree that the applicant aimed the bottle at a place on the wall above and to the side of the other person’s head. However, the audio recording does not reveal the direction at which the bottled was aimed.
- 16 The audio recordings are of an exchange of accusations and responses, at times people are shouting over the top of each other.
- 17 The respondent does not deny that the altercations took place. The respondent does not deny that the applicant was assaulted and says that the other employee involved was counselled on the inappropriate behaviour and the consequences of dismissal should such behaviour be repeated.
- 18 The audio recordings do not provide anything further than that of the oral and documentary evidence given to date and set out in outlines and submissions. The applicant submits his actions were justified because he was provoked. However, the audio recordings do not assist in deciding whether there was provocation of the applicant.
- 19 It is my view that the recordings are not reasonably necessary for the protection of the lawful interests of the applicant. A compelling reason to admit the recordings made without the knowledge and consent of those persons recorded has not been established. Accordingly, I rule that the recordings are not to be admitted.

2025 WAIRC 00032

**UNFAIR DISMISSAL APPLICATION**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

THOMAS GHIGO

**APPLICANT**

-v-

PICARD, AURELIE ESTELLE

**RESPONDENT**

**CORAM**

COMMISSIONER T B WALKINGTON

**DATE**

FRIDAY, 24 JANUARY 2025

**FILE NO/S**

U 79 OF 2023

**CITATION NO.**

2025 WAIRC 00032

**Result** Admission of Evidence is Refused

**Representation**

**Applicant** Mr Thomas Ghigo

**Respondent** Ms Aurelie Picard

*Order*

HAVING HEARD from the applicant on his own behalf and the respondent on her own behalf, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979 (WA)*, hereby orders:

THAT the applicant’s admission of evidence is refused.

(Sgd.) T B WALKINGTON,  
Commissioner.

[L.S.]

**STOP BULLYING/SEXUAL HARASSMENT—**

2025 WAIRC 00079

**STOP BULLYING ORDER**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	<b>APPLICANT</b>
	MATTHEW TRAN	
	-v-	
	EAST METROPOLITAN HEALTH SERVICE	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER T B WALKINGTON	
<b>DATE</b>	WEDNESDAY, 12 FEBRUARY 2025	
<b>FILE NO/S</b>	S 7 OF 2023	
<b>CITATION NO.</b>	2025 WAIRC 00079	

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<b>Result</b>	Application for Interim Orders Dismissed
<b>Representation</b>	
<b>Applicant</b>	Mr Matthew Tran
<b>Respondent</b>	Mr John Carroll (of counsel)

*Order*

HAVING heard from the applicant on his own behalf and Mr Carroll on behalf of the respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

1. THAT the applicant's application for discovery and production of documents made on 18 November 2024 is refused.
2. THAT the applicant's application to amend the application made on 3 December 2024 is dismissed.
3. THAT the applicant's application for interim orders made on 30 January 2025 is dismissed.

(Sgd.) T B WALKINGTON,  
Commissioner.

[L.S.]

**CONFERENCES—Matters referred—**

2025 WAIRC 00078

**DISPUTE RE REDUNDANCY PAYMENT AND AUTHORITY OF UNION TO ACT AS AN AUTHORITISED REPRESENTATIVE OF EMPLOYEE**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	<b>APPLICANT</b>
	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES	
	-v-	
	CITY OF STIRLING	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER T B WALKINGTON	
<b>DATE</b>	WEDNESDAY, 12 FEBRUARY 2025	
<b>FILE NO/S</b>	CR 29 OF 2023	
<b>CITATION NO.</b>	2025 WAIRC 00078	

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<b>Result</b>	Orders issued
<b>Representation</b>	
<b>Applicant</b>	Mr R Knox
<b>Respondent</b>	Ms K Groves (of counsel)

*Order*

WHEREAS on 3 July 2023 the applicant applied for a conference under s 44 of the *Industrial Relations Act 1979* (WA) (**IR Act**) AND WHEREAS following a conference conducted on 18 December 2023 in which the industrial matters were not settled by agreement the Commission referred the outstanding industrial matters for hearing and determination under s 44(9) of the IR Act; AND WHEREAS on 15 August 2023 the Commission issued a Memorandum of Matters Referred for Hearing and Determination under s 44(9) of the IR Act (**Memorandum**); AND WHEREAS having heard from Mr Knox for the Applicant and Ms Groves (of counsel) for the respondent on 11 October 2023 in relation to each of the matters set out in the Memorandum; AND WHEREAS having delivered reasons for decision on 9 September 2024; NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

**Question 1:** Is the role of Community Patrol Officer, suitable alternative employment under cl 10.4 of the *City of Stirling Inside Workforce Agreement 2019*?

**Answer:** *No.*

**Question 2:** If the answer to question 1 is 'yes', is Ms Cerinich entitled to:

- a) reject an offer of suitable alternative employment made under cl 10.4 of the *City of Stirling Inside Workforce Agreement 2019*; and
- b) be paid a redundancy payment under cl 10.7 of the *City of Stirling Inside Workforce Agreement 2019*?

**Answer:** *Given the answer to Question 1 is 'no', it is not necessary to answer this question 2.*

**Question 3:** If the answer to question 2 is 'yes', does section 80BE(2) of the *Industrial Relations Act 1979* (WA) apply so as to give the Western Australian Industrial Relations Commission the power under cl 10.7.5 of the *City of Stirling Inside Workforce Agreement 2019* to vary the applicable redundancy package the City is required to pay to Ms Cerinich under clause 10.7.1?

**Answer:** *Given there is no necessity to answer question 2, it is not necessary to answer this question 3.*

**Question 4:** If the answer to question 1 is 'no', is Ms Cerinich entitled to a redundancy payment under clause 10.7 of the *City of Stirling Inside Workforce Agreement 2019*?

**Answer:** *Question 4 is beyond the power of the Commission.*

**Question 5:** During what period did cl 6 of *City of Stirling Inside Workforce Agreement 2019* apply to Ms Cerinich as an employee affected by the Respondent's decision to restructure the Respondent's Community Safety Business Unit?

**Answer:** *Clause 6 applied until 3 July 2023.*

**Question 6:** Was Mr Knox appointed as Ms Cerinich's representative pursuant to cl 6.7 of the *City of Stirling Inside Workforce Agreement 2019* and if so, from when?

**Answer:** *No.*

**Question 7:** What rights, if any, does Mr Knox have as Ms Cerinich's representative under cl 6.7 of the *City of Stirling Inside Workforce Agreement 2019*?

**Answer:** *Given the answer to question 6 is 'no', this question 7 does not arise.*

**Question 8:** Did the City interfere with, impair or prevent Ms Cerinich from exercising her right to be represented under cl 6.7 of the *City of Stirling Inside Workforce Agreement 2019*?

**Answer:** *Given the answer to question 6 is 'no', this question 8 does not arise.*

**Question 9:** If Mr Knox was not at any time appointed as Ms Cerinich's representative under cl 6.7 of the *City of Stirling Inside Workforce Agreement 2019*, did the Western Australian Municipal, Administrative, Clerical and Services Union of Employees have a right under the *City of Stirling Inside Workforce Agreement 2019* and/or the *Industrial Relations Act 1979* (WA) to represent the interests of Ms Cerinich to the City in this matter?

**Answer:** *No finding or determination is made.*

**Question 10:** If the answer to question 9 is 'yes', did the City interfere with, impair or prevent the Western Australian Municipal, Administrative, Clerical and Services Union of Employees or Ms Cerinich from exercising that right?

**Answer:** *No.*

(Sgd.) T B WALKINGTON,  
Commissioner.

## UNIONS—Matters dealt with under Section 66

2025 WAIRC 00051

### ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

GARY LEWIS

**APPLICANT**

-v-

WESTERN AUSTRALIAN POLICE UNION OF WORKERS

**RESPONDENT**

**CORAM** CHIEF COMMISSIONER S J KENNER

**DATE** MONDAY, 3 FEBRUARY 2025

**FILE NO/S** PRES 15 OF 2024

**CITATION NO.** 2025 WAIRC 00051

**Result** Discontinued by leave

**Appearances**

**Applicant** In person

**Respondent** Ms A McNamara of counsel

*Order*

WHEREAS the applicant sought and was granted leave to discontinue the application, the Chief Commissioner, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the application be discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,  
Chief Commissioner.

## PRACTICE NOTES—

2025 WAIRC 00081

### PRACTICE NOTE 1 OF 2025

Reclassification Applications

#### Introduction

1. Practice Note 1 of 2025 is issued by The Western Australian Industrial Relations Commission (**the Commission**) for the purpose of informing employees, employers and relevant registered organisations of the process required to be undertaken when seeking the reclassification of a position within the public sector.
2. In accordance with s 113(1) of the *Industrial Relations Act 1979* and reg 39(3) of the *Industrial Relations Commission Regulations 2005*, Practice Note 1 of 2025 is effective 14 days after the date of its publication in the Western Australian Industrial Gazette, being 26 February 2025 and remains in force until such time as it is replaced.

#### General approach

3. The Commission encourages discussion between the parties and the disclosure of relevant information and documentation at all stages of the reclassification application process.
4. Before an applicant requests that an application be listed for hearing, the employer should have made the applicant fully aware of the reasons of the employer (and of the classification review committee) for rejecting the application for reclassification. This should include a copy of any report presented to and relied on by the employer for its consideration. However, it should be recognised that such reports are not always accepted by employers and accordingly, may be of little use to the applicant in considering their situation. Whether such a report may be relied upon in the hearing of the application will be a matter for the Commission to determine. The applicant should have had the opportunity to consider their position, after assessing the employer's reasons, before deciding to proceed with their application.
5. It should be recognised that, in determining reclassification applications, the Commission is performing a review of the decision made by the employer, including the conclusions of the classification review committee. It is not appropriate for

parties to adopt an adversarial approach to the proceedings. There will be an opportunity for each party to ask questions of witnesses for the purposes of clarification and elaboration. However, this is not cross-examination in the sense usually undertaken in hearings before the Commission generally.

6. The reclassification application should be based on the material that was before the employer and not on new material that was not previously considered. Where an applicant seeks to pursue an application based in part or in whole on new material not considered by the employer, or the employer seeks to introduce new material or reasons for rejecting the application, the Commission is likely to not proceed with the application until that new material has been considered.

#### **Procedure**

7. Unless it is directed otherwise, the following practice applies.
8. At least seven calendar days before the hearing of the application, the applicant is to provide the Commission with a written statement of the facts upon which the applicant relies to support the application and any relevant witness statement(s).
9. A copy of the applicant's written statement and any witness statement(s) will be served on the employer, or its legal practitioner or agent, by the Registrar.
10. At least three calendar days before the hearing, the employer is to provide the Commission with a written statement of the basis upon which it relies to refuse or otherwise question the application and any relevant witness statement(s).
11. A copy of the employer's written statement and any witness statement(s) will be served on the applicant, or the applicant's legal practitioner or agent, by the Registrar.
12. The material included in the parties' statements is the primary evidence to be considered by the Commission. Where there is a need for oral evidence, witnesses may be asked questions by the other party with a view to clarifying or eliciting information. However, this is not an opportunity for cross-examination of a party in the traditional sense.
13. The evidence presented to the Commission should be confined to that information provided to the employer for consideration of the application for reclassification and the employer's reasons for refusing the application.
14. The hearing of the application will proceed on the following basis:
  - (a) the applicant or the applicant's legal practitioner or agent may, if desired, make a brief opening statement to outline the basis of the application;
  - (b) the applicant may give evidence to support the application which, in the normal course of events, will be confined to those matters raised in the written statements submitted by the applicant and the employer;
  - (c) the employer may then question the applicant;
  - (d) the applicant may then be re-questioned in light of the employer's questioning;
  - (e) the applicant may call any other witnesses;
  - (f) the case for the applicant then closes;
  - (g) the employer, or through its legal practitioner or agent, then opens its case and in doing so may make a brief opening statement;
  - (h) the employer may give evidence to support its position which, in the normal course of events, will be confined to those matters raised in the written statements submitted by the applicant and the employer;
  - (i) the applicant may then question the employer;
  - (j) the employer may then be re-questioned as a result of the applicant's questioning;
  - (k) the employer may then call any other witnesses;
  - (l) the case for the employer then closes; and
  - (m) both parties may then make brief closing statements.
15. A period of 1.5 hours is normally set aside for the hearing of each application for reclassification.

#### **Operative date**

16. The normal practice is that successful reclassification applications are effective from the date on which the employee formally notified the employer that a reclassification is sought and provided sufficient information to enable a proper consideration of the application to be made.

#### **Relevant legislation**

*Industrial Relations Act 1979*, ss 27, 28, 29(1)(h), Pt II Div 2AA, 36AD, 36AE, 113.

*Industrial Relations Commission Regulations 2005*, regs 39(3), 62D.

#### **Useful resources**

17. The Commission's website contains additional resources.

[L.S.]

(Sgd.) S J KENNER,  
Chief Commissioner.

**PROCEDURAL DIRECTIONS AND ORDERS—**

2025 WAIRC 00027

**EDUCATION ASSISTANTS' (GOVERNMENT) GENERAL AGREEMENT 2025**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
DEPARTMENT OF EDUCATION

**PARTIES****APPLICANT**

-v-

UNITED WORKERS UNION (WA)

**RESPONDENT**

**CORAM** COMMISSIONER C TSANG  
**DATE** WEDNESDAY, 22 JANUARY 2025  
**FILE NO.** AG 1 OF 2025  
**CITATION NO.** 2025 WAIRC 00027

**Result** Order issued  
**Representation**  
**Applicant** Ms N Sanders  
**Respondent** Ms L Judge

*Order*

HAVING heard from Ms N Sanders on behalf of the applicant and Ms L Judge on behalf of the respondent, the Commission pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby Orders –

THAT the name of the applicant to the application ‘Department of Education’ be deleted and substituted with ‘Director General, Department of Education’.

[L.S.]

(Sgd.) C TSANG,  
Commissioner.

2025 WAIRC 00021

**MOERLINA SCHOOL (ENTERPRISE BARGAINING) AGREEMENT 2024**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
THE INDEPENDENT EDUCATION UNION OF WESTERN AUSTRALIA, UNION OF  
EMPLOYEES

**PARTIES****APPLICANT**

-v-

THE MOERLINA SCHOOL INC.

**RESPONDENT**

**CORAM** COMMISSIONER C TSANG  
**DATE** WEDNESDAY, 15 JANUARY 2025  
**FILE NO.** AG 28 OF 2024  
**CITATION NO.** 2025 WAIRC 00021

**Result** Direction issued  
**Representation**  
**Applicant** Mr M Elliot  
**Respondent** Mr E Callow

*Direction*

HAVING heard from Mr M Elliott on behalf of the applicant and Mr E Callow on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

1. THAT the question of whether the respondent is a *national system employer* pursuant to s 14(1)(a) of the *Fair*

*Work Act 2009* (Cth) (**jurisdictional issue**) be determined as a preliminary issue.

- 2. THAT the respondent file any affidavit(s) addressing the jurisdictional issue, which may include the respondent's constitution, it's activities and financial records, by Wednesday, 12 February 2025.
- 3. THAT the applicant file any legal submissions relevant to the jurisdictional issue by Wednesday, 26 February 2025.
- 4. THAT subject to further order, the jurisdictional issue be determined on the papers.
- 5. THAT the parties have liberty to apply.

(Sgd.) C TSANG,  
Commissioner.

[L.S.]

**2025 WAIRC 00062**

**APPLICATIONS PURSUANT TO S 72A**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES  
UNION OF EMPLOYEES

**APPLICANT**

-v-

THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS

**RESPONDENT**

LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA)

**FIRST INTERVENOR**

WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION

**SECOND INTERVENOR**

**FILE NO/S**

CICS 5 OF 2023

**PARTIES**

THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS

**APPLICANT**

-v-

WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES  
UNION OF EMPLOYEES

**RESPONDENT**

LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA)

**FIRST INTERVENOR**

WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION

**SECOND INTERVENOR**

**FILE NO/S**

CICS 8 OF 2023

**PARTIES**

WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES  
UNION OF EMPLOYEES

**APPLICANT**

-v-

THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS

**RESPONDENT**

LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA)

**FIRST INTERVENOR**

WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION

**SECOND INTERVENOR**

**FILE NO/S**

CICS 9 OF 2023

**CORAM**

COMMISSION IN COURT SESSION

CHIEF COMMISSIONER S J KENNER

SENIOR COMMISSIONER R COSENTINO

COMMISSIONER T EMMANUEL

**DATE** FRIDAY, 7 FEBRUARY 2025  
**CITATION NO.** 2025 WAIRC 00062

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**Result** Direction issued

**Representation**

**Applicant** Ms RJ Webb KC of counsel, Mr T Lettenmaier of counsel and with them Mr C Fogliani of counsel on behalf of the Western Australian Municipal, Administrative, Clerical and Services Union of Employees

**Respondent** Mr O Fagir of counsel and with him Mr M Cox of counsel on behalf of the Construction, Forestry, Mining and Energy Union of Workers

**First Intervenor** Mr K Trainer as agent on behalf of the Local Government, Racing and Cemeteries Employees Union (WA)

**Second Intervenor** Mr K De Kerloy SC of counsel and with him Mr J Creese of counsel on behalf of the Western Australian Local Government Association

*Direction*

- (1) THAT the time for compliance with paragraph 2 of the directions dated 23 December 2024 ([2024] WAIRC 01070) be amended to 11 February 2025.
- (2) THAT the time for compliance with paragraph 3 of the directions dated 23 December 2024 ([2024] WAIRC 01070) be amended to 18 February 2025.

[L.S.]

(Sgd.) S J KENNER,  
 Chief Commissioner,  
 By the Commission in Court Session.

**2025 WAIRC 00053**

**APPLICATION FOR A GENERAL ORDER FOR CASUAL EMPLOYEES SUBJECT TO SPECIFIED AWARDS**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
 UNIONSWA INCORPORATED

**PARTIES**

**APPLICANT**

-v-

(NOT APPLICABLE), WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION,  
 AUSTRALIAN RESOURCES AND ENERGY EMPLOYER ASSOCIATION, CHAMBER OF  
 COMMERCE AND INDUSTRY OF WA, MINISTER FOR INDUSTRIAL RELATIONS

**RESPONDENT**

**CORAM** SENIOR COMMISSIONER R COSENTINO  
 COMMISSIONER T EMMANUEL  
 COMMISSIONER T B WALKINGTON

**DATE** WEDNESDAY, 5 FEBRUARY 2025

**FILE NO/S** CICS 7 OF 2024

**CITATION NO.** 2025 WAIRC 00053

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**Result** Order issued

**Representation**

**Applicant** Mr G Hansen on behalf of UnionsWA Incorporated

**Respondents** Ms J Love on behalf of Western Australian Local Government Association  
 Ms M Hughie-Williams on behalf of the Hon. Minister for Industrial Relations  
 Mr C Harding on behalf of the Chamber of Commerce and Industry WA  
 Mr T Reid on behalf of Australian Resources and Energy Employer Association

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*Order*

THE Commission in Court Session, pursuant to the powers conferred on it under the Industrial Relations Act 1979 (WA) and by consent, hereby orders –

1. THAT the hearing listed for 6 February 2025 be vacated;
2. THAT subject to further order, the application be determined on the papers;
3. THAT any documentary evidence and any written submissions which parties seek to rely upon be filed by 7 February 2025; and
4. THAT any responsive documentary evidence and written submissions be filed by 12 February 2025.

(Sgd.) R COSENTINO,  
Senior Commissioner,

By the Commission In Court Session.

[L.S.]

**2025 WAIRC 00040**

**APPEAL AGAINST THE DISCIPLINARY DECISION AND PENALTY GIVEN ON 20 MAY 2024**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

JONATHAN BOSWELL

**APPELLANT**

-v-

COMMISSIONER, DEPARTMENT OF FIRE AND EMERGENCY SERVICES

**RESPONDENT**

**CORAM**

COMMISSIONER T B WALKINGTON  
MS B CONWAY – BOARD MEMBER  
MS R SINTON – BOARD MEMBER

**DATE**

TUESDAY, 28 JANUARY 2025

**FILE NO.**

PSAB 15 OF 2024

**CITATION NO.**

2025 WAIRC 00040

**Result**

Direction issued

**Representation**

**Applicant**

Mr J Boswell

**Respondent**

Mr J Carroll (of counsel)

*Direction*

HAVING heard from Mr Boswell on his own behalf and Mr Carroll on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby directs:

1. THAT the appellant file and serve an outline of submissions and any list of authorities, upon which they intend to rely, by no later than 21 February 2025;
2. THAT the respondent file and serve an outline of submissions and any list of authorities, upon which they intend to rely, by no later than 6 March 2025; and
3. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,  
Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2025 WAIRC 00049

**APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 1 JULY 2024**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

CATHY KIRKUP

**APPLICANT**

-v-

DIRECTOR GENERAL DEPARTMENT OF JUSTICE

**RESPONDENT****CORAM**COMMISSIONER T B WALKINGTON  
MR B HAWKINS – BOARD MEMBER  
MS E HAMILTON – BOARD MEMBER**DATE**

FRIDAY 31 JANUARY 2025

**FILE NO.**

PSAB 19 OF 2024

**CITATION NO.**

2025 WAIRC 00049

**Result**

Direction issued

**Representation****Applicant**

Ms G Murray (of counsel)

**Respondent**

Mr J Carroll (of counsel)

*Direction*

HAVING heard from Ms Murray on behalf of the applicant and Mr Carroll on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby directs:

1. THAT the appellant is to file and serve an outline of written submissions by 13 February 2025;
2. THAT the respondent is to file and serve an outline of written submissions by 27 February 2025;
3. THAT the matter is listed for hearing for two-days on 13 and 14 May 2025; and
4. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,  
Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2025 WAIRC 00029

**APPEAL AGAINST THE DISCIPLINARY DECISION AND PENALTY GIVEN ON 3 OCTOBER 2024**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

ERIC JAROSLAV SHEWCHUK

**APPELLANT**

-v-

DIRECTOR GENERAL, DEPARTMENT OF ENERGY, MINES, INDUSTRY REGULATION  
AND SAFETY**RESPONDENT****CORAM**PUBLIC SERVICE APPEAL BOARD  
COMMISSIONER C TSANG – CHAIR  
MR G BROWN – BOARD MEMBER  
MS H MOIR – BOARD MEMBER**DATE**

THURSDAY, 23 JANUARY 2025

**FILE NO.**

PSAB 24 OF 2024

**CITATION NO.**

2025 WAIRC 00029

**Result** Direction issued  
**Representation**  
**Appellant** Ms G Murray  
**Respondent** Mr M McIlwaine (of counsel)

*Direction*

HAVING heard from Ms G Murray on behalf of the appellant and Mr M McIlwaine (of counsel) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby directs –

1. THAT the appellant have leave to amend the remedy he is seeking at paragraph 14 of the schedule attached to the *Form 8B – Notice of Appeal - Government Officers, Public Service Officers* filed on 22 October 2024 (**Form 8B**), by filing an amended schedule to the Form 8B by Friday, 24 January 2025.
2. THAT the respondent have leave to file any amended *Form 4 – Response (General)* by Friday, 31 January 2025.
3. THAT discovery be informal.
4. THAT the parties file a statement of agreed facts and bundle of agreed documents by Friday, 21 February 2025.
5. THAT the appellant file any outlines of witness evidence and documents (other than those in the bundle of agreed documents) by Friday, 14 March 2025.
6. THAT the respondent file any outlines of witness evidence and documents (other than those in the bundle of agreed documents) by Friday, 4 April 2025.
7. THAT the appellant file an outline of legal submissions by Friday, 25 April 2025.
8. THAT the respondent file an outline of legal submissions by Friday, 16 May 2025.
9. THAT the appeal be listed for a 4-day hearing not before Friday, 23 May 2025.
10. THAT the parties have liberty to apply.

(Sgd.) C TSANG,  
 Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

**2025 WAIRC 00028**

**APPEAL AGAINST THE DISCIPLINARY DECISION AND PENALTY GIVEN ON 3 OCTOBER 2024**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

ERIC JAROSLAV SHEWCHUK

**APPELLANT**

-v-

DIRECTOR GENERAL, DEPARTMENT OF MINES, INDUSTRIAL REGULATION AND SAFETY

**RESPONDENT**

**CORAM**

PUBLIC SERVICE APPEAL BOARD  
 COMMISSIONER C TSANG – CHAIR  
 MR G BROWN – BOARD MEMBER  
 MS H MOIR – BOARD MEMBER

**DATE**

THURSDAY, 23 JANUARY 2025

**FILE NO.**

PSAB 24 OF 2024

**CITATION NO.**

2025 WAIRC 00028

**Result** Order issued  
**Representation**  
**Appellant** Ms G Murray  
**Respondent** Mr M McIlwaine (of counsel)

*Order*

HAVING heard from Ms G Murray on behalf of the appellant and Mr M McIlwaine (of counsel) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby orders –

THAT the name of the respondent to the application ‘Director General, Department of Mines, Industrial Regulation and Safety’ be deleted and substituted with ‘Director General, Department of Energy, Mines, Industry Regulation and Safety’.

(Sgd.) C TSANG,  
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

**2025 WAIRC 00037**

**APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 31 OCTOBER 2024**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

SIMMONE VAN BUERLE

**APPELLANT**

-v-

THE DIRECTOR GENERAL, DEPARTMENT OF PRIMARY INDUSTRIES AND REGIONAL DEVELOPMENT

**RESPONDENT**

**CORAM**

PUBLIC SERVICE APPEAL BOARD  
COMMISSIONER T EMMANUEL - CHAIRPERSON  
MS B CONWAY - BOARD MEMBER  
MR M SALAMON - BOARD MEMBER

**DATE**

FRIDAY, 24 JANUARY 2025

**FILE NO**

PSAB 25 OF 2024

**CITATION NO.**

2025 WAIRC 00037

**Result**

Order issued

**Representation**

**Appellant**

Mr W Claydon (of counsel)

**Respondent**

Mr J Carroll (of counsel)

*Order*

HAVING heard from Mr W Claydon of counsel on behalf of the appellant and Mr J Carroll of counsel on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

1. THAT the directions hearing listed 29 January 2025 be vacated;
2. THAT discovery be informal;
3. THAT by 14 February 2025, the parties file a statement of agreed facts and bundle of agreed facts;
4. THAT by 7 March 2025, the appellant file any outlines of evidence and any documents, not being agreed documents, upon which she intends to rely;
5. THAT by 28 March 2025, the respondent file any outlines of evidence and any documents, not being agreed documents, upon which she intends to rely;
6. THAT by 18 April 2025, the appellant file an outline of written submissions;
7. THAT by 9 May 2025, the respondent file an outline of written submissions;
8. THAT the matter be listed for a hearing of up to two days on a date to be fixed not before 16 May 2025; and
9. THAT the parties have liberty to apply.

(Sgd.) T EMMANUEL,  
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2025 WAIRC 00041

## APPEAL AGAINST THE DISCIPLINARY DECISION AND PENALTY GIVEN ON 31 OCTOBER 2024

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION STEVEN GRAHAM INNES	<b>APPELLANT</b>
	-v- NORTH METROPOLITAN HEALTH SERVICE	<b>RESPONDENT</b>
<b>CORAM</b>	PUBLIC SERVICE APPEAL BOARD COMMISSIONER T EMMANUEL - CHAIRPERSON MR D HILL - BOARD MEMBER MR J RAJA - BOARD MEMBER	
<b>DATE</b>	TUESDAY, 28 JANUARY 2025	
<b>FILE NO</b>	PSAB 27 OF 2024	
<b>CITATION NO.</b>	2025 WAIRC 00041	

<b>Result</b>	Order issued
<b>Representation</b>	
<b>Appellant</b>	Mr H Bawden (of counsel)
<b>Respondent</b>	Mr J Carroll (of counsel)

*Order*

WHEREAS this is an appeal to the Public Service Appeal Board under s 80I of the *Industrial Relations Act 1979* (WA);  
HAVING heard from Mr H Bawden of counsel on behalf of the appellant and Mr J Carroll of counsel on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders by consent:

1. THAT the directions hearing listed 28 January 2025 be vacated;
2. THAT discovery be informal;
3. THAT the parties file an agreed statement of facts and agreed bundle of documents by 21 February 2025;
4. THAT the appellant file any outlines of evidence and any documents, not being agreed documents, upon which he intends to rely by 14 March 2025;
5. THAT the respondent file any outlines of evidence and any documents, not being agreed documents, upon which it intends to rely by 4 April 2025;
6. THAT the appellant file an outline of written submissions by 28 April 2025;
7. THAT the respondent file an outline of written submissions by 16 May 2025;
8. THAT the matter be listed for a hearing of up to two days on a date to be fixed not before 26 May 2025; and
9. THAT the parties have liberty to apply.

(Sgd.) T EMMANUEL,  
Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2025 WAIRC 00018

## APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 02 DECEMBER 2024

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION ADRIAN MITCHELL	<b>APPELLANT</b>
	-v- PUBLIC SECTOR COMMISSION	<b>RESPONDENT</b>
<b>CORAM</b>	PUBLIC SERVICE APPEAL BOARD COMMISSIONER T KUCERA - CHAIRPERSON MR B HAWKINS - BOARD MEMBER MR A SALTER - BOARD MEMBER	
<b>DATE</b>	MONDAY, 13 JANUARY 2025	
<b>FILE NO</b>	PSAB 30 OF 2024	
<b>CITATION NO.</b>	2025 WAIRC 00018	

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<b>Result</b>	Order issued
<b>Representation</b>	
<b>Appellant</b>	Mr A Mitchell
<b>Respondent</b>	Mr J Carroll (of counsel)

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*Order*

HAVING heard from Mr A Mitchell and Mr J Carroll of counsel on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders by consent –

1. THAT discovery is to be informal.
2. THAT the parties are to file any statement of agreed facts and bundle of agreed documents by 4.00 pm on 31 January 2025.
3. THAT by 4.00pm on Friday, 14 February 2025 the appellant is to file:
  - a. any witness outlines; and
  - b. any documents which are not agreed documents upon which he intends to rely on.
4. THAT by 4.00pm on Friday, 28 February 2025 the respondent is to file:
  - a. any witness outlines; and
  - b. any documents which are not agreed documents upon which they intend to rely on.
5. THAT the appellant is to file an outline of written submissions upon which he intends to rely on by 4.00 pm on Friday, 14 March 2025.
6. THAT the respondent is to file an outline of written submissions upon which they intend to rely on by 4.00 pm on Friday, 28 March 2025.
7. THAT the appeal is to be listed for hearing of up to 1 day not before Thursday, 3 April 2025.
8. THAT there be liberty to apply.

(Sgd.) T KUCERA,  
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

**2025 WAIRC 00022**

**DISPUTE RE UNDERPAYMENT CLAIM**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
APANUI TRANSPORT PTY LTD AND OTHERS

**PARTIES**

**APPLICANT**

-v-

BORAL RESOURCES (WA) LTD

**RESPONDENT**

**CORAM** COMMISSIONER T KUCERA

**DATE** WEDNESDAY, 15 JANUARY 2025

**FILE NO/S** RFT 1 OF 2021, RFT 2 OF 2021, RFT 3 OF 2021, RFT 4 OF 2021, RFT 5 OF 2021, RFT 6 OF 2021, RFT 7 OF 2021, RFT 8 OF 2021, RFT 9 OF 2021, RFT 10 OF 2021, RFT 11 OF 2021, RFT 12 OF 2021, RFT 13 OF 2021, RFT 14 OF 2021, RFT 15 OF 2021, RFT 16 OF 2021, RFT 17 OF 2021, RFT 18 OF 2021, RFT 19 OF 2021, RFT 20 OF 2021, RFT 21 OF 2021, RFT 22 OF 2021, RFT 23 OF 2021, RFT 24 OF 2021, RFT 25 OF 2021, RFT 26 OF 2021, RFT 27 OF 2021, RFT 28 OF 2021

**CITATION NO.** 2025 WAIRC 00022

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<b>Result</b>	Order issued
<b>Representation</b>	
<b>Applicant</b>	Mr L Slaney
<b>Respondent</b>	Mr L Izzo (of counsel)

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*Order*

HAVING heard from Mr L Slaney on behalf of the applicants and Mr L Izzo of counsel on behalf of the respondent, the Road Freight Transport Industry Tribunal, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders by consent –

1. THAT the applicants file particulars of claim (**POC**) by 11 December 2024;
2. THAT the respondent makes any request for further and better particulars of the POC by 24 December 2024;
3. THAT the applicants file any response to a request for further and better particulars of the POC by 31 January 2025;
4. THAT the respondent files a response to the POC by 14 March 2025;
5. THAT this matter be relisted for a directions hearing on a date to be fixed after 14 March 2025;
6. THAT there be liberty to apply on short notice.

[L.S.]

(Sgd.) T KUCERA,  
Commissioner.

**2025 WAIRC 00050****UNFAIR DISMISSAL APPLICATION**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
BRETT MORGAN PALMER

**PARTIES****APPLICANT**

-v-

COMMISSIONER OF THE WESTERN AUSTRALIAN POLICE

**RESPONDENT****CORAM** COMMISSIONER T B WALKINGTON**DATE** FRIDAY, 31 JANUARY 2025**FILE NO/S** U 2 OF 2025**CITATION NO.** 2025 WAIRC 00050

<b>Result</b>	Order issued
<b>Representation</b>	
<b>Applicant</b>	Tindall Gask Bentley Lawyers
<b>Respondent</b>	State Solicitor's Office

*Order*

THE Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA) and by consent, hereby declares —

- A. THAT on 28 December 2024 the Applicant instituted an appeal under s 33P of the *Police Act 1892* (WA) within the time prescribed under that Act.

AND by consent, hereby orders —

1. THAT the applicant have leave to administratively uplift the *Form 1A – Multipurpose Form* filed on 13 January 2025.
2. THAT pursuant to reg 38 of the *Industrial Relations Commission Regulations 2005* (WA), the Registrar file the *Form 2 – Unfair Dismissal Application* lodged by the applicant and received by the Office of the Registrar on 28 December 2024 as though it was an appeal made on Form 8C – *Notice of Appeal or Referral (Other Matters)* pursuant to reg 90 of the Regulations and return a filed copy of it to the parties.
3. In filing the appeal, the Registrar is to arrange for a new matter number to identify the proceedings and refer the matter to the Chief Commissioner for allocation.

[L.S.]

(Sgd.) T B WALKINGTON,  
Commissioner.

2025 WAIRC 00057

**UNFAIR DISMISSAL APPLICATION**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

LISA KING

**APPLICANT**

-v-

THE TRUSTEE FOR SARAHS FAMILY TRUST

**RESPONDENT**

**CORAM** COMMISSIONER T B WALKINGTON  
**DATE** FRIDAY, 7 FEBRUARY 2025  
**FILE NO.** U 23 OF 2024  
**CITATION NO.** 2025 WAIRC 00057

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**Result** Direction Issued  
**Representation**  
**Applicant** Ms Lisa King  
**Respondent** Ms Sarah O’Sullivan

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*Direction*

HAVING heard from the applicant on their own behalf, and Ms O’Sullivan on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs:

1. THAT the applicant file and serve any outlines of witness evidence and documents, upon which they intend to rely, by no later than 24 February 2025;
2. THAT the respondent file and serve any outlines of witness evidence and documents, upon which they intend to rely, by no later than 10 March 2025;
3. THAT the applicant file and serve an outline of submissions and any list of authorities, upon which they intend to rely, by no later than 24 March 2025;
4. THAT the respondent file and serve an outline of submissions and any list of authorities, upon which they intend to rely, by no later than 7 April 2025;
5. THAT this matter be listed for hearing for 3 days on a date to be fixed; and
6. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,  
Commissioner.

[L.S.]

2025 WAIRC 00054

**UNFAIR DISMISSAL APPLICATION**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

LISA KING

**APPLICANT**

-v-

ALYV

**RESPONDENT**

**CORAM** COMMISSIONER T B WALKINGTON  
**DATE** THURSDAY, 6 FEBRUARY 2025  
**FILE NO/S** U 23 OF 2024  
**CITATION NO.** 2025 WAIRC 00054

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**Result** Name of respondent amended  
**Representation**  
**Applicant** Ms Lisa King  
**Respondent** Ms Sarah O’Sullivan

*Order*

HAVING heard from the applicant on her own behalf, and Ms O’Sullivan on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), and by consent, hereby directs:

THAT the name of the respondent by amended to The Trustee for Sarahs Family Trust.

(Sgd.) T B WALKINGTON,  
Commissioner.

[L.S.]

2025 WAIRC 00020

**UNFAIR DISMISSAL APPLICATION**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

SEAN DOBBS

**APPLICANT**

-v-

MYRA THOMAS

**RESPONDENT**

**CORAM** COMMISSIONER T B WALKINGTON

**DATE** TUESDAY, 14 JANUARY 2025

**FILE NO.** U 67 OF 2024

**CITATION NO.** 2025 WAIRC 00020

**Result** Direction issued

**Representation**

**Applicant** Mr Sean Dobbs

**Respondent** Ms Myra Thomas

*Direction*

HAVING heard from the applicant on their own behalf, and the respondent on their own behalf, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs:

1. THAT the applicant file and serve any outlines of witness evidence and documents, upon which they intend to rely, by no later than 18 February 2025;
2. THAT the respondent file and serve any outlines of witness evidence and documents, upon which they intend to rely, by no later than 11 March 2025;
3. THAT the applicant file and serve an outline of submissions and any list of authorities, upon which they intend to rely, by no later than 25 March 2025;
4. THAT the respondent file and serve an outline of submissions and any list of authorities, upon which they intend to rely, by no later than 8 April 2025;
5. THAT this matter be listed for hearing for 2 days on a date to be fixed; and
6. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,  
Commissioner.

[L.S.]

2025 WAIRC 00076

## UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

## PARTIES

AJAH OBANG ABUY

APPLICANT

-v-

TOWN OF PORT HEDLAND

RESPONDENT

**CORAM** SENIOR COMMISSIONER R COSENTINO  
**DATE** WEDNESDAY, 12 FEBRUARY 2025  
**FILE NO.** U 73 OF 2024  
**CITATION NO.** 2025 WAIRC 00076

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**Result** Direction issued  
**Representation**  
**Applicant** Ms A Abuy (in person)  
**Respondent** Ms H Millar (of counsel)

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*Direction*

HAVING heard from the applicant on her own behalf and Ms Millar on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

1. THAT the applicant file written closing submissions by no later than 14 February 2025; and
2. THAT the respondent file written closing submissions by no later than 21 February 2025.

[L.S.]

(Sgd.) R COSENTINO,  
Senior Commissioner.

2025 WAIRC 00045

## UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

## PARTIES

AJAH OBANG ABUY

APPLICANT

-v-

TOWN OF PORT HEDLAND

RESPONDENT

**CORAM** SENIOR COMMISSIONER R COSENTINO  
**DATE** WEDNESDAY, 29 JANUARY 2025  
**FILE NO.** U 73 OF 2024  
**CITATION NO.** 2025 WAIRC 00045

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**Result** Order issued  
**Representation**  
**Applicant** Ms A Abuy  
**Respondent** Ms H Millar of counsel

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*Order*

HAVING heard from Ms A Abuy on her own behalf and Ms H Millar of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

1. THAT the requirement for the respondent's outlines of witness evidence to comply with Practice Note 9 be dispensed with.

[L.S.]

(Sgd.) R COSENTINO,  
Senior Commissioner.

2025 WAIRC 00024

**UNFAIR DISMISSAL APPLICATION**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

AJAH OBANG ABUY

**APPLICANT**

-v-

TOWN OF PORT HEDLAND

**RESPONDENT****CORAM** SENIOR COMMISSIONER R COSENTINO**DATE** TUESDAY, 21 JANUARY 2025**FILE NO.** U 73 OF 2024**CITATION NO.** 2025 WAIRC 00024**Result** Directions issued**Representation****Applicant** Mr C Reath**Respondent** Ms A Greenwood of counsel*Direction*

HAVING heard from Mr C Reath on behalf of the applicant and Ms A Greenwood of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

1. THAT the time for the applicant to file an outline of her evidence complying with Order 1(a) of the orders issued on 14 November 2024 be extended to 24 January 2025.
2. THAT the time for the respondent to comply with Order 2 of the orders issued on 14 November 2024 be extended to 5 February 2025.
3. THAT there be liberty to apply at short notice.

(Sgd.) R COSENTINO,  
Senior Commissioner.

[L.S.]

2025 WAIRC 00019

**UNFAIR DISMISSAL APPLICATION**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

AJAH OBANG ABUY

**APPLICANT**

-v-

TOWN OF PORT HEDLAND

**RESPONDENT****CORAM** SENIOR COMMISSIONER R COSENTINO**DATE** MONDAY, 13 JANUARY 2025**FILE NO/S** U 73 OF 2024**CITATION NO.** 2025 WAIRC 00019**Result** Order issued**Representation****Applicant** Mr C Reath**Respondent** Ms A Greenwood of counsel

*Order*

Pursuant to the powers conferred under the *Industrial Relations Act 1979 (WA)*, and by consent, the Commission hereby orders:

1. THAT, subject to further order, the parties have leave for their witnesses to appear via video-link at the hearing listed on 10 and 11 February 2025.
2. THAT, subject to further order, Mr Reath have leave to appear on behalf of the Applicant via video-link at the hearing listed on 10 and 11 February 2025.

[L.S.]

(Sgd.) R COSENTINO,  
Senior Commissioner.

2025 WAIRC 00052

**UNFAIR DISMISSAL APPLICATION**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

PAUL ROBBINS

**APPLICANT**

-v-

MAIN ROADS WESTERN AUSTRALIA

**RESPONDENT**

**CORAM**

COMMISSIONER T KUCERA

**DATE**

MONDAY, 3 FEBRUARY 2025

**FILE NO/S**

U 112 OF 2024

**CITATION NO.**

2025 WAIRC 00052

**Result**

Order issued

**Representation**

**Applicant**

Mr L Slaney

**Respondent**

Mr M McIlwaine (of counsel)

*Order*

HAVING heard from Mr L Slaney on behalf of the applicant and Mr M McIlwaine of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979 (WA)*, hereby orders by consent –

1. THAT discovery be informal.
2. THAT the parties file a statement of agreed facts and bundle of agreed documents by Friday, 14 February 2025.
3. THAT the applicant files any outlines of witness evidence and documents (other than those in the bundle of agreed documents) by Friday, 28 February 2025.
4. THAT the respondent files any outlines of witness evidence and documents (other than those in the bundle of agreed documents) by Friday, 14 March 2025.
5. THAT the applicant files an outline of legal submissions by Friday, 28 March 2025.
6. THAT the respondent files an outline of legal submissions by Friday, 11 April 2025.
7. THAT the application be listed for a 2-day hearing not before Monday 21 April 2025.
8. THAT the parties have liberty to apply.

[L.S.]

(Sgd.) T KUCERA,  
Commissioner.

2025 WAIRC 00061

**UNFAIR DISMISSAL APPLICATION**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

RICHARD STUART BROWN

**APPLICANT**

-v-

CITY OF JOONDALUP

**RESPONDENT**

**CORAM** SENIOR COMMISSIONER R COSENTINO  
**DATE** THURSDAY, 6 FEBRUARY 2025  
**FILE NO.** U 126 OF 2024  
**CITATION NO.** 2025 WAIRC 00061

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**Result** Direction issued  
**Representation**  
**Applicant** Mr R Brown  
**Respondent** Mr A Sinanovic of counsel

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*Direction*Pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA) the Commission hereby directs:

1. THAT the jurisdictional issue of whether the applicant's resignation was a dismissal for the purpose of s 23A(1) of the Act (Preliminary Issue) be determined as a preliminary issue.
2. THAT by 6 March 2025, the applicant is to file any evidence upon which he relies in support of his claim that his resignation was a dismissal in the form of witness statement(s) which will stand as the applicant's evidence-in-chief, subject to any objections. Such witness statement(s) are to:
  - a. Only contain evidence that is relevant to the determination of the Preliminary Issue;
  - b. comply with Practice Note 9 of 2021's requirements for witness statements; and
  - c. refer to and attach all documents the applicant intends to rely upon in relation to the Preliminary Issue.
3. THAT by 3 April 2025, the respondent is to file any evidence upon which it relies in relation to the Preliminary Issue in the form of witness statement(s) which will stand as the respondent's evidence-in-chief, subject to any objections. Such witness statement(s) are to:
  - a. Only contain evidence that is relevant to the determination of the Preliminary Issue;
  - b. comply with Practice Note 9 of 2021's requirements for witness statements; and
  - c. Refer to and attach all documents the respondent intends to rely upon in relation to the Preliminary Issue.
4. THAT by 10 April 2025 the parties are to inform the Commission and each other in writing whether any witnesses will be required for cross-examination, and if so, which witnesses are required for cross-examination.

(Sgd.) R COSENTINO,  
Senior Commissioner.

[L.S.]

2025 WAIRC 00064

**APPLICATION FOR EXTERNAL REVIEW PURSUANT TO SECTION 229 OF THE WORK HEALTH AND SAFETY ACT 2020**

THE WORK HEALTH AND SAFETY TRIBUNAL

**PARTIES**

SEAN KELLY

**APPLICANT**

-v-

WORKSAFE COMMISSIONER

**RESPONDENT**

**CORAM** COMMISSIONER T EMMANUEL  
**DATE** MONDAY, 10 FEBRUARY 2025  
**FILE NO/S** WHST 15 OF 2024  
**CITATION NO.** 2025 WAIRC 00064

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<b>Result</b>	Order issued
<b>Representation</b>	
<b>Applicant</b>	On his own behalf
<b>Respondent</b>	Ms J Courtney (of counsel)

*Order*

HAVING heard from Mr S Kelly on his own behalf and Ms J Courtney (of counsel) on behalf of the WorkSafe Commissioner, the Work Health and Safety Tribunal, pursuant to the powers conferred by the *Work Health and Safety Act 2020* (WA), orders –

1. THAT programming orders [2024] WAIRC 01017 be vacated;
2. THAT by 3pm, 22 April 2025, the parties file in the Registry a statement of agreed facts and bundle of agreed documents;
3. THAT by 3pm, 7 May 2025, the WorkSafe Commissioner file in the Registry her foreshadowed application to dismiss application WHST 15 of 2024 (Dismissal Application), any evidence and documents in support of the Dismissal Application and written submissions in support of the Dismissal Application;
4. THAT by 3pm, 21 May 2025, Mr Kelly file in the Registry a response to the Dismissal Application, any evidence and documents in support of his response to the Dismissal Application and written submissions in support of his response to the Dismissal Application; and
5. THAT discovery be informal.

(Sgd.) T EMMANUEL,  
Commissioner.

[L.S.]

## INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Augusta Margaret River Shire Industrial Agreement 2024 AG 6/2025	29/01/2025	Augusta Margaret River Shire	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Senior Commissioner R Cosentino	Agreement registered
City of Vincent Industrial Agreement 2024 AG 11/2025	11/02/2025	City of Vincent	Australian Services Union Western Australian Branch	Senior Commissioner R Cosentino	Agreement registered
City of Vincent Rangers Industrial Agreement 2024 AG 12/2025	11/02/2025	City of Vincent	Australian Services Union Western Australian Branch	Senior Commissioner R Cosentino	Agreement registered
City of Wanneroo Asset Operations Industrial Agreement 2024 AG 8/2025	29/01/2025	City of Wanneroo	Local Government, Racing and Cemeteries Employees Union (WA), Construction Forestry Mining Energy Union - Construction & General Division and Others.	Senior Commissioner R Cosentino	Agreement registered
Education Assistants' (Government) General Agreement 2025 AG 1/2025	24/01/2025	Director General, Department of Education	United Workers Union (WA)	Commissioner C Tsang	Agreement registered
Electorate and Research Employees CSA Agreement 2024 AG 14/2025	12/02/2025	Department of the Premier and Cabinet	Civil Service Association of Western Australia Incorporated	Commissioner T B Walkington	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Government Services (Miscellaneous) General Agreement 2025 AG 2/2025	22/01/2025	Arts and Culture Trust, Department of Planning, Lands and Heritage, Department of Primary Industries and Regional Development, Forest Products Commission and others	United Workers Union (WA)	Commissioner T B Walkington	Agreement Registered
Main Roads APEA Enterprise Bargaining Agreement 2024 PSAAG 1/2025	11/02/2025	Main Roads Western Australia	The Association of Professionals Engineers, Australia (Western Australia Branch) Organisation of Employees (APEA)	Commissioner T B Walkington	Agreement Registered
Main Roads AWU Enterprise Bargaining Agreement 2024 AG 10/2025	12/02/2025	Main Roads Western Australia	The Australian Workers' Union, West Australian Branch, Industrial Union of Workers (AWU)	Commissioner T Kucera	Agreement registered
Main Roads CSA Enterprise Agreement 2024 PSAAG 2/2025	12/02/2025	Main Roads Western Australia	The Civil Service Association of Western Australia Inc.	Commissioner T Kucera	Agreement registered
Shire of Boyup Brook Outside Employees Enterprise Agreement 2024-2027 AG 3/2025	17/01/2025	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Shire of Boyup Brook, Local Government, Racing, Cemeteries Employees Union	Senior Commissioner R Cosentino	Agreement registered
Shire of Brookton Outside Staff Agreement 2024 AG 30/2024	09/01/2025	Local Government, Racing and Cemeteries Employees Union (WA)	Shire of Brookton	Senior Commissioner R Cosentino	Agreement registered
Shire of Harvey Recreation Centres Enterprise Agreement 2023 AG 7/2025	29/01/2025	Shire of Harvey	Western Australian Municipal, Administrative, Clerical and Services Union of Employees (WASU)	Senior Commissioner R Cosentino	Agreement registered

## NOTICES—Union Matters—

2025 WAIRC 00065

### NOTICE CICS 3 of 2025

NOTICE is given of an application made to the Commission in Court Session by 'Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch' (**applicant**) for the right to represent the industrial interests of employees engaged in waste collection services employed in the enterprises of the City of Gosnells, City of Melville and City of Stirling.

The application is made pursuant to section 72A of the *Industrial Relations Act 1979* (WA) and is published hereunder. A copy of the application may be inspected on the 17<sup>th</sup> Floor, 111 St Georges Terrace, Perth.

The matter will be listed for hearing on a date to be fixed.

Pursuant to regulation 73(2) of the *Industrial Relations Commission Regulations 2005* (WA) any person who wishes to be heard in relation to the application must file an application to be heard on a Form 1A – Multipurpose Form, setting out the grounds on which the person claims sufficient interest to be heard in relation to the application. A Form 1A – Multipurpose Form is available on the WAIRC website at [www.wairc.wa.gov.au](http://www.wairc.wa.gov.au) under Applications & Forms.

(Sgd.) S BASTIAN,  
Registrar.

[L.S.]  
6 February 2025