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## **PUBLIC SERVICE ARBITRATOR—Awards/Agreements—Variation of—**

2019 WAIRC 00664

### **GOVERNMENT OFFICERS SALARIES, ALLOWANCES AND CONDITIONS AWARD 1989**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

**APPLICANT**

-v-

ANIMAL RESOURCES AUTHORITY, BOTANIC GARDENS AND PARKS AUTHORITY,  
BUILDERS' REGISTRATION BOARD OF WESTERN AUSTRALIA

**RESPONDENTS**

**CORAM**

PUBLIC SERVICE ARBITRATOR  
SENIOR COMMISSIONER S J KENNER

**DATE**

MONDAY, 2 SEPTEMBER 2019

**FILE NO/S**

P 2A OF 2018

**CITATION NO.**

2019 WAIRC 00664

**Result**

Award varied

**Representation**

**Applicant**

Mr R Johnstone of counsel and with him Mr M Finnegan of counsel

**Respondents**

Mr S Dane

*Order*

HAVING heard Mr R Johnstone of counsel and with him Mr M Finnegan of counsel on behalf of the applicant and Mr S Dane on behalf of the respondents, the Arbitrator, pursuant to the powers conferred on him under the *Industrial Relations Act 1979*, hereby orders –

THAT the *Government Officers Salaries, Allowances and Conditions Award 1989* be varied in accordance with the following schedule and that such variation shall have effect on and from 2 September 2019.

(Sgd.) S J KENNER,  
Senior Commissioner,  
Public Service Arbitrator.

[L.S.]

## SCHEDULE

**1. Schedule A – List of Respondents: Delete this clause and insert the following in lieu thereof:**SCHEDULE A – LIST OF RESPONDENTS

The employing authority of each of the following:

Agricultural Produce Commission  
Animal Resources Authority  
Architects Board of Western Australia  
Botanic Gardens and Parks Authority  
Building and Construction Industry Training Fund  
Central Regional TAFE  
Commissioner of Main Roads Western Australia  
Construction Industry Long Service Leave Payments Board (My Leave)  
Corruption and Crime Commission  
Department of Biodiversity, Conservation and Attractions  
Department of Communities  
Department of Education  
Department of Fire and Emergency Services  
Department of Jobs, Tourism and Innovation  
Department of Local Government, Sport and Cultural Industries  
Department of Primary Industries and Regional Development  
Department of Training and Workforce Development  
Disability Services Commission  
Forest Products Commission  
Infrastructure Western Australia  
Keep Australia Beautiful Council (WA)  
Legal Aid Commission of Western Australia  
Legal Practice Board of Western Australia  
Lotteries Commission Western Australia  
Metropolitan Cemeteries Board  
Minerals Research Institute of Western Australia  
North Metropolitan Health Service (Salaried Officers in Dental Health Services, other than Dentists and Dental Technicians)  
North Metropolitan TAFE  
North Regional TAFE  
Office of the Information Commissioner  
Parliamentary Commissioner for Administrative Investigations (Ombudsman Western Australia)  
Perth Theatre Trust  
School Curriculum and Standards Authority  
Small Business Development Corporation  
South Metropolitan TAFE  
South Regional TAFE  
Teacher's Registration Board of WA  
The Burswood Park Board  
The Hon. Premier, the Hon. Deputy Premier and all Ministers of the Crown in the right of the State of Western Australia as they be from time to time.  
The National Trust of Australia  
Veterinary Surgeons' Board Western Australia  
Western Australian Land Information Authority (Landgate)  
Western Australian Sport Centre Trust (Venueswest)  
Western Australian Tourism Commission (Tourism Western Australia)  
Zoological Parks Authority

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2019 WAIRC 00691

**GOVERNMENT OFFICERS SALARIES, ALLOWANCES AND CONDITIONS AWARD 1989**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

**APPLICANT**

-v-

ANIMAL RESOURCES AUTHORITY, BOTANIC GARDENS AND PARKS AUTHORITY,  
BUILDERS' REGISTRATION BOARD OF WESTERN AUSTRALIA**RESPONDENTS****CORAM**PUBLIC SERVICE ARBITRATOR  
SENIOR COMMISSIONER S J KENNER**DATE**

WEDNESDAY, 4 SEPTEMBER 2019

**FILE NO**

P 2A OF 2018

**CITATION NO.**

2019 WAIRC 00691

**Result**

Order issued

**Representation****Applicant**

Mr R Johnstone of counsel and with him Mr M Finnegan of counsel

**Respondent**

Mr S Dane

*Correcting Order*

HAVING heard Mr R Johnstone of counsel and with him Mr M Finnegan of counsel on behalf of the applicant and Mr S Dane on behalf of the respondents, and there being an error in the order of 2 September 2019, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders –

THAT the order of 2 September 2019 deposited in the office of the Registrar on 2 September 2019 be and is hereby corrected in the terms of the attached Schedule.

(Sgd.) S J KENNER,  
Senior Commissioner,  
Public Service Arbitrator.

[L.S.]

**SCHEDULE****1. Schedule A – List of Respondents: Delete this clause and insert the following in lieu thereof:****SCHEDULE A – LIST OF RESPONDENTS**

The employing authority of each of the following:

Agricultural Produce Commission  
Animal Resources Authority  
Architects Board of Western Australia  
Botanic Gardens and Parks Authority  
Building and Construction Industry Training Fund  
Central Regional TAFE  
Commissioner of Main Roads Western Australia  
Construction Industry Long Service Leave Payments Board (My Leave)  
Corruption and Crime Commission  
Department of Biodiversity, Conservation and Attractions  
Department of Communities  
Department of Education  
Department of Fire and Emergency Services  
Department of Jobs, Tourism and Innovation  
Department of Local Government, Sport and Cultural Industries  
Department of Primary Industries and Regional Development  
Department of Training and Workforce Development  
Disability Services Commission  
Forest Products Commission  
Infrastructure WA  
Keep Australia Beautiful Council (WA)

Legal Aid Commission of Western Australia  
 Legal Practice Board of Western Australia  
 Lotteries Commission Western Australia  
 Metropolitan Cemeteries Board  
 Minerals Research Institute of Western Australia  
 North Metropolitan Health Service (Salaried Officers in Dental Health Services, other than Dentists and Dental Technicians)  
 North Metropolitan TAFE  
 North Regional TAFE  
 Office of the Information Commissioner  
 Parliamentary Commissioner for Administrative Investigations (Ombudsman Western Australia)  
 Perth Theatre Trust  
 School Curriculum and Standards Authority  
 Small Business Development Corporation  
 South Metropolitan TAFE  
 South Regional TAFE  
 Teacher's Registration Board of WA  
 The Burswood Park Board  
 The Hon. Premier, the Hon. Deputy Premier and all Ministers of the Crown in the right of the State of Western Australia as they be from time to time.  
 The National Trust of Australia  
 Veterinary Surgeons' Board Western Australia  
 Western Australian Land Information Authority (Landgate)  
 Western Australian Sport Centre Trust (Venueswest)  
 Western Australian Tourism Commission (Tourism Western Australia)  
 Zoological Parks Authority

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## AWARDS/AGREEMENTS AND ORDERS—Variation of—

2019 WAIRC 00707

**APPLICATION TO VARY THE THEATRICAL EMPLOYEES ENTERTAINMENT, SPORTING AND AMUSEMENT FACILITIES (WESTERN AUSTRALIAN GOVERNMENT) AWARD 1987 TO ENSURE THAT PAYMENT OF WAGES FOR HOURS IN EXCESS OF 38 PER WEEK COMPLIES WITH STATUTORY MINIMUM REQUIREMENTS**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

COMMISSION'S OWN MOTION

**APPLICANT**

-v-

(NOT APPLICABLE)

**RESPONDENT**

**CORAM**

CHIEF COMMISSIONER P E SCOTT

**DATE**

FRIDAY, 13 SEPTEMBER 2019

**FILE NO/S**

APPL 35 OF 2018

**CITATION NO.**

2019 WAIRC 00707

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**Result**

Award varied

### *Order*

HAVING heard Dr T Dymond on behalf of UnionsWA, Mr K Black on behalf of Chamber of Commerce and Industry WA and Mr B Entekin, and later Ms on behalf of the Minister for Industrial Relations, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders –

THAT the *Theatrical Employees Entertainment, Sporting and Amusement Facilities (Western Australian Government) Award 1987* be varied in accordance with the following Schedule and that such variations in the attached Schedule shall have effect from the beginning of the first pay period commencing on or after the Friday, 13 September 2019.

(Sgd.) P E SCOTT,  
Chief Commissioner.

[L.S.]

## SCHEDULE

**Clause 5 – Contract of Employment: Delete subclauses (2) and (3) and insert the following in lieu thereof:**

5. - CONTRACT OF EMPLOYMENT

- (2) WEEKLY EMPLOYEES
- (a) Employees engaged to work on a weekly basis shall be employed for no more than 3 months in any one term of employment.
  - (b) The rate to apply to weekly employees shall be calculated in accordance with the following:  
Hourly Rate x 40 hours = weekly wage
  - (c) Weekly employees shall not be entitled to accrue annual leave.
  - (d) Weekly employees shall accrue sick leave at the rate of 2 hours per 40 hours' employment provided that such sick leave credit is not transferable to another later period of weekly employment.
  - (e) Weekly employees shall give or be given seven days' notice of termination of the contract of employment.
- (3) CASUAL EMPLOYEES
- (a) A casual employee shall be defined as an employee engaged on the day of, or the day before the event they are engaged to work at and who do not receive written notification of their employment.
  - (b) A casual employee shall be paid an additional 20% loading on all ordinary time rates.
  - (c) Casual employees shall give or be given a minimum of one hour's notice of termination of the contract of employment provided that payment shall be made for the full period for which the employee was engaged on that day.

**Clause 16 - Rates of Payment: Delete clause and insert the following in lieu thereof:**

16. - RATES OF PAYMENT

- (1) Subject to anything elsewhere provided in this Award the minimum rate of payment for the classifications as defined in Clause 4. - Definitions, shall be as per Schedule A.
- (2) The rates of payment for this Award shall be based and calculated on the minimum weekly wage and hours for an adult worker as prescribed by the Western Australian Industrial Relations Commission and published in the Western Australian Industrial Gazette from time to time. The minimum ordinary casual hourly rate shall be calculated by dividing that minimum weekly wage by the hours prescribed and adding 20%.
- (3) (a) The weekly wage of employees employed for 40 hours in any one week shall be calculated in accordance with the following: Hourly Rate (as per Schedule A) x 40 hours

**Schedule A – Rates of payment: Delete this schedule and insert the following in lieu thereof:**

SCHEDULE A – RATES OF PAYMENT

| Classification   | Hourly Rate of Pay |          |      |       |
|--|--------------------|----------|------|-------|
|  | Column A \$        | Column B | ASNA | TOTAL |
| (1) Attendant - General Duties:<br>Cloakroom Attendant<br>Gate Attendant<br>Parking Attendant<br>Turnstile Attendant<br>Usher  |                    |          |      | 19.66 |
| (2) Barrier Attendant (Racing)<br>Change Room Attendant<br>Curtain Attendant<br>Door Attendant<br>Fence Attendant<br>Kennel Attendant/Dog Leader<br>Ride Operator<br>Stalls Attendant (Racing)<br>Ticket Collector/Examiner<br>Track Attendant |                    |          |      | 19.66 |
| (3) Scoreboard Operator<br>Scratching Board Operator/<br>Writer (Racing)   |                    |          |      | 19.66 |

|     | Classification   | Hourly Rate of Pay |          |      |       |
|-----|--|--------------------|----------|------|-------|
|     |  | Column A \$        | Column B | ASNA | TOTAL |
| (4) | Parking Fee Collector<br>Kennel Supervisor<br>Programme Seller             |                    |          |      | 19.66 |
| (5) | Change Cashier<br>Gate Keeper<br>Ticket/Token Seller<br>Turnstile Operator |                    |          |      | 19.66 |
| (6) | Scales – Assistant<br>Starter (Racing)                                     |                    |          |      | 19.66 |
| (7) | Supervisor of less than 10 employees                                       |                    |          |      | 19.66 |
| (8) | Supervisor of 10 or more employees   |                    |          |      | 19.66 |

The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

The State Wage Case increase is to be applied to the rates of pay in this award by dividing the flat dollar increase by 38 (and round to the nearest cent)

**2019 WAIRC 00708**

**APPLICATION TO VARY THE THEATRICAL EMPLOYEES (PERTH THEATRE TRUST) AWARD NO. 9 OF 1983  
TO ENSURE THAT PAYMENT OF WAGES FOR HOURS IN EXCESS OF 38 PER WEEK COMPLIES WITH  
STATUTORY MINIMUM REQUIREMENTS**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

COMMISSION'S OWN MOTION

**APPLICANT**

-v-

(NOT APPLICABLE)

**RESPONDENT**

**CORAM**

CHIEF COMMISSIONER P E SCOTT

**DATE**

FRIDAY, 13 SEPTEMBER 2019

**FILE NO/S**

APPL 42 OF 2018

**CITATION NO.**

2019 WAIRC 00708

**Result**

Award varied

*Order*

HAVING heard Dr T Dymond on behalf of UnionsWA, Mr K Black on behalf of Chamber of Commerce and Industry WA and Mr B Entekin, and later Ms C Pickering on behalf of the Minister for Industrial Relations, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders -

THAT the *Theatrical Employees (Perth Theatre Trust) Award No. 9 of 1983* be varied in accordance with the following Schedule and that such variations in the attached Schedule shall have effect from the beginning of the first pay period commencing on or after the Friday, 13 September 2019.

(Sgd.) P E SCOTT,  
Chief Commissioner.

[L.S.]

## SCHEDULE

**Clause 5 – Rates of Pay: Delete this clause and insert the following in lieu thereof:****5. – RATES OF PAY**

The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

The minimum weekly award rate of pay to be paid to an employee shall be as follows -

|     |  | MINIMUM<br>RATE | SUPPLE-<br>MENTARY<br>PAYMENT | ASNA   | TOTAL<br>MINIMUM<br>AWARD<br>RATE |
|-----|--|-----------------|-------------------------------|--------|-----------------------------------|
|     |  | \$              | \$                            | \$     | \$                                |
| (1) | Stage Management Section   |                 |                               |        |                                   |
|     | (a) Technical Stage Manager  | 500.40          | 8.00                          | 441.60 | 950.00                            |
|     | (b) Stage Manager  | 472.40          | 8.00                          | 440.80 | 921.20                            |
|     | (c) Assistant Stage Manager  | 390.00          | 8.00                          | 427.70 | 825.70                            |
| (2) | Mechanical Department  |                 |                               |        |                                   |
|     | (a) Workshop   |                 |                               |        |                                   |
|     | (i) Head carpenter   | 460.40          | 8.00                          | 439.40 | 907.80                            |
|     | (ii) Carpenter   | 406.30          | 8.00                          | 429.10 | 843.40                            |
|     | (iii) Carpenter's assistant  | 357.50          | 8.00                          | 425.00 | 790.50                            |
|     | (b) Stage  |                 |                               |        |                                   |
|     | (i) Head mechanist/head road manager   | 460.40          | 8.00                          | 439.40 | 907.80                            |
|     | (ii) Mechanist/head flyman/road manager  | 406.30          | 8.00                          | 429.10 | 843.40                            |
|     | (iii) Stage hand/flyman  | 357.50          | 8.00                          | 425.00 | 790.50                            |
|     | Loading for stage hands in charge of<br>side/revolve truck: 8 per cent.  |                 |                               |        |                                   |
| (3) | Electrical/Lighting Department   |                 |                               |        |                                   |
|     | (a) Head electrician   | 460.40          | 8.00                          | 439.40 | 907.80                            |
|     | (b) Electrician/main switchboard operator  | 406.30          | 8.00                          | 429.10 | 843.40                            |
|     | (c) Electrical hand  | 357.50          | 8.00                          | 425.00 | 790.50                            |
|     | Loading for electrical hand who is<br>required to operate spots/auxiliary<br>switchboard/visual effects: 8 per cent.                               |                 |                               |        |                                   |
| (4) | Audio Department   |                 |                               |        |                                   |
|     | (a) Head audio technician  | 460.40          | 8.00                          | 439.40 | 907.80                            |
|     | (b) Audio operator   | 406.30          | 8.00                          | 429.10 | 843.40                            |
|     | (c) Audio hand   | 357.50          | 8.00                          | 425.00 | 790.50                            |
|     | N.B. Where there is no separate<br>audio department the audio<br>operator/hand shall be classified<br>under (3) Electrical/Lighting<br>Department. |                 |                               |        |                                   |
| (5) | Wardrobe Section   |                 |                               |        |                                   |
|     | (a) Workshop   |                 |                               |        |                                   |
|     | (i) Head of wardrobe   | 460.40          | 8.00                          | 439.40 | 907.80                            |
|     | (ii) Cutter/tailor/ wigmaker/milliner  | 406.30          | 8.00                          | 429.10 | 843.40                            |
|     | (iii) Seamstress/maintenance<br>hand/buyer/costume jeweller  | 357.50          | 8.00                          | 425.00 | 790.50                            |
|     | (b) Stage  |                 |                               |        |                                   |
|     | (i) Head of department   | 460.40          | 8.00                          | 439.40 | 907.80                            |
|     | (ii) Wardrobe hand/dresser/valet   | 406.30          | 8.00                          | 429.10 | 843.40                            |
| (6) | Property Department  |                 |                               |        |                                   |
|     | (a) Workshop   |                 |                               |        |                                   |
|     | (i) Property master/mistress   | 460.40          | 8.00                          | 439.40 | 907.80                            |
|     | (ii) Property maker  | 406.30          | 8.00                          | 429.10 | 843.40                            |
|     | (iii) Property hand  | 357.50          | 8.00                          | 425.00 | 790.50                            |
|     | (b) Stage  |                 |                               |        |                                   |
|     | (i) Property master/mistress   | 460.40          | 8.00                          | 439.40 | 907.80                            |
|     | (ii) Property hand   | 357.50          | 8.00                          | 425.00 | 790.50                            |

|      | MINIMUM<br>RATE   | SUPPLE-<br>MENTARY<br>PAYMENT | ASNA   | TOTAL<br>MINIMUM<br>AWARD<br>RATE |
|------|---|-------------------------------|--------|-----------------------------------|
|      | \$  | \$                            | \$     | \$                                |
| (7)  | Art Department  |                               |        |                                   |
| (a)  | 460.40  | 8.00                          | 439.40 | 907.80                            |
| (b)  | 406.30  | 8.00                          | 429.10 | 843.40                            |
| (c)  | 357.50  | 8.00                          | 425.00 | 790.50                            |
| (8)  | Services  |                               |        |                                   |
| (a)  | 348.30  | 8.00                          | 430.10 | 786.40                            |
| (b)  |   |                               |        | 786.40                            |
| (c)  | 349.40  | 8.00                          | 429.00 | 786.40                            |
| (d)  |   |                               |        | 786.40                            |
| (9)  | Cleaners  |                               |        |                                   |
| (a)  | 371.50  | 8.00                          | 426.20 | 805.70                            |
| (b)  | 364.10  | 8.00                          | 425.40 | 797.50                            |
|      | Engaged by the hour (with a minimum payment as of three and a half hours).  |                               |        |                                   |
|      | \$  |                               |        |                                   |
|      | 8.00 a.m. to 6.00 p.m.  | 23.93                         |        |                                   |
|      | 6.00 p.m. to midnight   | 35.90                         |        |                                   |
|      | midnight to 8.00 a.m.   | 47.86                         |        |                                   |
| (10) | 460.40  | 8.00                          | 439.40 | 907.80                            |
| (11) |   |                               |        | 786.40                            |
| (12) | Additional Rates  |                               |        |                                   |
|      | Persons employed as casuals in the following classifications shall be paid the specified hourly amounts in addition to the wage provided elsewhere: |                               |        |                                   |
|      | MINIMUM<br>RATE   | SUPPLE-<br>MENTARY<br>PAYMENT | ASNA   | TOTAL<br>MINIMUM<br>AWARD<br>RATE |
|      | \$  | \$                            | \$     | \$                                |
|      | 1.70  |                               |        |                                   |
|      | 1.52  |                               |        |                                   |
|      | 0.70  |                               |        |                                   |
| (13) | \$  | \$                            | \$     | \$                                |
| (a)  | 498.80  | 8.00                          | 443.60 | 950.40                            |
| (b)  | 467.00  | 8.00                          | 440.10 | 915.10                            |
| (c)  | 438.90  | 8.00                          | 434.80 | 881.70                            |
| (d)  | 384.30  | 8.00                          | 427.10 | 819.40                            |
| (e)  | 348.30  | 8.00                          | 430.10 | 786.40                            |

Booking clerks and ticket sellers shall not be held responsible for cash shortages when they are instructed to allow another employee (including the manager of the venue) access to their cash or tickets during a selling period

(14) Subclause (15) applies whenever a State Wage Case decision is issued by the Commission, increasing adult rates of pay in State awards by a flat dollar amount.

(15) The State Wage Case increase is to be applied to adult weekly rates of pay in this award for the classifications under subclauses (1) to (12) in accordance with the following formula:

Step 1: Divide the flat dollar increase by 38 (and round to the nearest cent)

Step 2: Multiply the figure calculated in Step 1 by 40

*Example: The Commission awards an \$18.00 per week increase to adult weekly rates of pay*

*Step 1 = \$18.00 ÷ 38 = \$0.47*

*Step 2 = \$0.47 x 40 = \$18.80*

*In this example adult weekly rates of pay would be increased by \$18.80 per week.*



THAT the application be and is hereby discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,  
Senior Commissioner,  
Public Service Arbitrator.

**2019 WAIRC 00668**

**ELECTORATE OFFICERS AWARD 1986**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

**APPLICANT**

**-v-**

THE HONOURABLE SPEAKER OF THE LEGISLATIVE ASSEMBLY, THE HONOURABLE  
PRESIDENT OF THE LEGISLATIVE COUNCIL

**RESPONDENTS**

**CORAM**

PUBLIC SERVICE ARBITRATOR

SENIOR COMMISSIONER S J KENNER

**DATE**

MONDAY, 2 SEPTEMBER 2019

**FILE NO**

P 6 OF 2018

**CITATION NO.**

2019 WAIRC 00668

**Result** Order issued

**Representation**

**Applicant** Mr R Johnstone of counsel

**Respondent** Mr S Dane

*Order*

WHEREAS the applicant sought and was granted leave to discontinue the application, the Arbitrator, pursuant to the powers conferred on him under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,  
Senior Commissioner,  
Public Service Arbitrator.

**2019 WAIRC 00667**

**GOVERNMENT OFFICERS (INSURANCE COMMISSION OF WESTERN AUSTRALIA) AWARD, 1987**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

**APPLICANT**

**-v-**

DIRECTOR GENERAL, INSURANCE COMMISSION OF WESTERN AUSTRALIA

**RESPONDENT**

**CORAM**

PUBLIC SERVICE ARBITRATOR

SENIOR COMMISSIONER S J KENNER

**DATE**

MONDAY, 2 SEPTEMBER 2019

**FILE NO**

P 5 OF 2018

**CITATION NO.**

2019 WAIRC 00667

**Result** Order issued

**Representation**

**Applicant** Mr R Johnstone of counsel

**Respondent** Mr S Dane

*Order*

WHEREAS the applicant sought and was granted leave to discontinue the application, the Arbitrator, pursuant to the powers conferred on him under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,  
Senior Commissioner,  
Public Service Arbitrator.

**2019 WAIRC 00671**

**GOVERNMENT OFFICERS (SOCIAL TRAINERS) AWARD 1988**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

**APPLICANT**

**-v-**

DIRECTOR GENERAL, DEPARTMENT OF COMMUNITIES, BEING THE DIRECTOR  
GENERAL OF THE DISABILITY SERVICES COMMISSION

**RESPONDENTS**

**CORAM**

PUBLIC SERVICE ARBITRATOR  
SENIOR COMMISSIONER S J KENNER

**DATE**

MONDAY, 2 SEPTEMBER 2019

**FILE NO**

P 10 OF 2018

**CITATION NO.**

2019 WAIRC 00671

**Result**

Order issued

**Representation**

**Applicant**

Mr R Johnstone of counsel

**Respondent**

Mr S Dane

*Order*

WHEREAS the applicant sought and was granted leave to discontinue the application, the Arbitrator, pursuant to the powers conferred on him under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,  
Senior Commissioner,  
Public Service Arbitrator.

**2019 WAIRC 00666**

**JUVENILE CUSTODIAL OFFICERS' AWARD**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

**APPLICANT**

**-v-**

CHIEF EXECUTIVE OFFICER, BEING THE DIRECTOR GENERAL, DEPARTMENT OF  
JUSTICE, DIRECTOR GENERAL, DEPARTMENT OF COMMUNITIES

**RESPONDENTS**

**CORAM**

PUBLIC SERVICE ARBITRATOR  
SENIOR COMMISSIONER S J KENNER

**DATE**

MONDAY, 2 SEPTEMBER 2019

**FILE NO**

P 4 OF 2018

**CITATION NO.**

2019 WAIRC 00666

**Result** Order  
**Representation**  
**Applicant** Mr R Johnstone of counsel  
**Respondent** Mr S Dane

*Order*

WHEREAS the applicant sought and was granted leave to discontinue the application, the Arbitrator, pursuant to the powers conferred on him under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

(Sgd.) S J KENNER,  
Senior Commissioner,  
Public Service Arbitrator.

[L.S.]

**2019 WAIRC 00665**

**PUBLIC SERVICE AWARD 1992**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

**APPLICANT**

-v-

CHEMISTRY CENTRE, COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE,  
CURRICULUM COUNCIL OF WESTERN AUSTRALIA

**RESPONDENTS**

**CORAM** PUBLIC SERVICE ARBITRATOR  
SENIOR COMMISSIONER S J KENNER

**DATE** MONDAY, 2 SEPTEMBER 2019

**FILE NO** P 3 OF 2018

**CITATION NO.** 2019 WAIRC 00665

**Result** Order issued  
**Representation**  
**Applicant** Mr R Johnstone of counsel  
**Respondent** Mr S Dane

*Order*

WHEREAS the applicant sought and was granted leave to discontinue the application, the Arbitrator, pursuant to the powers conferred on him under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

(Sgd.) S J KENNER,  
Senior Commissioner,  
Public Service Arbitrator.

[L.S.]

**INDUSTRIAL MAGISTRATE—Claims before—**

2019 WAIRC 00650

**WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT**

**CITATION** : 2019 WAIRC 00650  
**CORAM** : INDUSTRIAL MAGISTRATE D. SCADDAN  
**HEARD** : WEDNESDAY, 3 JULY 2019  
**DELIVERED** : WEDNESDAY, 21 AUGUST 2019  
**FILE NO.** : M 128 OF 2018  
**BETWEEN** : THE AUSTRALIAN WORKERS' UNION

CLAIMANT

AND

VESCO FOODS PTY LTD, TRADING AS VESCO FOODS

RESPONDENT

|  |   |  |
|--|---|--|
| <b>CatchWords</b>                      | : | INDUSTRIAL LAW – Construction of term of an enterprise agreement – Meaning of ‘agreed hours’ – Payment of overtime   |
| <b>Legislation</b>                     | : | <i>Fair Work Act 2009</i> (Cth)<br><i>Industrial Relations Act 1979</i> (WA)   |
| <b>Instruments</b>                     | : | <i>Vesco Foods Pty Ltd (Production Employees, Western Australia) Enterprise Agreement 2017</i><br><i>Food, Beverage and Tobacco Manufacturing Award 2010</i>   |
| <b>Case(s) referred to in reasons:</b> | : | <i>Border Express Pty Ltd</i> [2013] FWA 7627<br><i>Hospira Australia Pty Ltd</i> [2013] FWCA 3663<br><i>Dairy Technical Services Ltd re DTS Food Laboratories Collective Agreement 2012 – 2015</i> [2012] FWAA 10728<br><i>O’Brien Glass Industries Ltd re O’Brien Tasmania Glaziers Enterprise Bargaining Agreement 2012-2014</i> [2012] FWAA 9371<br><i>Barlina Pty Ltd</i> [2014] FWC 887<br><i>United Voice v Wilson Security Pty Ltd</i> [2019] FCAFC 66<br><i>Mildren and Anor v Gabbusch</i> [2014] SAIRC 15<br><i>Miller v Minister of Pensions</i> [1947] 2 All ER 372<br><i>Briginshaw v Briginshaw</i> [1938] HCA 34<br><i>Fedec -v- The Minister for Corrective Services</i> [2017] WAIRC 00828<br><i>City of Wanneroo v Australian Municipal, Administrative, Clerical And Services Union</i> [2006] FCA 813<br><i>Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Excelior Pty Ltd</i> [2013] FCA 638<br><i>ALDI Foods Pty Ltd v Shop, Distributive &amp; Allied Employees Association</i> [2017] HCA 53<br><i>Armacell Australia Pty Ltd and others</i> [2010] FWAFB 9985 |
| <b>Result</b>                          | : | Claim proven in part   |
| <b>Representation:</b>                 |   |  |
| Claimant                               | : | Mr C. Young (industrial officer)   |
| Respondent                             | : | Mr J. Raftos (of counsel) as instructed by Minter Ellison  |

**REASONS FOR DECISION**

- 1 Deng Atack Ken Agany (Mr Agany) is employed by Vesco Foods Pty Ltd, trading as Vesco Foods (Vesco) as a permanent part-time food process worker pursuant to an updated employment contract dated 8 August 2016 (Employment Contract).
- 2 Mr Agany, The Australian Workers' Union (the Claimant) and Vesco are all covered by the *Vesco Foods Pty Ltd (Production Employees, Western Australia) Enterprise Agreement 2017* (the Agreement) pursuant to s 53 of the *Fair Work Act 2009* (Cth) (FWA).
- 3 The Agreement, approved by the Fair Work Commission (FWC) on 18 August 2017 with the operative date being 25 August 2017, was approved and subject to undertakings given by Vesco.
- 4 Pursuant to cl 4.3 of the Agreement, the Agreement operates to the exclusion of any modern award or other industrial agreement, including the *Food, Beverage and Tobacco Manufacturing Award 2010* (the Award). The Award is relevant for the purposes of interpreting the Agreement to the extent required by the undertakings given by Vesco and because the Award was the relevant award for the ‘better off overall test’ under s 193 of the FWA.

- 5 The Claimant claims Vesco has contravened s 50 of the FWA by:
- (a) failing to pay Mr Agany overtime for hours worked in excess of 20 hours per week at the rate required under the Agreement (by reference to the undertakings); and
  - (b) failing to establish a reconciliation system to determine any shortfall on payment as required by undertakings in the Agreement.
- 6 The Claimant further claims Vesco has contravened s 323 of the FWA by failing to pay Mr Agany any amount in full that he was entitled under the Agreement.
- 7 The Claimant seeks an amount to be paid to Mr Agany of \$5,193.42.
- 8 Vesco denies the Claimant's claim and relevant to the alleged failure to pay overtime says that Mr Agany's agreed hours were 38 hours per week as determined by a weekly roster where Mr Agany accepted the working hours published in the roster. Further, the reference to 20 hours per week is reference to a guaranteed minimum of hours of work per week.
- 9 The parties, having conferred, identified certain questions for determination (see below) and lodged an amended statement of agreed facts<sup>1</sup> with a sample week from 28 August 2017 to 3 September 2017 to assist the court in answering the questions (Example Week).
- 10 Schedule I contains the amended statement of agreed facts (Agreed Facts).
- 11 Schedule II outlines the jurisdiction and practice and procedure relevant to the Industrial Magistrates Court (IMC).
- 12 Schedule III outlines the principles relevant to construction of an industrial instrument.
- 13 Schedule IV contains various tables of calculations referred to in these reasons for decision.

#### **Questions And Issues For Determination**

- 14 The parties identified the following questions for determination:
- (a) Are Mr Agany's 'agreed hours' for the purposes of the undertaking in the Agreement 20 hours per week?
  - (b) If the answer to (a) is 'yes', what is the amount owing to Mr Agany in respect of overtime hours for the Example Week?
- 15 To answer those questions the following issues require determination:
- (a) What were Mr Agany's 'agreed hours' under his Employment Contract and the Agreement?
  - (b) What does 'minimum of 20 hours per week' mean in cl 9.2 in the Agreement and in the Employment Contract?
  - (c) When do overtime rates apply?
  - (d) What, if anything, is owed to Mr Agany?
- 16 The remaining issue is whether Vesco undertook weekly reconciliation required by the undertakings to the Agreement.

#### **Claimant's Contentions**

- 17 The Claimant contends that:
- (a) Mr Agany's agreed hours of work are 20 hours per week and consequently he is entitled to be paid overtime for each hour worked over 20 hours per week in accordance with overtime rates in the Agreement;
  - (b) the Employment Contract and the Agreement guarantees Mr Agany 20 hours per week of work as a minimum and the Claimant claims this is the agreed hours of work;
  - (c) a fair and objective interpretation of the Employment Contract and Agreement does not favour a reading of agreed hours as '20 hours per week and any additional hours' as determined by Vesco;
  - (d) the purpose of the undertaking in the Agreement as it related to overtime for part-time employees was to ensure that part-time employees did not suffer a financial detriment in comparison to that which they might be paid under the Award; and
  - (e) their proposed methodology for calculating overtime means Mr Agany is owed \$242.72 for the Example Week.

#### **Respondent's Contentions**

- 18 Vesco contends that:
- (a) the Employment Contract and the Agreement set a minimum number of guaranteed working hours per week (20 hours), but these are not Mr Agany's agreed hours;
  - (b) Mr Agany's agreed hours are between 20 and 38 hours as allocated and published in a roster and accepted by him;
  - (c) the Agreement wholly excludes the Award and conceptually 'agreed hours' is significantly different under the Agreement given no equivalent undertaking to that contained in cl 12.3 of the Award applies; and
  - (d) alternatively, if the issue of 'agreed hours' is determined in accordance with the Claimant's contention, the amount owed is less than that alleged by the Claimant using a different methodology.

#### **The Agreement Undertakings**

- 19 The undertakings in the Agreement cover a number of areas. Relevant to the claim are the following undertakings:

##### ***Base rates of pay***

*Notwithstanding the base rates of pay in Schedule 1 of the Agreement, employees will receive at least the base rate of pay in the Award or the rate set out in the Agreement relevant to their classification, whichever is the higher rate.*

**Overtime**

*Employees who are required to work overtime will receive at least the amount that they would receive under the Award for working the same hours, calculated on a weekly basis.*

**Overtime – part-time employees**

*Part-time employees are entitled to overtime rates (to be paid in accordance with the overtime undertaking above) for hours worked in excess of **their agreed hours** [my emphasis], calculated on a weekly basis.*

**Reconciliation**

*Vesco will establish a system to ensure that any shortfalls in payments to employees arising from the Overtime, Overtime – part-time employees, and Allowances undertakings are reconciled and paid to employees at the following frequency (remainder omitted)*

- 20 Vesco, having given the undertakings, satisfied the FWC that the undertakings would not cause financial detriment to any of Vesco's employees covered by the Agreement.<sup>2</sup>
- 21 In accordance with the undertaking relevant to the base rate of pay, and s 206 of the FWA, from 18 August 2017 Mr Agany was paid an hourly rate of \$20.20 following a Fair Work Commission determination varying the minimum wage for a level 4 employee under the Award to \$20.21.<sup>3</sup>
- 22 The Agreement outlines the payment of overtime and penalty rates in cl 17, relevantly, as follows:
- 17.1 *If an employee works more than 38 hours in one weekly pay period, inclusive of paid leave entitlements (leave omitted), then the additional hours will be paid as follows:*
- (a) 38.01 to 45.0 hours – base rate of pay plus 50% penalty
- (b) 45.01 hours to 55 hours – base rate of pay plus 65% penalty
- (c) 55.01 hours and above – base rate of pay plus 81% penalty
- 17.3 *If the employer requires an employee to work on a Saturday, the employee shall be paid time and a half the employee's base rate of pay for all hours worked, and the total hours are included in the minimum rostered hours for the week.*
- 17.7 *All hours worked after 6.00pm and before 10.00pm Monday to Friday will be paid at an additional 15% of the employee's base rate. This 15% will be known as Shift Allowance 1 and will not be payable when either penalty rates or overtime rates are applied to these hours worked.*
- 17.10 *It is a term of the Agreement that employees will make themselves available to work reasonable overtime in order to meet the operational requirements of the employer. Where practical, employees will be notified of the requirement for overtime within the first 3 hours of the shift.*
- 23 Clause 12 of the Agreement refers to hours of work. In summary, the ordinary hours of work are on shift from Monday to Saturday based on a production roster arrangement where the maximum daily shift length is 12 hours.<sup>4</sup>
- 24 Vesco is to provide a minimum of 7.6 hours for 'Ordinary Time Shift' for full-time employees and six hours for 'Ordinary Time Shift' for part-time employees.<sup>5</sup> A part-time employee may agree to work additional hours to their 'Ordinary Time Shift' up to the levels set out in cl 9.2. 'Ordinary Time Shift' is a shift that commences with the employee earning ordinary time pay rate (that is, not overtime penalty pay rate).<sup>6</sup>
- 25 Under the Agreement, a permanent part-time is a person who works less than 38 hours per week. Part time employees may be required to work reasonable additional hours in excess of 38 hours per week. Part time workers are required to work a minimum of 20 hours per week as determined by a roster system.<sup>7</sup>
- 26 Thus when the terms of the Agreement and the undertakings are read together, the net effect is that employees cannot be paid less than the relevant Award rates of pay both in respect of base rate of pay and overtime for hours worked under the Agreement. For full-time employees the situation is relatively straight forward because overtime is paid for hours worked in excess of 38 hours per week.
- 27 However, the situation is more nuanced for part-time employees because, in accordance with the overtime undertaking relevant to part-time employees, it depends on what 'their agreed hours', in fact, are where they are paid overtime for hours worked in excess of those hours.

**What Were Mr Agany's Agreed Hours Of Work?**

- 28 According to the Employment Contract, Mr Agany was contracted to work a '*minimum of 20 hours per week, and reasonable additional hours as determined by roster*'.<sup>8</sup> He was paid weekly.
- 29 The weekly rosters started on Mondays and were made available to the employees, including Mr Agany, on Wednesday the previous week by text message and published on the Vesco Work Planner.
- 30 Employees in the same section as Mr Agany are rostered on a 10 hour shift although it appears that from time to time the length of the shift may be longer or shorter for various reasons.<sup>9</sup>
- 31 Clause 12.3 of the Award requires that prior to commencing part-time employment, the employee and the employer must agree in writing: (a) on the hours to be worked by the employee, the days on which they will be worked and the commencing and finishing times for work; and (b) on the classification of work performed. Pursuant to cl 12.4 of the Award these terms may be varied by consent in writing.
- 32 Pursuant to cl 12.8 of the Award an employee who is required by the employer to work in excess of the hours agreed under clauses 12.3 and 12.4 must be paid overtime in accordance with cl 33 of the Award.

- 33 A fair reading of clauses 12.3, 12.4, 12.8 and 33 of the Award indicates that the hours worked by part-time employees is required to be certain but can be varied by consent in writing. Thereafter, if the part-time employee works in excess of these specified hours they are entitled to the payment of overtime in accordance with cl 33 of the Award.
- 34 Clause 4.3 of the Agreement excludes the operation of the Award, subject to the terms of the relevant undertakings, which appear to be relevant only for the purposes of ensuring that comparatively employees are not paid less than that they may receive under the Award.
- 35 To the extent that there is a provision of the Agreement similar to cl 12.3 of the Award this is contained in cl 11 where an employee, on commencing employment or on transfer or promotion, is to be provided with a written contract of employment outlining the employee's:
- (a) classification and duties;
  - (b) ordinary hours of employment and roster arrangements;
  - (c) rate of pay; and
  - (d) date of appointment or transfer or promotion.
- 36 The Employment Contract outlines Mr Agany's:
- (a) classification (level 4) and his position (food process worker);
  - (b) the hourly rate of pay (\$19.65);
  - (c) the date of variation to his classification (8 August 2016); and
  - (d) in terms of the ordinary hours of employment and roster arrangements '*[a]s a part-time employee, you will be engaged on a permanent basis for a minimum of 20 hours per week, and reasonable additional hours as determined by roster*'.
- 37 Vesco referred to several FWC and Fair Work Australia decisions relevant to the provision of undertakings and how undertakings apply to enterprise agreements.
- 38 In *Border Express Pty Ltd* [2013] FWA 7627, the proposed enterprise agreement relevant to part-time employees contained a clause similar to cl 9.2 of the Agreement (save for the inclusions of cl 10.4.3 in the proposed enterprise agreement). Notably, the proposed enterprise agreement in *Border Express* provided at cl 2.2 that the agreement be read in conjunction with the relevant award subject to any inconsistencies in favour of the agreement.
- 39 The relevant award contained a clause requiring parties to the award to fix hours for part-time employees in writing prior to commencing employment (cl 12.4).
- 40 The FWC identified an inconsistency between the proposed enterprise agreement and the relevant award as it related to the payment of overtime to part-time employees working in excess of 38 hours (under the proposed enterprise agreement) and working in excess of agreed hours (under the relevant award).
- 41 The FWC found that part-time employees were not better off all round under the relevant enterprise agreement (in comparison to the relevant award) as it related to the payment of overtime and required an undertaking by Border Express Pty Ltd to the effect that hours worked outside of those agreed by the employer and employee would be paid at overtime rates provided by the relevant award. It can only be assumed that such undertaking was given as the approval of the proposed enterprise agreement was dependent upon it.
- 42 In *Hospira Australia Pty Ltd* [2013] FWCA 3663, the FWC identified that part-time employees under the proposed enterprise agreement were significantly worse off than under the relevant award in a manner similar to that identified in *Border Express*. Again, the proposed enterprise agreement provided that the agreement be read in conjunction with the relevant award subject to any inconsistencies in favour of the agreement.
- 43 Hospira Australia Pty Ltd provided an undertaking to the FWC in similar terms to that contained in *Border Express*, the effect of which was that part-time employees would be paid overtime for hours worked over the employees' agreed hours (not over 36 or 38 hours), similar to that provided for in cl 13 of the relevant award.
- 44 In *Dairy Technical Services Ltd re DTS Food Laboratories Collective Agreement 2012 – 2015* [2012] FWAA 10728, like *Border Express* and *Hospira*, Fair Work Australia required Dairy Technical Services Ltd to provide an undertaking agreeing to pay part-time employees overtime for hours worked in excess of the employees' ordinary agreed hours (subject to any variation by consent of those agreed hours). Notably, the agreement and the relevant award both contained a provision requiring the part-time employee and the employer to fix the hours of work prior to commencing employment.
- 45 In *O'Brien Glass Industries Ltd re O'Brien Tasmania Glaziers Enterprise Bargaining Agreement 2012-2014* [2012] FWAA 9371 in response to concerns raised by Fair Work Australia, O'Brien Glass Industries Ltd provided an undertaking to fix the hours of work of part-time employees prior to the commencement of employment and overtime rates would be paid in excess of the written agreed hours. Interestingly, Commissioner Ryan stated:
- The very essence of the Award protections for part time employees are that the Award provides absolute certainty to a part time employee as to the hours they will work and the days on which they will work those hours. The agreed hours cannot be unilaterally varied by the employer but can only be varied by agreement in writing with the employee*[8].
- 46 Finally, in *Barlina Pty Ltd* [2014] FWC 887, Barlina Pty Ltd provided a similar undertaking to the preceding cases referred to above in respect of fixing the hours worked by part-time employees and the payment of overtime for hours worked in excess of those agreed hours, similar to the relevant award.
- 47 Pursuant to s 185 of the FWA, an application was made in respect of the Agreement. The application was purported to have been assessed by reference to sections 186, 187, 188 and 190 of the FWA where it was found that the relevant requirements set out by those sections had been met.<sup>10</sup>

- 48 The effect of the undertaking is that once approved, the undertaking is taken to be a term of the agreement as the agreement applies to the employer.<sup>11</sup>
- 49 An enterprise agreement comes into operation in the sense of creating rights and obligations between an employer and employees in relation to the work performed under it only after it has been approved by the FWC. After that time the agreement applies to the employers and employees who are covered by it.<sup>12</sup>
- 50 In terms of the assessment of 'better off overall test', it may be that if the same assessment was applied by a differently constituted forum a different conclusion may ensue as to undertakings given.<sup>13</sup>
- 51 Therefore, it is not to the point whether cl 11 of the Agreement accords with cl 12.3 of the Award, where the Agreement has been approved and cl 11 is not subject to any other undertaking. Clause 11 of the Agreement lacks the specificity of the information contained within cl 12.3 of the Award. The Employment Contract accords with cl 11 of the Agreement and it is not for the IMC to reassess what might have been where the Claimant may wish it had struck a different bargain or taken different action concerning the approval of the Agreement.
- 52 The IMC can only have regard to the terms contained in the Agreement (including the undertakings) and the Employment Contract.

What does 'minimum of 20 hours per week' mean?

- 53 The Claimant contends that a 'minimum of 20 hours per week' must mean Mr Agany's agreed hours are 20 hours per week because any other interpretation is too uncertain and at the behest of Vesco who determine the weekly roster.
- 54 Vesco contends that Mr Agany's agreed hours are between 20 and 38 hours per week depending upon his weekly roster and that reference to a 'minimum' number of hours merely guarantees that Mr Agany will work at least 20 hours per week and any other reasonable hours on the roster.
- 55 The Employment Contract provides that Mr Agany is engaged on a permanent part-time basis for a minimum of 20 hours per week, and additional hours as determined by roster. The weekly roster is then sent via text message the Wednesday prior to the commencement of the working week, Monday to Sunday.
- 56 Clause 9.2 of the Agreement provides that a part-time employee is a person who works less than 38 hours per week, but they are required to work a minimum of 20 hours per week as determined by a roster system.
- 57 Clause 12.5 of the Agreement provides that Vesco is to provide a minimum six hours for an 'Ordinary Time Shift' for part-time employees (exceptions apply) although the employee may agree to work additional hours to their 'Ordinary Time Shift' up to the levels in clause 9.2 (that is, up to 38 hours per week).
- 58 '*Ordinary Time Shift*' means a shift that commences with the employee earning ordinary time pay rate (i.e. not overtime penalty rate).<sup>14</sup>
- 59 The application of cl 17 of the Agreement – 'Overtime and Penalty Rates' – applies to all employees (see the definition in cl 2) and, in relation to overtime, applies after an employee who works more than 38 hours in one weekly pay period.
- 60 Having regard to the ordinary meaning of the word 'minimum' in the context of its use in the Employment Contract and Agreement, 'minimum' describes *an amount which is the smallest that is possible, allowed, or required*.<sup>15</sup>
- 61 That is, the least possible number of hours to be worked by Mr Agany as a permanent part-time employee is 20 hours per week with reasonable additional hours determined by a roster. The minimum number of hours Mr Agany could expect to work in any week is 20 hours, but the employment reality is that he will not know of any additional hours until the roster is published on the Wednesday before the week commencing Monday.
- 62 Therefore, having regard to the terms of the Agreement and the Employment Contract and the industrial reality, Mr Agany's 'agreed hours' of work vary weekly and his hours of work are not known until Wednesday for the forthcoming week.
- 63 I do not accept that Mr Agany's 'agreed hours' are 20 hours per week where his hours of work are prefaced by the word 'minimum' and subject to a roster where he is expected to work reasonable additional hours over the minimum of 20 hours per week.
- 64 In the context of the claim, the IMC is not required to determine whether Mr Agany's hours of work in addition to 20 hours per week were reasonable or in contravention of the FWA, although this may or may not be the case.
- 65 The situation may have been different had the Agreement (including any undertakings) contained a clause like cl 12.3 of the Award (as required in the cases discussed above) where the weekly hours for a permanent part-time employee were required to be fixed.
- 66 The undertaking in the Agreement relevant to overtime for part-time employees does not assist the Claimant because it is predicated on part-time employees being paid overtime in excess of their 'agreed hours' and not their 'minimum' hours, calculated on a weekly basis. In Mr Agany's case, his agreed hours vary week to week.
- 67 Further, when read with the undertaking, relevant to overtime, it is not the case that the terms of the Award relevant to hours of work apply but that where an employee works overtime they will receive no less under the Agreement for working the same overtime hours. However, the Agreement still determines when overtime hours applies, and, therefore, when overtime pay applies.
- 68 Therefore, at its highest Mr Agany's agreed hours were those published each Wednesday which varied on a weekly basis.

When Do Overtime Rates Apply?

- 69 Having regard to the reasons above where I do not accept that Mr Agany's 'agreed hours' are 20 hours per week, there are two alternatives applicable to Mr Agany concerning when overtime rates apply:
- overtime rates do not apply until a part-time employee works in excess of 38 hours per week; or
  - overtime rates apply to the hours worked after the minimum 20 hours but which are less than 38 hours per week as determined by Wednesday's published roster.

- 70 That is, if Mr Agany's published roster requires him to work 28 hours the following week (to which he agrees) but, in fact, he works 32 hours (also by agreement), is he entitled to no overtime rates (because the total hours are less than 38 hours per week), or is he entitled to four hours of work paid at the overtime rates (because he has, in fact, worked additional time to that in the published roster)?
- 71 For the following reasons, I consider that the second alternative for the payment of overtime rates to part-time employees applies:
- part-time employees are employees who work less than 38 hours per week;
  - nothing in the undertaking relevant to overtime for part-time employees (which forms part of the Agreement) limits the payment of overtime to hours worked in excess of 38 hours. The undertaking countenances the payment of overtime for hours worked in excess of agreed hours, where the overtime payment is calculated on a weekly basis;
  - part-time employees are subject to a weekly published roster which supports an intent of weekly agreed hours subject to the minimum number of hours required to be worked;
  - more generally, employees who are required to work overtime are to receive at least the amount they would receive for working the same hours under the Award, although for part-time employees this must be seen in the context of what their agreed hours are where there is no undertaking like that contained in cl 12.3 of the Award; and
  - notwithstanding cl 17.1 of the Agreement provides that employees (as defined) are paid overtime on a graduated basis when they work more than 38 hours in one week, this needs to be read with the undertakings.
- 72 Therefore, when all clauses of the Agreement including the undertakings, are read together, the following applies:
- full-time employees are eligible for overtime pay when they work 38 hours per week; and
  - part-time employees are eligible for overtime pay when they work more than their published weekly agreed hours. If the published weekly agreed hours are 38 hours per week or more than 38 hours per week, overtime pay applies after the part-time employee has worked more than 38 hours per week. If the published weekly agreed hours are less than 38 hours per week, overtime pay applies to the hours worked in excess of the published agreed hours regardless of whether those agreed hours are less than 38 hours per week.
- 73 For example, if the part-time employees published weekly agreed hours are 28 hours (for the forthcoming week) and the part-time employee is required to work 36 hours in that week, they are eligible for overtime pay for the eight hours worked after the published agreed 28 hours. If the part-time employee's published weekly agreed hours are 50 hours, they are eligible for overtime pay for the 12 hours worked after 38 hours.

**What Should Mr Agany Be Paid For The Hours Worked In The Example Week?**

- 74 Mr Agany worked 56 hours in the Example Week over six days, including Saturday.<sup>16</sup>
- 75 According to paragraph 25 of the Agreed Facts the roster for the Example Week was provided on the Wednesday prior to commencement on Monday, 28 August 2017.
- 76 Further, Mr Agany was rostered on a 10 hour shift on each of the rostered days and was paid for 9.5 hours of work (minus the unpaid meal break). However, it is apparent that he worked less hours on some days and more on others.
- 77 A number of assumptions need to be made:
- (a) the roster was published to Mr Agany in the manner stated by Vesco;
  - (b) the published roster had the specified start times on it; and
  - (c) the hours worked were all paid hours.
- 78 Therefore, the published weekly agreed hours for the week commencing 28 August 2017 was 60 hours, of which Mr Agany worked 56 hours that week. That is, having regard to the reasons above, Mr Agany worked 18 hours overtime in the Example Week.
- 79 The parties detailed three different methods of calculating Mr Agany's total pay for the Example Week:
- Vesco's actual payment methodology;<sup>17</sup>
  - Claimant's suggested methodology;<sup>18</sup> and
  - Vesco's alternative suggested methodology.<sup>19</sup>

**Vesco's actual payment methodology**

- 80 Vesco's actual payment methodology applies the terms of the Agreement to an entitlement of overtime for hours worked over 38 hours per week.

**The Claimant's suggested methodology**

- 81 The Claimant's suggested methodology is predicated on six hours of ordinary pay (or base rate of pay) each day starting Monday until 20 hours is exhausted whereupon the remaining hours for the day over six hours (if any) and the week is paid at the overtime rates provided in cl 12.3 of the Award.<sup>20</sup>

**Vesco's alternative suggested methodology**

- 82 Noting the alternative suggested methodology is not Vesco's principle argument to the claim, its alternative suggested methodology is by averaging ordinary hours over six days using 20 hours as the ordinary hours (3.34 hours per day) and thereafter similarly applying the overtime rates provided in cl 12.3 of the Award to the remaining hours each day.<sup>21</sup>

**The court's methodology**

- 83 I do not accept the methodologies put forward by the parties.

- 84 The Claimant's methodology uses cl 12.5 of the Agreement to establish that because Vesco must provide a minimum of six hours per day of ordinary time to a part-time employee, this is the number of hours per day the part-time employee should receive at base rate of pay and anything over that is paid at the overtime rate.
- 85 Thus, once the Claimant's preferred position of 20 hours is exhausted (part way through Thursday), the part-time employee is eligible to be paid at overtime rates on a daily and weekly basis.
- 86 Vesco's methodology uses a similar rationale but instead seeks to spread the hours paid at ordinary time (3.34 hours) over the whole working week from Monday to Saturday.
- 87 The net effect between the Claimant's and Vesco's methodology is a marginal increase in wages in favour of the Claimant, but where Vesco limits its exposure to overtime pay at 200%.
- 88 In my view, the underpinning assumptions to the calculations made by both parties do not accord with the terms of the Agreement and Employment Contract, and it is to those documents that regard ought to be had when calculating Mr Agany's pay for the Example Week, including overtime pay.
- 89 However, before turning to the terms of the Agreement and Employment Contract, it is useful to consider what overtime means (both generally and under the Agreement).
- 90 In *United Voice v Wilson Security Pty Ltd* [2019] FCAFC 66, the Full Court of the Federal Court discussed the meaning of overtime by reference to a number of other cases and at [30] and [33] state:
- Properly considered, 'overtime' means no more than it states and has been long understood on the authorities referred to above – over, or more, than ordinary hours, in relation to the period of time for which ordinary hours apply. The chronological limitation Mr Davis seeks to impose is the product of historic usage and application, rather than inherent meaning. Even that usage and application does not necessarily support the appellants' argument. It is an amount of time that is over the ordinary hours, not necessarily after the ordinary hours, even if it is more commonly, or even invariably, takes place after those ordinary hours will be, or have been, worked.*
- Once the broader meaning of overtime is appreciated, which is consistent with the prior curial understanding in **Re Steel Works Employees, Re Confectioners and Mills**, and no inconsistent with **Australian Communication Exchange**, all of which focus on the notion of overtime being additional working hours, that meaning does not influence the operation of the Award in the manner contended by the appellants. Nor do the findings of industrial tribunals or dictionary definitions assist, reflecting as they do common historic applications of the concept of overtime in one particular way, rather than reflecting any limitation to be given to its true meaning. Just because the extra or additional hours might often take place after ordinary hours have been, or will be, worked, that does not preclude them taking place before they have been, or will be, worked, or in between the time in which ordinary hours will be worked.*
- 91 As discussed, the real question in *United Voice* was whether the relevant award imposed any restriction upon the employer rostering overtime to be worked prior to the point in time at which the monthly ordinary hours would be performed, such that overtime could only be rostered to take place after ordinary hours have been, or will be, worked. Ultimately the answer in *United Voice* was 'no' and the employer was able to roster employees within a four week period so as to minimise the amount of overtime/penalty rate paid to the employees.
- 92 Clause 12 of the Agreement contains the hours of work for all employees and includes that ordinary hours are worked on shifts commencing Monday to Saturday, based on a production roster arrangement. The maximum shift length is 12 hours.
- 93 Thereafter, Vesco is to provide a minimum six hours for an ordinary shift to the part-time employee, unless in exceptional circumstances. A part-time employee may agree to work additional hours to their ordinary time shift referred in cl 9.2, that is, up to 38 hours per week. From 38 hours, subject to my reasons where the agreed hours are less than 38 hours, the part-time employee is eligible for overtime rates.
- 94 The Agreement and Employment Contract do not provide for how the rostering of ordinary hours is applied.
- 95 Therefore, a part-time employee who is engaged for say 24 hours per week could potentially work two 12-hour shifts or four six-hour shifts at Vesco's discretion (under the current Agreement) in accordance with the roster. In both examples, the part-time employee works a minimum of 20 hours per week and the hours comply with cl 12 of the Agreement. Notably, in relation to the two 12-hour shifts, the part-time employee may receive more shift allowance under cl 17.7 and cl 17.8 of the Agreement.
- 96 In the absence of any other information and where the Agreement provides for a weekly cycle of 38 hours per week starting on Monday, the notional application of six hours or 3.34 hours per day as ordinary hours is not otherwise supported.
- 97 Therefore, in my view, it is appropriate to apply a lineal methodology consistent with the ordinary hours worked weekly under the Agreement commencing on Monday. In the Example Week, this commences on Monday at 1.30 pm and finishes on Friday at 3.00 pm (that is, 0.5 hours into Friday's shift).
- 98 From Monday to Thursday there are no shifts which exceed 12 hours, although there is entitlement to shift allowances pursuant to cl 17.7 and cl 17.8 of the Agreement (where no overtime applies to these shifts).
- 99 Thereafter, 10 hours of the 10.5 hours worked on Friday and 8 hours of the hours worked on Saturday are hours worked in excess of 38 hours per week and eligible to be paid at overtime rates. In my view, the 8 hours worked on Saturday are payable at the overtime rate set under cl 33.1(a) of the Award rather than cl 31.4 of the Award, where the words in cl 33.1(a) state "*for all work done outside ordinary hours on any day or shift*" [my emphasis], which can only have been intended to override the rates otherwise paid for working on a Saturday. To hold otherwise would mean that someone working in excess of 38 hours per week on a Saturday would be in no better position to someone working ordinary hours on a Saturday, even though they worked more than ordinarily required.
- 100 Schedule IV of the reasons contains the court's methodology and calculation<sup>22</sup> and compares it to the Agreement using the same methodology.<sup>23</sup>

101 Applying this methodology, the amount to be paid to Mr Agany is \$1,559.17 based on the application of cl 33.1 of the Award (inclusive of any relevant shift allowance under cl 17.6 and cl 17.7 of the Agreement).<sup>24</sup>

102 In comparison, applying the same methodology by using the overtime rates in cl 17.1 of the Agreement the amount paid to Mr Agany would be \$1,412.14.<sup>25</sup>

103 The amount actually paid to Mr Agany by Vesco was \$1,444.81, although Vesco say that a small amount of this was erroneously paid but they do not seek to recover any overpayment.

104 The difference between what should have been paid and what was paid for the Example Week is \$114.36.

#### **Reconciliation**

105 Vesco agreed that it did not complete a weekly reconciliation as required by the reconciliation undertaking in the Agreement. It has now done so for Mr Agany.

106 Vesco contends that it was unnecessary to undertake a reconciliation because there was no underpayment if the IMC was to accept its position on what is meant by 'agreed hours' and the associated calculation.

107 While in part, the IMC agrees with Vesco's interpretation of 'minimum agreed hours' under the Agreement, the computation of Mr Agany's pay was not accepted, which resulted in an underpayment to Mr Agany.

108 It was incumbent on Vesco to carry out the reconciliation with the Award in order to ensure that any shortfall, if there was one, was identified and paid to the affected employee. In this case, the parties had divergent views on how any reconciliation was to be calculated.

#### **Outcome**

109 The answers to the questions posed by the parties:

(a) Mr Agany's 'agreed hours' for the purposes of the Agreement are not 20 hours per week, but are variable agreed hours published in the weekly roster; and

(b) notwithstanding this, the amount owed to Mr Agany for the Example Week is \$114.36.

110 Therefore, Vesco has failed to pay Mr Agany the full amount of wages he is entitled to for the Example Week in contravention of s 323 of the FWA.

111 Further, Vesco has failed to pay overtime rates for hours worked (albeit not for the reason claimed by the Claimant) and failed to complete a reconciliation as required by the undertakings both in breach of the Agreement and in contravention of s 50 of the FWA.

112 I will hear further from the parties in respect of the orders sought.

#### **D SCADDAN**

#### **INDUSTRIAL MAGISTRATE**

<sup>1</sup> Schedule I - Agreed Facts.

<sup>2</sup> Annexure B to the Agreed Facts.

<sup>3</sup> Agreed Facts [17] to [20]. I note there is a \$0.01 difference between the hourly rate paid by Vesco and the Award rate but neither party raised this as an issue.

<sup>4</sup> Clauses 12.1 and 12.2 of the Agreement.

<sup>5</sup> Clauses 12.4 and 12.5 of the Agreement.

<sup>6</sup> Clause 2 of the Agreement.

<sup>7</sup> Clause 9.2 of the Agreement.

<sup>8</sup> Annexure C to the Agreed Facts.

<sup>9</sup> Annexure D and [25] of the Agreed Facts.

<sup>10</sup> Annexure B to the Agreed Facts.

<sup>11</sup> Section 191(1) of the FWA.

<sup>12</sup> *ALDI Foods Pty Ltd v Shop, Distributive & Allied Employees Association* [2017] HCA 53 [34].

<sup>13</sup> *Armaceil Australia Pty Ltd and others* [2010] FWAFB 9985 [41].

<sup>14</sup> Clause 2 of the Agreement.

<sup>15</sup> Collins English Dictionary.

<sup>16</sup> Amended Statement of Agreed Facts at [22].

<sup>17</sup> Schedule IV – table 1.

<sup>18</sup> Schedule IV – table 2.

<sup>19</sup> Schedule IV – table 3.

<sup>20</sup> Claimant's Statement of Claim (first page of the attachments) – replicated in Schedule IV.

<sup>21</sup> Replicated in Schedule IV – table 3.

<sup>22</sup> Schedule IV – table 5.

<sup>23</sup> Schedule IV – table 4.

<sup>24</sup> Schedule IV – table 5.

<sup>25</sup> Schedule IV – table 4.

**Schedule I: Statement of Amended Agreed Facts**

M128/21018

The Australian Workers' Union  
and  
Vesco Foods Pty Ltd

**AMENDED STATEMENT OF AGREED FACTS****Questions for determination**

**Question 1:** Are Mr Agany's 'agreed hours' for the purposes of the Undertaking 20 hours per week?

**Question 2:** If the answer to Question 1 is yes, what is the amount owing to Mr Agany in respect of overtime hours for the Example Week of 28 August 2017 to 3 September 2017? Is it:

- (a) \$242.72 (per the AWU's calculation)
- (b) \$232.92 (per Vesco's calculation); or
- (c) some other amount to be calculated in accordance with guidance from the Court?

**The Applicant and Respondent**

1. The Applicant (the Australian Workers' Union) (**AWU**) is an organisation of employees registered under the industrial legislation of the Commonwealth.
2. The rules of the AWU (**Rules of the AWU**) are registered pursuant to the *Fair Work (Registered Organisations) Act 2009*.
3. The Rules of the AWU contain 'constitutional coverage' Rules in Rule 6, and specific Rules that apply in WA in Rule 6B.
4. Under Rule 6B subrule 40(b) the AWU has constitutional coverage of employees employed 'in processing by canning, quick-freeze, or other methods of preservation of poultry, rabbits, game, fruit, vegetables, fish...' [see page 56 of the Rules of the AWU].
5. The Respondent (**Vesco**) is a constitutional corporation.
6. Vesco manufactures chilled and frozen food at its plant at 14 Neil Street, Osbourne Park, WA.

**The Food Award**

7. The *Food, Beverage and Tobacco Manufacturing Award 2010 (Food Award)* (**Annexure A, page 3**):
  - (a) covers Vesco and Vesco's employees employed in the classifications in the Vesco Foods Pty Ltd (Production Employees, Western Australia) Enterprise Agreement 2017 (**Vesco Agreement**) by reason of section 48 of the FW Act; but
  - (b) is only relevant to the interpretation of the Vesco Agreement to the extent required by the undertakings described at 13 below.
8. The Food Award was the relevant modern award for the purposes of the better off overall test under section 193 of the FW Act when the Vesco Agreement was approved.

**The Vesco Agreement**

9. On 18 August 2017 the Vesco Agreement was approved by the Fair Work Commission (**FWC**) (**Annexure B, page 91**).
10. The operative date of the Vesco Agreement was 25 August 2017.
11. The AWU is covered by the Vesco Agreement.
12. Vesco and its employees described in the classifications in the Vesco Agreement are covered by the Vesco Agreement.

13. The Vesco Agreement was approved with undertakings titled 'Overtime', 'Overtime — part time employees', and 'Reconciliation.'

#### Deng Atack Ken Agany

14. Deng Atack Ken Agany (**Deng**) is employed by Vesco.
15. On or about 8 August 2016 Deng signed a Change in Terms and Conditions of Employment letter with Vesco (**Annexure C, page 132**).
16. At the period relevant to the claim period (28 August 2017 to 22 April 2018) Deng was a Level 4 Employee.
17. The Vesco Agreement provides for ordinary rates of hourly pay of \$19.94 for a Level 4 Employee from 'approval date 2017'. The Vesco Agreement was approved 18 August 2017.
18. On and from 18 August 2017 Deng was paid a base hourly rate of \$20.20c.
19. Section 206 of the FW Act provides that if the base rate of pay payable to an employee under the Vesco Agreement (**the Agreement Rate**) is less than the base rate of pay that would be payable to an employee under the Food Award (**the Award Rate**) then the Employer will treat the Agreement rate as being equal to the Award rate.
20. On 20 June 2017 the Fair Work Commission issued a Determination that varied the minimum hourly wage in the Food Award. In this regard:
- (a) The rate for a Level 4 Employee is \$20.21; and
- (b) The rate came into operation at and from the start of the first full pay period that starts on or after 1 July 2017.
21. Deng is paid weekly and in this regard:
- (a) the work cycle operates from Monday to Sunday; and
- (b) employees are paid on Wednesday for the work performed for the previous full work cycle (Monday to Sunday).
22. By way of example, in the week beginning 28 August 2017 Deng worked the following hours:

| Date                      | Start time | Hours     |
|---------------------------|------------|-----------|
| Monday 28 August 2017     | 1330       | 8         |
| Tuesday 29 August 2017    | 1430       | 9.75      |
| Wednesday 30 August 2017  | 1430       | 10.25     |
| Thursday 31 August 2017   | 1430       | 9.5       |
| Friday 1 September 2017   | 1430       | 10.5      |
| Saturday 2 September 2017 | 1500       | 8         |
| Sunday 3 September 2018   | Off        | Off       |
| <b>TOTAL</b>              |            | <b>56</b> |

#### Ordinary hours

23. Vesco's part-time employees, including Deng, are paid by Vesco on the basis that hours worked between 20 and 38 hours per week are ordinary hours and are paid as ordinary hours. Hours worked in excess of 38 hours per week are paid as overtime hours.
24. The AWU's application asserts that hours worked in excess of an employee's 'agreed hours' are all overtime hours.

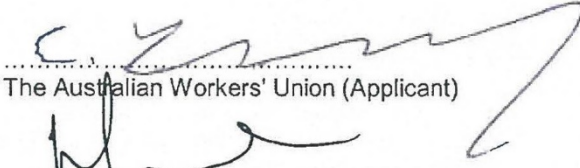
**Vesco's roster system**

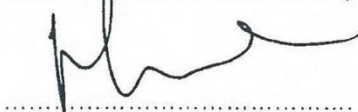
25. Vesco had a roster system which, in relation to Mr Agany during the claim period, had the following features:
- (a) Mr Agany's weekly rosters started on Monday, and they were made available on Wednesday of the previous week. The rosters for the claim period are **Annexure D, p 135**;
  - (b) the rosters were sent to employees, including Mr Agany, on Wednesday of the previous week by text message via an automated system;
  - (c) rosters were also published on the Vesco Work Planner (**VWP**). The VWP was accessible by computers available around the Vesco facility;
  - (d) the rosters contain a start time and a 'K' followed by a number. The 'K' is a reference to the location or 'kitchen' that the employee was rostered for that shift;
  - (e) employees in Batching and Kitchen (Mr Agany's section) were rostered for 10 hour shifts. This was the standard position and the reason that the roster does not contain a finish time. If a 10 hour shift was worked, employees were paid for 9.5 hours taking into account an unpaid meal break;
  - (f) employees may, for a variety of reasons including delivery schedules, quality assurance issues, downtime due to equipment failure, hygiene and other reasons, work beyond 10 hours on a particular shift. This was not mandatory and if an employee wishes to leave at completion of their 10 hour shift then they were permitted to do so.

**Reconciliation**

26. Vesco has not completed a reconciliation on a weekly basis.
27. Vesco has completed a reconciliation in respect of Mr Agany.

Signed by:

  
 .....  
 The Australian Workers' Union (Applicant)

  
 .....  
 MinterEllison, solicitors for Vesco Foods Pty Ltd (Respondent)

**Schedule II: Jurisdiction, Practice And Procedure Of The Industrial Magistrates Court (WA) Under The Fair Work Act 2009 (Cth): Alleging Contravention Of Enterprise Agreement**

**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 Industrial Magistrates Court (WA) (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), sections 81 and 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 terms of an enterprise agreement where the agreement *applies* to give an entitlement to a person and to impose an obligation upon a respondent employer: FWA, s 51(2). The agreement *applies* if it *covers* the employee or the employee organisation and the employer, the agreement is in operation and no other provision of the FWA provides that the agreement does not apply: FWA, s 52(1) (when read with s 53 of the FWA).

- [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:
- Contravening a term of an enterprise agreement: FWA, s 539 and s 50.
  - Other terms and conditions of employment as set out in Part 2 - 9 of the FWA, s 539 and s 323. Those terms and conditions include obligations of employers to employees with respect to the method and frequency of amounts payable in relation to the performance of work including payments of incentive-based payments and bonuses: FWA, s 323(1).
  - 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.
- [8] 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.

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 and Anor v Gabbusch* [2014] SAIRC 15.

### **Burden And Standard Of Proof**

- [9] 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.*

- [10] In the context of an allegation of the breach of a civil penalty provision of the FWA it is also relevant to recall the observation of Dixon J said in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 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].*

- [11] Where in this decision I state that ‘I am satisfied’ of a fact or matter I am saying that ‘I am satisfied on the balance of probabilities’ of that fact or matter. Where I state that ‘I am not satisfied’ of a fact or matter I am saying that ‘I am not satisfied on the balance of probabilities’ of that fact or matter.

### **Schedule III – Relevant Principles Of Construction**

- [1] This case involves construing industrial agreements and statutes. Similar principles apply to both. 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 [21] - [23]. In summary (omitting citations), the Full Bench stated:
- (a) ‘The general principles that apply to the construction of contracts and other instruments also apply to the construction of an industrial agreement.’
  - (b) ‘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. 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.’
  - (c) ‘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. 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’;
  - (d) ‘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’;

- (e) ‘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
- (f) ‘Industrial agreements are usually not drafted with careful attention to form by persons who are experienced in drafting documents that have legal effect.’

To the above list I would add:

- (g) 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 v Australian Municipal, Administrative, Clerical And Services Union* [2006] FCA 813 [53] - [57] (French J).
- (h) 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).

**Schedule IV – Tables Of Calculations**

**Table 1: Vesco’s actual payment to Mr Agany**

**M128/2018  
AWU v Vesco Foods Pty Ltd  
Summary of Hours and Rates**

| Day            | Hours worked     | Number of hours worked | Hours at single time | Hours attracting Clause 17.3 Saturday rate (1.5x) | Hours attracting 17.1(a) overtime (150%) | Hours attracting 17.1(b) overtime (165%) | Hours attracting 17.1(c) overtime (181%) | Hours attracting Clause 17.7 6pm-10pm loading (15%) | Hours attracting Clause 17.8 loading |
|----------------|------------------|------------------------|----------------------|---|--|--|--|---|--------------------------------------|
| Monday 28/8    | 1.30pm – 10.00pm | 8                      | 8                    | 0   | 7 Hours in total                         | 1.5 Hours in total                       | Nil                                      | 3.5   |                                      |
| Tuesday 29/8   | 2.30pm – 12.45am | 9.75                   | 9.75                 | 0   |  |  |  | 3.5   | 2.75                                 |
| Wednesday 30/8 | 2.30pm – 1.15am  | 10.25                  | 10.25                | 0   |  |  |  | 3.5   | 3.25                                 |
| Thursday 31/8  | 2.30pm – 1.30am  | 9.5                    | 9.5                  | 0   |  |  |  | 3.5   | 2.5                                  |
| Friday 01/9    | 2.30pm – 1.30am  | 10.5                   | 9                    | 1.5   |  |  |  | 3.5   |                                      |
| Saturday 02/9  | 3.00pm – 11.30am | 8                      | 8                    | 8   | 3.5                                      |  |  |   |                                      |

Notes:

1. 30 minutes unpaid meal break each shift.
2. Total hours worked Monday – Friday = 46.5, made up of:
  - (a) 38 hours at ordinary time.
  - (b) 7 hours at 1.5 x (Clause 17.1(a)).
  - (c) 1.5 hours at 1.65 x (Clause 17.1(b)).
3. All hours worked on Saturday (9.5 hours) attracts the 17.3 rate (1.5x) which includes the last 1.5 hours of the Friday shift.
4. The shift loadings in clause 17.7 and 17.8 have been applied to all hours worked after 6.00 pm, although strictly the Agreement does not require them to be paid on hours which otherwise attract an overtime or weekend loading. This appears to be an overpayment but not one relevant to the proceedings.

| Summary of Payment                           |                   |
|--|-------------------|
| 38 hours at 1 x 20.20                        | = \$ 767.60       |
| 9.5 hours at 1.5 x 20.20 (Saturday late)     | = \$ 287.85       |
| 7 hours at 1.5 x 20.20 (17.1(a) overtime)    | = \$ 212.10       |
| 1.5 hours at 1.65 x 20.20 (17.1(b) overtime) | = \$ 50.00        |
| 21 hours at 15% loading (17.7)               | = \$ 63.63        |
| 10.5 hours at 30% loading (17.8)             | = \$ 63.63        |
| <b>TOTAL</b>                                 | <b>\$1,444.81</b> |

**Table 2: Claimant’s Proposed Methodology for Calculation of Overtime**

Deng AGANY Vesco Foods Time & Wages Check

Vesco Foods PTY LTD  
(Production Employees, Western Australia)  
Enterprise Agreement 2017

| Food, Beverage and Tobacco<br>Manufacturing Award 2010 |         |         |         |
|--|---------|---------|---------|
| Hourly   | 150%    | 200%    | 250%    |
| \$20.21  | \$30.31 | \$40.42 | \$50.52 |

Underpayment  
Claim

|                |       |       |       |
|----------------|-------|-------|-------|
| 28/08/2017 Mon | 13.28 | 21.59 | 8     |
| 29/08/2017 Tue | 14.26 | 0.45  | 9.75  |
| 30/08/2017 Wed | 14.28 | 1.15  | 10.25 |
| 31/08/2017 Thu | 14.28 | 0.31  | 9.5   |
| 1/09/2017 Fri  | 14.27 | 1.31  | 10.5  |
| 2/09/2017 Sat  | 14.59 | 23.3  | 8     |
| 3/09/2017 Sun  | off   |       |       |

|     |   |      |  |
|-----|---|------|--|
| 6   | 2 |      |  |
| 6   | 3 | 0.75 |  |
| 6   | 3 | 1.25 |  |
| 2   | 3 | 4.5  |  |
| 0   | 3 | 7.5  |  |
|     | 3 | 5    |  |
| off |   |      |  |

|               |             |
|---------------|-------------|
| Vesco Records | 56          |
| Paid          | \$ 1,444.81 |

|           |           |           |             |
|-----------|-----------|-----------|-------------|
| 20        | 17        | 19        | 56          |
| \$ 404.20 | \$ 515.35 | \$ 767.98 | \$ 1,687.53 |

\$ 242.72

Table 3: Vesco's proposed alternative methodology for calculation of overtime

| Date                            | Hours     | Ordinary        | 150%            | 200%              |
|---------------------------------|-----------|-----------------|-----------------|-------------------|
| Monday 28 August 2017           | 8         | 3.34            | 3               | 1.66              |
| Tuesday 29 August 2017          | 9.75      | 3.34            | 3               | 3.41              |
| Wednesday 30 August 2017        | 10.25     | 3.34            | 3               | 3.91              |
| Thursday 31 August 2017         | 9.5       | 3.34            | 3               | 3.16              |
| Friday 1 September 2017         | 10.5      | 3.34            | 3               | 4.16              |
| Saturday 2 September 2017       | 8         | 3.34            | 3               | 1.66              |
| Sunday 3 September 2018         | Off       |                 |                 |                   |
| <b>TOTAL HOURS<sup>13</sup></b> | <b>56</b> | <b>20</b>       | <b>18</b>       | <b>18</b>         |
| <b>Rate \$20.21</b>             |           | <b>\$404.20</b> | <b>\$545.97</b> | <b>\$727.56</b>   |
| <b>TOTAL \$</b>                 |           |                 |                 | <b>\$1,677.73</b> |

Table 4: IMC's calculation of overtime in accordance with the Agreement (only)

|      | Hours | 100%<br>\$20.21 | 150%<br>(Sat) | 200%<br>(Sun) | 150%<br>OT1 | 165%<br>OT2 | 181%<br>OT3 | 15%<br>SA1 | 30%<br>SA2 | Total<br>\$                        |
|------|-------|-----------------|---------------|---------------|-------------|-------------|-------------|------------|------------|------------------------------------|
| Mon  | 8     | 8               |               |               |             |             |             | 3.5        |            | 161.68<br>+<br>10.61               |
| Tues | 9.75  | 9.75            |               |               |             |             |             | 3.5        | 2.75       | 197.05<br>+<br>10.61<br>+<br>16.67 |
| Wed  | 10.25 | 10.25           |               |               |             |             |             | 3.5        | 3.25       | 207.15<br>+<br>10.61<br>+<br>19.70 |
| Thur | 9.5   | 9.5             |               |               |             |             |             | 3.5        | 2.5        | 191.99<br>+<br>10.61<br>+<br>15.15 |

|               | Hours | 100%<br>\$20.21 | 150%<br>(Sat) | 200%<br>(Sun) | 150%<br>OT1 | 165%<br>OT2 | 181%<br>OT3 | 15%<br>SA1 | 30%<br>SA2 | Total<br>\$                                      |
|---------------|-------|-----------------|---------------|---------------|-------------|-------------|-------------|------------|------------|--|
| Fri           | 10.5  | .5              | 1.5           |               | 7           | 1.5         |             |            |            | 10.10<br>+<br>45.47<br>+<br>212.20<br>+<br>50.02 |
| Sat           | 8     |                 | 8             |               |             |             |             |            |            | 242.52   |
| <b>Total:</b> |       | <b>38</b>       | <b>9.5</b>    |               | <b>7</b>    | <b>1.5</b>  |             | <b>14</b>  | <b>7</b>   | <b>1412.14</b>                                   |

SA1 = Shift Allowance 1 pursuant to cl 17.7 of the Agreement

SA2 = Shift Allowance 2 pursuant to cl 17.8 of the Agreement

OT1, OT2, OT3 = Overtime pursuant to cl 17.1(a),(b) and (c) of the Agreement

Table 5: IMC's calculation of overtime in accordance with the Agreement (consistent with the undertakings and the Award)

|               | Hours | 100%<br>\$20.21 | 150%<br>OT1 | 200%<br>OT2 | 15%<br>SA1 | 30%<br>SA2 | Total<br>\$            |
|---------------|-------|-----------------|-------------|-------------|------------|------------|------------------------|
| Mon           | 8     | 8               |             |             | 3.5        |            | 161.68 + 10.61         |
| Tues          | 9.75  | 9.75            |             |             | 3.5        | 2.75       | 197.05 + 10.61 + 16.67 |
| Wed           | 10.25 | 10.25           |             |             | 3.5        | 3.25       | 207.15 + 10.61 + 19.70 |
| Thurs         | 9.5   | 9.5             |             |             | 3.5        | 2.5        | 191.99 + 10.61 + 15.15 |
| Fri           | 10.5  | .5              | 3           | 7           |            |            | 10.10 + 90.94 + 282.94 |
| Sat           | 8     |                 |             | 8           |            |            | 323.36                 |
| <b>Total:</b> |       | <b>38</b>       | <b>3</b>    | <b>15</b>   | <b>14</b>  | <b>7</b>   | <b>1,559.17</b>        |

SA1 = Shift Allowance 1 pursuant to cl 17.7 of the Agreement

SA2 = Shift Allowance 2 pursuant to cl 17.8 of the Agreement

OT1, OT2 = Overtime pursuant to cl 33.1(a) of the Award

2019 WAIRC 00651

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

**CITATION** : 2019 WAIRC 00651  
**CORAM** : INDUSTRIAL MAGISTRATE D. SCADDAN  
**HEARD** : WEDNESDAY, 31 JULY 2019, ON THE PAPERS  
**DELIVERED** : THURSDAY, 22 AUGUST 2019  
**FILE NO.** : M 85 OF 2018  
**BETWEEN** : ALASTAIR ENKEL

CLAIMANT

AND

WE R FINANCE PTY LTD (ACN 137 850 714)

FIRST RESPONDENT

HARRY CHARLES ROSS

SECOND RESPONDENT

|                                       |   |   |
|---------------------------------------|---|---|
| <b>CatchWords</b>                     | : | INDUSTRIAL LAW – FAIR WORK – Assessment of pecuniary penalties for contraventions of <i>Fair Work Act 2009</i> (Cth) and award – Application for costs  |
| <b>Legislation</b>                    | : | <i>Fair Work Act 2009</i> (Cth)<br><i>Fair Work Regulations 2009</i> (Cth)<br><i>Taxation Administration Act 1953</i> (Cth)<br><i>Industrial Relations Act 1979</i> (WA)<br><i>Magistrates Court (Civil Proceedings) Act 2004</i> (WA)<br><i>Crimes Act 1914</i> (Cth)  |
| <b>Instrument</b>                     | : | <i>Banking, Finance and Insurance Award 2010</i> [MA000019]<br><i>Vehicle Industry – Repair, Services and Retail - Award 1983</i>   |
| <b>Case(s) referred to in reasons</b> | : | <i>Enkel v We r Finance Pty Ltd and Anors</i> [2019] WAIRC 284<br><i>Director, Fair Work Building Industry Inspectorate v Foxville Projects Group Pty Ltd</i> [2015] FCA 492<br><i>Ryan v Primesafe</i> [2015] FCA 8<br><i>FWO in Fair Work Ombudsman v Valuair Limited (No 3)</i> [2014] FCA 1182<br><i>Rentuza v Westside Auto Wholesale</i> [2009] FMCA 1022<br><i>Fair Work Ombudsman v Maritime Union of Australia (No 2)</i> [2015] FCA 814<br><i>Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate; Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate</i> [2015] HCA 46<br><i>Trade Practices Commission v CSR Ltd</i> [1990] FCA 521<br><i>Briginshaw v Briginshaw</i> [1938] HCA 34<br><i>Sammut v AVM Holdings Pty Ltd [No2]</i> [2012] WASC 27<br><i>Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)</i> [2017] FCA 557<br><i>Kelly v Fitzpatrick</i> [2007] FCA 1080<br><i>Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith</i> [2008] FCAFC 8; 165 FCR 560<br><i>Rocky Holdings Pty Ltd v Fair Work Ombudsman</i> [2014] FCAFC 62<br><i>Fair Work Ombudsman v South Jin Pty Ltd (No 2)</i> [2016] FCA 832<br><i>Milardovic v Vemco Services Pty Ltd (Administrators Appointed) (No 2)</i> [2016] FCA 244<br><i>Miller v Minister of Pensions</i> [1947] 2 All ER 372<br><i>Mason v Harrington Corporation Pty Ltd</i> [2007] FMCA 7<br><i>Sayed v Construction, Forestry, Mining and Energy Union</i> [2016] FCAFC 4<br><i>Gibbs v The Mayor, Councillors and Citizens of City of Altona</i> [1992] FCA 553 |
| <b>Result</b>                         | : | Pecuniary penalty to be paid, no order as to costs  |
| <b>Representation:</b>                |   |   |
| Claimant                              | : | Mr D. Scaife (of counsel) from Eureka Lawyers   |
| Respondents                           | : | Mr G. McCorry (agent) from Labourline   |

#### **SUPPLEMENTARY REASONS FOR DECISION**

- 1 On 13 June 2019, We R Finance Pty Ltd (the First Respondent) was found to have contravened sections 44 and 45 of the *Fair Work Act 2009* (Cth) (the Act) in that the First Respondent was found to have failed to pay Alistair Enkel (the Claimant) an amount under the *Banking, Finance and Insurance Award 2010* [MA000019] (the Banking Modern Award) and the Act and failed to comply with the National Employment Standards (NES) and in doing so contravened a civil remedy provision in failing to pay the amount.
- 2 The First Respondent was ordered to pay:
  - \$13,826.89 in ordinary pay, overtime and penalty rates;<sup>1</sup>
  - \$499.22 in accrued untaken annual leave and annual leave loading;<sup>2</sup> and
  - an amount to be determined in relation to superannuation contributions to a superannuation fund for the benefit of the Claimant.<sup>3</sup>

- 3 Further, the First Respondent was found to have contravened the Banking Modern Award by failing to provide copies of the Banking Modern Award and NES to the Claimant and did not comply with regulations 3.32 and 3.34 of the *Fair Work Regulations 2009* (Cth) (the Regulations) in failing to keep and maintain certain prescribed records of employment.<sup>4</sup>
- 4 In brief, the First Respondent's contraventions arose from a dispute concerning the applicability of the Banking Modern Award to the Claimant's employment by the First Respondent.
- 5 In *Enkel v We r Finance Pty Ltd and Anors* [2019] WAIRC 284 the court provided its reasons for decision in respect of the claim, the First Respondent's contraventions and the court's construction of the Banking Modern Award as it applied to the Claimant's employment.
- 6 These supplementary reasons are in relation to an application by the Claimant for a pecuniary penalty pursuant to s 546(1) of the Act and his application for costs pursuant to s 570 of the Act.
- 7 The parties each provided an outline of written submissions on the payment of a pecuniary penalty and costs. The parties also lodged further witness statements tendered into evidence as evidence in chief, including the Claimant and Guiseppi Crisafio (on behalf of the First Respondent) and the Claimant was cross-examined on the content of his statement.
- 8 Schedule I of these supplementary reasons outline the jurisdiction, standard of proof and practice and procedure of the court.
- 9 Schedule II of these supplementary reasons outline the provisions of the Act and principles relevant in determining an appropriate pecuniary penalty (if any) for the First Respondent's contraventions.

#### **Payment Of A Civil Penalty**

- 10 The effect of s 557(1) of the Act is that two or more contraventions of the Act are taken to constitute a single contravention if they are committed by the same person and arose out of a course of conduct by that person.
- 11 I am satisfied having regard to the findings made in the substantive decision with respect to the contraventions that no relevant distinction can be made in the First Respondent's conduct with respect to some of the contraventions. It follows from this that I find a single course of conduct by the First Respondent in failing to pay ordinary pay, overtime and penalty rates, annual leave and annual leave loading and associated superannuation, and these failures will be treated as one single contravention.
- 12 I intend to deal with the other contraventions relating to failing to provide copies of the NES and the Banking Modern Award and failing to keep and maintain employment records as two separate single contraventions.
- 13 The maximum penalty with respect to each contravention of s 44 and s 45 of the Act by the First Respondent is 60 penalty units which equates to between \$54,000 and \$63,000 given the First Respondent is a body corporate.<sup>5</sup>
- 14 The maximum penalty with respect to each contravention of s 535 of the Act by the First Respondent is 30 penalty units which equates to between \$27,000 and \$31,500 given the First Respondent is a body corporate.<sup>6</sup>

#### **The Claimant's Submissions**

- 15 In summary, the Claimant submits that the nature and extent of conduct should be regarded as serious where it says:
  - the First Respondent's conduct was a deliberate scheme to avoid minimum protections set out in the Banking Modern Award given the Claimant's contract of employment stated the Banking Modern Award applied to the Claimant;
  - the Claimant was a young employee, vulnerable and inexperienced in workplace rights, trusting the First Respondent to do the right thing;
  - the Claimant considers that the First Respondent deliberately exploited him through attempts to dissuade the pursuit of entitlements as the First Respondent had invested in training and helped the Claimant establish himself in the finance industry;
  - requests by the Claimant for explanation about his payment in accordance with the Banking Modern Award were repeatedly met with defiance and misdirection by the First Respondent;
  - the First Respondent profited from its exploitation of the Claimant; and
  - senior management was involved in setting the Claimant's employment terms and conditions and failed to take corrective action.
- 16 Further, the Claimant submits that the nature and extent of the loss and damage suffered by the Claimant included a relatively large underpayment over a comparatively short period of time. The underpayment contributed to financial hardship experienced by the Claimant and he suffered emotional harm caused by financial stress and working long hours without proper remuneration.
- 17 The Claimant accepts the First Respondent has no known previous contraventions of industrial law but says the First Respondent lacks contrition and failed to cooperate with the Claimant when he raised concerns and failed to take corrective action.
- 18 The Claimant characterises the First Respondent's conduct as substantial and willful contraventions of the Act where, he says, the First Respondent's contraventions show open defiance to the Claimant's concerns and attempts to mediate the issues.

#### **The First Respondent's Submissions**

- 19 In response and in summary, the First Respondent submits:
  - the First Respondent has no previous records of contravening any award or other industrial law;
  - contraventions of a comparable industry award applicable to the car sales industry, *Vehicle Industry – Repair, Services and Retail - Award 1983* (the Vehicle Award), demonstrate that in an associated industry any contraventions related to underpayment of wages and keeping of employment records were minor or non-existent (in comparison) and do not represent deliberate or negligent exploitation of the Claimant's age or purported vulnerability;
  - accordingly, personal or general deterrence is less relevant;

- the Claimant was overpaid an amount that was not deducted from his annual leave entitlements and the Claimant conceded he was paid annual leave entitlements, albeit not in accordance with the court's findings, and the amount of annual leave loading not paid was at the lower end of the scale;
  - the Claimant's reference to *Director, Fair Work Building Industry Inspectorate v Foxville Projects Group Pty Ltd* [2015] FCA 492 as an appropriate guide to penalties for a contravention of failing to provide copies of the Banking Modern Award and NES is erroneous when regard is had to the type of employees and their special vulnerability in *Foxville Projects Group Pty Ltd*;
  - the nature and extent of the contravention related to information on the employment records was at the lower end of the spectrum in terms of seriousness; and
  - the nature and extent of the contraventions overall were at the lower end of the spectrum and any penalty should be similarly at the low end of the scale.
- 20 Further, the First Respondent submits that it is 'notorious' in the car sales industry of employees in the Claimant's position being paid on a retainer/commission basis with usually a vehicle and fuel supplied. Therefore, the First Respondent was doing no less than what the industry circumstances dictated.
- 21 The First Respondent says the Claimant has not suffered loss and damage and remains employed in the same industry carrying out the same work and is not paid overtime in that capacity. In addition, the Claimant worked until 1.00 pm on Saturdays and went to five or six family dinners because he worked late (the inference being that the Claimant overstated the stress caused by the work hours).

### Determination

- 22 The following considerations are significant in assessing penalties in this case:
- the determination of the claim required consideration and construction of the Banking Modern Award and its applicability to the Claimant;
  - the First Respondent failed in that context to pay the Claimant the correct award rates relevant to ordinary pay, overtime, annual leave and annual leave loading (the superannuation follows as a result), but it was not a gross failure to pay entitlements or otherwise deprive an employee of an entitlement often seen by the court. Of course, any underpayment has serious consequences for the Claimant and must be treated accordingly by the court;
  - the Claimant and the First Respondent did not adduce evidence concerning the size of the company and the Claimant failed to satisfy the court to the requisite standard of the involvement of Harry Charles Ross (the Second Respondent) in the contraventions, notwithstanding the Second Respondent carried out decision making concerning the Claimant;
  - the more sinister character attributed by the Claimant to the Second Respondent and to the emails between him and the Second Respondent is not made out from the content of the emails. There is clearly a disagreement between the Claimant and the Second Respondent and the Second Respondent is disgruntled with the Claimant but nothing in the emails suggests the Second Respondent is 'taking advantage' of the Claimant, being oppressive, or threatening;
  - the Claimant remains employed in the same industry with another employer on ostensibly the same terms as he was employed by the First Respondent, including not being paid overtime, diminishing his assertion employment with the First Respondent impacted on his personal relationships and prevented him from attending the occasional 5.30 pm dinner. In that sense, I found the Claimant's evidence concerning the impact of the First Respondent's actions to be overstated;
  - while the Claimant was approximately 21 years of age at the time of the contraventions, he did not strike me as especially vulnerable in the same way as indicated in *Foxville Projects Group Pty Ltd* (that is, multiple migrants with English as a second language). The Claimant had previous employment and has gone on to secure further employment in the same industry;
  - the lack of contrition is not an aggravating circumstance which might increase the penalty;<sup>7</sup>
  - there is no evidence the First Respondent either 'exploited' the Claimant or 'profited' from its 'exploitation' of the Claimant;
  - the Respondent has not been found to have previously contravened the Act; and
  - while there was a course of conduct because of the failure of the First Respondent to apply the Banking Modern Award, the First Respondent properly accounted to the Claimant for all wages and commissions paid and entitlements owed (by way of pay slips, albeit incorrectly applied rates). Therefore, in that sense the First Respondent did not attempt to 'hide' any contraventions.
- 23 While criminal penalties import notions of retribution and rehabilitation, the primary purpose of a civil penalty is to promote the public interest in compliance with the law and not as an additional award of compensation for financial or emotional stress, hurt feelings, inconvenience or legal fees.<sup>8</sup>
- 24 Considering the above, while considerations of punishment and specific deterrence are of importance, it is perhaps of less importance in this case than the need to deter employers from making assumptions about the applicable terms of employment and disregard of award considerations, ensuring vigilance in applying the correct award and thereafter adhering to the requirements of the terms of the correct award and to the Act. The conduct in all the circumstances is properly categorised in the low range.
- 25 For these reasons, and having regard to principles of totality, penalties fixed in the sum of:
- \$15,000 for the failure to pay minimum weekly hours of pay, overtime, untaken paid annual leave and leave loading and associated superannuation in accordance with the terms of the Banking Modern Award and NES;

- \$3,000 for failing to provide copies of the Banking Modern Award and NES; and
- \$2,500 for failing to keep the prescribed employment records,

is a proportionate reflection of the gravity of the contravening conduct by the First Respondent.

- 26 The Claimant seeks an order pursuant to s 546(3)(c) of the Act that the penalties be paid to him and an order is made that the First Respondent pay the penalty of \$20,500 to the Claimant.

#### Costs

- 27 Pursuant to s 570(1) of the Act, a party to proceedings in relation to a matter arising under the Act may be ordered by the court to pay costs incurred by another party to the proceedings only in accordance with subsection (2), s 569, or s 569A of the Act.

- 28 Relevant to the claim, subsection (2)(b) of the Act provides that a party may be ordered to pay costs only if the court is satisfied that the party's unreasonable act or omission caused the other party to incur costs.

- 29 As I understand the Claimant's submission on costs, he says:

- the First Respondent's defence in this matter was wholly without merit and rises to the level of unreasonableness required to trigger s 570(2)(b) of the Act;
- the First Respondent defended the matter solely based on a misconceived submission that it was not an employer to whom the Banking Modern Award applied as it was not in the 'banking, finance and insurance industry' within the definition of that phrase in the Banking Modern Award; and
- to support this defence, the First Respondent relied on irrelevant decisions relating to the construction of awards, maintained that the Banking Modern Award needed to be tended into evidence, failed to lead evidence relating to business activities, or from the Second Respondent, and failed to challenge or disturb business records put into evidence by the Claimant.

- 30 As I understand the First Respondent's submission in response to the application for costs, it says:

- the First Respondent was entitled to raise a 'no case to answer' submission because of the evidentiary hiatus or failure to adduce any evidence as to an essential element in the cause of action;
- the fact the court did not uphold the no case submission does not mean a misconceived submission was made such as to enliven s 570 of the Act; and
- there is nothing in the First Respondent's conduct during the proceedings that would enliven s 570 of the Act.

- 31 In *Ryan v Primesafe* [2015] FCA 8, Mortimer J states (omitting citations):

*The discretion conferred by the confined terms of s 570(2) should be exercised cautiously, and the case for its exercise should be clear. The reason for caution is the potential for discouraging parties' pursuit in a complete and robust way of the claims for contravention which they seek to make under the Fair Work Act, or the defense of such claims. The policy behind s 570 is to ensure that the spectra of costs being awarded if a claim is unsuccessful does not loom so large in the mind of potential applicants (in particular, in my opinion) that those with genuine grievances and an arguable evidentiary and legal basis for them are put off commencing or continuing proceedings. It is an access to justice provision. Insofar as it operates to the benefit of respondents, it is designed to ensure respondents feel free to pursue arguable legal and factual responses to the claims made against them (my emphasis) [64].*

- 32 In *Fair Work Ombudsman v Skilled Offshore (Australia) Pty Ltd (No 2)* [2015] FCA 1509, Gilmour J states (omitting citations):

[8] *The purpose of s 570 is to ensure that litigants, including respondents, are not deterred from 'complete[ly] and robust[ly]' defending claims for contravention.*

[9] *In light of this purpose, costs will rarely be awarded under [s 570] and exceptional circumstances are required to justify the making of such an order. Courts should be particularly cautious before finding that a party has engaged in an unreasonable act or omission, lest that discourages parties from pursuing litigation in the manner which they deem best.*

[10] *That a party has a 'self-evidently weak case' is not enough to warrant a costs order. There must be 'a higher level of criticism or disapprobation' Indeed, costs were not awarded against the **FWO in Fair Work Ombudsman v Valuair Limited (No 3)** [2014] FCA 1182 even though elements of the FWO's case were 'artificial and unsatisfactory' and 'potentially bizarre'.*

[11] *Where a party relies on s 570(2)(b), the Court must be satisfied of two matters: there must be an unreasonable act or omission; and that act or omission must have 'caused' costs to be incurred.*

[12] *The pursuit of a case by a party in circumstances where, on the materials before the party at the time, there was no substantial prospect of success may constitute an unreasonable act or omission. However, that an argument is ultimately not accepted does not mean it is unreasonable to put it.*

[13] *Even if the Court is satisfied of a s 570(2) precondition, it retains a discretion not to order costs.*

- 33 In *Rentuzza v Westside Auto Wholesale* [2009] FMCA 1022, Lucev FM states (omitting citations):

[27] *Whether a party has engaged in an unreasonable act or omission depends upon an objective analysis of the particular circumstances of the case.*

[28] *The exercise of the discretion in s.570(2)(b) is not necessarily engaged because:*

- (a) *a party does not conduct litigation efficiently;*
- (b) *a concession is made late;*
- (c) *a party may have acted in a different or timelier fashion;*
- (d) *a party has adopted a genuine but misguided approach.*

- 34 Three things immediately arise. Firstly, the First Respondent is not required to lead evidence of business activities, or from the Second Respondent, to demonstrate or assist the Claimant's claim or to defend the claim. The Claimant bears the onus of proving his claim to the requisite standard.
- 35 Secondly, the Claimant successfully proved part of the claim. The aspect of his claim as it related to the Second Respondent was not proven to the requisite standard.
- 36 Thirdly, forensic decisions made by a respondent in defending a claim are entirely a matter for the respondent and/or his or her or its representative. The only issue for the court to determine in respect of the application for costs is whether there is any unreasonable act or omission causing the other party to incur costs.<sup>9</sup>
- 37 The First Respondent and Second Respondent made a no case to answer submission. They were entitled to do so but were unsuccessful as it related to the underpayment and other non-monetary aspects of the claim relevant to the First Respondent. The claim and the defence to the claim largely turned on the construction and application of the Banking Modern Award upon which the parties had firmly held but divergent views.
- 38 However, as stated, the Claimant was unsuccessful in proving his claim as it related to the Second Respondent.
- 39 The parties conducted the litigation in an efficient manner and there were, in fact, limited factual matters in dispute. The First Respondent did not engage in protracted or irrelevant cross-examination or prolix submissions.
- 40 Notwithstanding some of the First Respondent's legal arguments may have been misguided, I am not satisfied that there was no substantial prospect of success such that there was an *unreasonable act or omission* by the First Respondent causing the Claimant to incur legal costs in the manner contemplated by s 570(2)(b) of the Act and as outlined in the above cases.
- 41 The Claimant's application for costs is refused.

### **Orders**

- 42 Having heard from the parties, subject to any liability to the Commissioner of Taxation under the *Taxation Administration Act 1953* (Cth) (if any), the First Respondent is ordered to pay to the Claimant the following amounts within 28 days:
- \$13,826.89 in ordinary pay, overtime and penalty rates;
  - \$499.22 in accrued untaken annual leave and annual leave loading; and
  - a penalty of \$20,500.
- 43 Further, the First Respondent is ordered to pay within 28 days:
- \$297.05 in superannuation contribution to the relevant superannuation fund for the benefit of the Claimant; and
  - interest on the judgment amount of \$14,326.11 fixed in the amount of \$1,537.80.

### **D SCADDAN**

#### **INDUSTRIAL MAGISTRATE**

<sup>1</sup> Contravening s 45 of the FWA by failing to comply with the Banking Modern Award – item 2 of the Civil Remedy Provisions in s 539(2) of the FWA.

<sup>2</sup> Contravening s 44 of the FWA as it relates to accrued annual leave by failing to comply with the NES and s 45 of the FWA as it relates to annual leave loading by failing to comply with the Banking Modern Award – items 1 and 2 of the Civil Remedy Provisions in s 539(2) of the FWA, respectively.

<sup>3</sup> Contravening s 45 of the FWA by failing to comply with the Banking Modern Award – item 2 of the Civil Remedy Provisions in s 539(2) of the FWA.

<sup>4</sup> Contravening s 535 of the FWA by failing to keep prescribed records.

<sup>5</sup> The contravention period was from 15 March 2017 to 30 October 2017 and an increase in the penalty rate per penalty unit occurred on 1 July 2017.

<sup>6</sup> See footnote 5.

<sup>7</sup> *Fair Work Ombudsman v Maritime Union of Australia* (No 2) [2015] FCA 814.

<sup>8</sup> *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate; Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46 [55] (referring to *Trade Practices Commission v CSR Ltd* [1990] FCA 521).

<sup>9</sup> See also *Fair Work Ombudsman v Maritime Union of Australia* (No 2) [2015] FCA 814 [97] - [101] for reference to 'baseless defence' and the respondents successfully defeating part of the claim.

### **Schedule I: Jurisdiction, Practice and Procedure of the Industrial Magistrates Court (WA) under the Fair Work Act 2009 (Cth)**

#### **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 Act. The Industrial Magistrates Court (WA) (IMC), being a court constituted by an industrial magistrate, is 'an eligible State or Territory court': s 12 of the Act (see definitions of 'eligible State or Territory court' and 'Magistrates Court'); *Industrial Relations Act 1979* (WA), s 81, 81B.
- [2] The application to the IMC must be made within six years after the day on which the contravention of the civil penalty provision occurred: s 544 of the Act.
- [3] The civil penalty provisions identified in s 539 of the Act include:
- section 44 of the Act;
  - section 45 of the Act; and

- section 535 of the Act.

- [4] 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’: s 14, s 12 of the Act. 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’: s 13 of the Act. It is not in dispute and it was found that the First Respondent is a corporation to which paragraph 51(xx) of the Constitution applies and that the Claimant was employed by the First Respondent.
- [5] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the court may make orders for a person to pay a pecuniary penalty: s 546 of the Act.

#### **Burden And Standard Of Proof**

- [6] In an application under the Act, the Claimant carries the burden of proving the claim. 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.*
- [7] 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; (1938) 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].*
- [8] Where in this decision it is stated that a finding has been made, the finding is made on the balance of probabilities. Where it is stated that a finding has not been made or cannot be made, then no finding can be made on the balance of probabilities.

#### **Practice And Procedure Of The Industrial Magistrates Court**

- [9] The *Industrial Relations Act 1979* (WA) provides that, except as prescribed by or under the Act, the powers, practice and procedure of the IMC is to be the same as if the proceedings were a case under the *Magistrates Court (Civil Proceedings) Act 2004* (WA): s 81CA. Relevantly, regulations prescribed under the *Industrial Relations Act 1979* (WA) provide for an exception: a court hearing a trial is not bound by the rules of evidence and may inform itself on any matter and in any manner as it thinks fit: regulation 35(4).
- [10] In *Sammut v AVM Holdings Pty Ltd [No2]* [2012] WASC 27, Commissioner Sleight examined a similarly worded provision regulating the conduct of proceedings in the State Administrative Tribunal and made the following observation (omitting citations):
- ... The tribunal is not bound by the rules of evidence and may inform itself in such a manner as it thinks appropriate. This does not mean that the rules of evidence are to be ignored. The more flexible procedure provided for does not justify decisions made without a basis in evidence having probative force. The drawing of an inference without evidence is an error of law. Similarly, such error is shown when the tribunal bases its conclusion on its own view of a matter which requires evidence [40].*

#### **Schedule II: Pecuniary Penalty Orders Under The Fair Work Act 2009 (Cth)**

##### **Pecuniary Penalty Orders**

- [1] The Act provides that the court may order a person to pay an appropriate pecuniary penalty if the court is satisfied that the person has contravened a civil remedy provision: s 546(1). The maximum penalty for each contravention by a natural person, expressed as a number of penalty units, set out in a table found in s 539(2) of the Act: s 546(2) of the Act. If the contravener is a body corporate, the maximum penalty is five times the maximum number of penalty units proscribed for a natural person: s 546(2) of the Act.
- [2] The rate of a penalty unit is set by s 4AA of the *Crimes Act 1914* (Cth): s 12 of the Act. The relevant rate is that applicable at the date of the contravening conduct:
- |                             |       |
|-----------------------------|-------|
| Before 28 December 2012     | \$110 |
| Commencing 28 December 2012 | \$170 |
| Commencing 31 July 2015     | \$180 |
| Commencing 1 July 2017      | \$210 |
- [3] The purpose served by penalties was described by Katzmann J in *Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)* [2017] FCA 557 in the following terms (omitting citations):
- In contrast to the criminal law, however, where, in sentencing, retribution and rehabilitation are also relevant, the primary, if not the only, purpose of a civil penalty is to promote the public interest in compliance with the law. This is achieved by imposing penalties that are sufficiently high to deter the wrongdoer from engaging in similar conduct in the future (specific deterrence) and to deter others who might be tempted to contravene (general deterrence). The penalty for each contravention or course of conduct is to be no more and no less than is necessary for that purpose [338].*

- [4] In *Kelly v Fitzpatrick* [2007] FCA 1080; 166 IR 14 [14], Tracey J adopted the following ‘non-exhaustive range of considerations to which regard may be had in determining whether particular conduct calls for the imposition of a penalty, and if it does the amount of the penalty’ which had been set out by Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7:
- The nature and extent of the conduct which led to the breaches.
  - The circumstances in which that conduct took place.
  - The nature and extent of any loss or damage sustained as a result of the breaches.
  - Whether there had been similar previous conduct by the respondent.
  - Whether the breaches were properly distinct or arose out of the one course of conduct.
  - The size of the business enterprise involved.
  - Whether or not the breaches were deliberate.
  - Whether senior management was involved in the breaches.
  - Whether the party committing the breach had exhibited contrition.
  - Whether the party committing the breach had taken corrective action.
  - Whether the party committing the breach had cooperated with the enforcement authorities.
  - The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements and
  - The need for specific and general deterrence.
- [5] The list is not ‘a rigid catalogue of matters for attention. At the end of the day the task of the court is to fix a penalty which pays appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public confidence in the statutory regime which imposes the obligations.’ (Buchanan J in *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8; 165 FCR 560 [91]).
- [6] ‘Multiple contraventions’ may occur because the contravening conduct done an employer:
- (a) resulted in a contravention of a single civil penalty provision or resulted in the contravention of multiple civil penalty provisions;
  - (b) was done once only or was repeated;
  - (c) was done with respect to a single employee or was done with respect to multiple employees.
- [7] The fixing of a pecuniary penalty for multiple contraventions is subject to s 557 of the Act. It provides that two or more contraventions of specified civil remedy provisions (including contraventions of an enterprise agreement and a contravention on s 323 on the payments) by an employer are taken to be a single contravention if the contraventions arose out of a course of conduct by the employer. Subject to proof of a ‘course of conduct’, the section applies to contravening conduct that results in multiple contraventions of a single civil penalty provision whether by reason of the same conduct done on multiple occasions or conduct done once with respect to multiple employees: *Rocky Holdings Pty Ltd v Fair Work Ombudsman* [2014] FCAFC 62; (2014) 221 FCR 153; *Fair Work Ombudsman v South Jin Pty Ltd (No 2)* [2016] FCA 832 [22] (White J) The section does *not* to apply to case where the contravening conduct results in the contravention of multiple civil penalty provisions (example (a) above): *Grouped Property Services Pty Ltd (No 2)* [411] ff (Katzmann J).
- [8] The totality of the penalty must be re-assessed in light of the totality of the offending behaviour. If the resulting penalty is disproportionately harsh, it may be necessary to reduce the penalty for individual contraventions. *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560; 246 ALR 35; [2008] FCAFC 8; [47] - [52].
- [9] Section 546(3) of the Act also provides:
- Payment of penalty**
- (3) *The court may order that the pecuniary penalty, or a part of the penalty, be paid to:*
- (a) *the Commonwealth; or*
  - (b) *a particular organisation; or*
  - (c) *a particular person.*
- [10] In *Milardovic v Vemco Services Pty Ltd (Administrators Appointed) (No 2)* [2016] FCA 244 [40] - [44], Mortimer J summarised the law (omitting citations and quotations) on this provision in light of *Sayed v Construction, Forestry, Mining and Energy Union* [2016] FCAFC 4:
- The power conveyed by s 546(3) is ordinarily to be exercised by awarding any penalty to the successful applicant. The initiating party is normally the proper recipient of the penalty as part of a system of recognising particular interests in certain classes of persons in upholding the integrity of awards and agreements the subject of penal proceedings. Where a public official vindicates the law by suing for and obtaining a penalty, it is appropriate that the penalty be paid to the Consolidated Revenue Fund. Otherwise, the general rule remains appropriate, that the penalty is to be paid to the party initiating the proceeding, with the ‘Gibbs exception’ (*Gibbs v The Mayor, Councillors and Citizens of City of Altona* [1992] FCA 553) that the penalty may be ordered to be paid to the organisation on whose behalf the initiating party has acted.*

2019 WAIRC 00656

## WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

**CITATION** : 2019 WAIRC 00656  
**CORAM** : INDUSTRIAL MAGISTRATE D. SCADDAN  
**HEARD** : ON THE PAPERS  
**DELIVERED** : THURSDAY, 22 AUGUST 2019  
**FILE NO.** : M 198 OF 2017  
**BETWEEN** : SATNAM SINGH

CLAIMANT

AND

SEATOURS PTY LTD, TRADING AS PIZZA BELLA ROMA FREMANTLE

FIRST RESPONDENT

CHRIS JOHNSON

SECOND RESPONDENT

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**CatchWords** : INDUSTRIAL LAW – FAIR WORK – Assessment of pecuniary penalties for contraventions of *Fair Work Act 2009* (Cth) – Application for costs

**Legislation** : *Fair Work Act 2009* (Cth)  
*Long Service Leave Act 1958* (WA)  
*Industrial Relations Act 1979* (WA)  
*Magistrates Court (Civil Proceedings) Act 2004* (WA)  
*Crimes Act 1914* (Cth)  
*Workplace Relations Act 1996* (Cth)  
*Taxation Administration Act* (Cth)

**Instrument** : *Restaurant Industry Award 2010* [MA000119]

**Case(s) referred to in reasons** : *Singh v Seatours Pty Ltd t/as Pizza Bella Roma Fremantle and Anor* [2019] WAIRC 359  
*Sayed-v- Construction, Forestry, Mining and Energy Union* [2016] FCAFC 4  
*Fair Work Ombudsman v Mamak Pty Ltd & Ors* [2016] FCCA 2104  
*Miller v Minister of Pensions* [1947] 2 All ER 372, 374  
*Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336  
*Sammut v AVM Holdings Pty Ltd [No2]* [2012] WASC 27  
*Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)* [2017] FCA 557  
*Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8  
*Rocky Holdings Pty Ltd v Fair Work Ombudsman* [2014] FCAFC 62  
*Fair Work Ombudsman v South Jin Pty Ltd (No 2)* [2016] FCA 832  
*Milardovic v Vemco Services Pty Ltd (Administrators Appointed) (No 2)* [2016] FCA 244  
*Gibbs v The Mayor, Councillors and Citizens of City of Altona* [1992] FCA 553  
*Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate; Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46  
*Trade Practices Commission v CSR Ltd* [1990] FCA 521  
*Kelly v Fitzpatrick* [2007] FCA 1080  
*Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7  
*Ryan v Primesafe* [2015] FCA 8  
*Fair Work Ombudsman v Skilled Offshore (Australia) Pty Ltd (No 2)* [2015] FCA 1509  
*Rentuza v Westside Auto Wholesale* [2009] FMCA 1022  
*McDonald v Parnell Laboratories (Aust) (No 2)* [2007] FCA 2086  
*Australian Licensed Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd (No 2)* [2011] FCA 394

**Result** : Pecuniary penalty to be paid, costs order made

**Representation:**

Claimant : Mr G. McCorry (agent) from Labourline

Respondents : Ms L. Langridge (of counsel) from Sparke Helmore Lawyers

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### SUPPLEMENTARY REASONS FOR DECISION

- 1 On 4 July 2019, Seatours Pty Ltd, trading as Pizza Bella Roma Fremantle (the First Respondent) was found to have contravened the *Fair Work Act 2009* (Cth) (the FWA) in that the First Respondent was found to have failed to pay Satnam Singh (the Claimant) the relevant hourly rates applicable to his classification under the *Restaurant Industry Award 2010* [MA000119] (the Award) from time to time and in doing so, contravened a civil remedy provision in failing to pay the amount, associated penalties and superannuation.
- 2 The First Respondent was also found to have contravened the FWA in failing to keep prescribed records, failing to record start and finish times and failing to provide accessible copies of the National Employment Standards (NES) and the Award.
- 3 Further, the First Respondent admitted that it had not paid an amount owed under the *Long Service Leave Act 1958* (WA).
- 4 The parties were invited to make submissions on quantum having regard to the findings made by the Industrial Magistrates Court (IMC).
- 5 In *Singh v Seatours Pty Ltd t/as Pizza Bella Roma Fremantle and Anor* [2019] WAIRC 359 the IMC provided its reasons for decision in respect of the contraventions.
- 6 These supplementary reasons are in relation to an application by the Claimant for a pecuniary penalty pursuant to s 546(1) of the FWA and to determine (if necessary) the quantum of the claim.
- 7 The parties each provided an outline of written submissions on the payment of a pecuniary penalty and quantum. Further, the First Respondent and Chris Johnson (Mr Johnson) (the Respondents) have made an application for costs pursuant to s 570(1) of the FWA.
- 8 Schedule I of these supplementary reasons outline the jurisdiction, standard of proof and practice and procedure of the IMC in determining this case.
- 9 Schedule II of these supplementary reasons outline the provisions of the FWA and principles relevant in determining an appropriate pecuniary penalty (if any) for the First Respondent's contraventions.

### Quantum

- 10 The parties conferred and, having regard to the findings made in the substantive decision, agree on the following amounts to be paid by the First Respondent to the Claimant:

|                      | Amount owed        | Interest on amount |
|----------------------|--------------------|--------------------|
| Wages                | \$5,544.73         | \$1,283.18         |
| Superannuation       | \$526.75           | \$124.66           |
| Annual leave         | \$261.64           |                    |
| Annual leave loading | \$45.79            |                    |
| Personal leave       | \$44.53            |                    |
| Long service leave   | \$7,255.77         |                    |
| <b>Total</b>         | <b>\$13,679.21</b> | <b>\$2,205.94</b>  |

- 11 Therefore, the total agreed amount to be paid by the First Respondent is \$15,885.15.

### The Claimant's Submissions On Penalty

- 12 In summary, the Claimant submits:
  - the First Respondent's conduct can be characterised as:
    - o seriously negligent or in reckless disregard of its obligations in respect of the monetary contraventions occurring prior to March 2014;
    - o it knew the Award applied where it paid in accordance with the Award for hours worked from Monday to Friday, but not for weekend or public holiday work;
    - o deliberately in breach of the Award and record keeping obligations from March 2014 to June 2015 when the Claimant was paid a flat rate of pay for all hours worked;
    - o seriously negligent or in reckless disregard of its obligations in respect of the monetary contraventions occurring after May 2015; and
    - o a contumelious disregard of its obligation to pay the outstanding annual leave, annual leave loading, personal leave and long service leave on cessation of Claimant's employment,
  - the First Respondent knew the Award applied and ignored the obligations of penalty rates applying on weekends and public holidays;
  - there is no reasonable excuse for failing to pay the Claimant the correct award rates of pay for the work he was doing from January 2015 onwards, once the First Respondent had decided to go back to paying in accordance with the Award in June 2015;
  - there was no effort made to correct any underpayments that occurred between the end of May 2015 and reclassification of the Claimant several weeks later;

- the First Respondent knew these amounts were owing and has, and continues to make, no effort to pay them with no reasonable basis for not doing so;
  - the First Respondent was seriously negligent in respect of its record keeping obligations and the records kept by the First Respondent do not enable the court or any regulator to determine the extent of compliance with the Award;
  - relevant to the period July 2012 to 16 February 2014, the Claimant accepts that each weekly contravention of each Award obligation constitutes a course of conduct by the First Respondent and accordingly there are three contraventions of s 45 of the FWA;
  - relevant to the period 16 February 2014 to 29 May 2015, there are nine distinct contraventions of s 45 of the FWA and two contraventions of s 44 of the FWA; and
  - in total there are five non-monetary contraventions, two of which contravene s 45 of the FWA and three of which contravene s 535 of the FWA.
- 13 It is not enough to adopt the cavalier approach to compliance with the Award where the Fair Work Ombudsman's (FWO) research reveals:
- the restaurant industry accounted for 11% of all disputes lodged with FWO between July 2013 to June 2016 (the highest of all industries from which dispute forms were received);
  - the FWO conducted 1,066 compliance activities during the 2015 'National Hospitality Industry Campaign – Restaurants, Cafes and Catering' and found 58% businesses to be in contravention; and
  - the restaurant industry represented a significant proportion of compliance outcomes in the 2015 - 2016 financial year.
- 14 Therefore, the need for general deterrence is great.
- 15 A substantial personal deterrent penalty is also called for as the First Respondent expressed no contrition and failed to make payment of monies due at the cessation of the Claimant's employment without a reasonable excuse.
- 16 The First Respondent principal's attitude toward the contraventions during the hearing was cavalier and amounts to egregious conduct.
- 17 The Claimant submits that a totality principle discount of 40% is appropriate to be applied and the appropriate total of penalties to be imposed should be between \$28,000 and \$56,000.
- 18 The penalties should be awarded to the Claimant in accordance with decision in *Sayed-v- Construction, Forestry, Mining and Energy Union* [2016] FCAFC 4.
- 19 The First Respondent should be ordered to pay to the Claimant and the Claimant's superannuation fund the amounts specified.

#### **The First Respondent's Submissions On Penalty**

- 20 In summary, the First Respondent submits:
- this is not a matter in which an imposition of penalties is necessary to encourage general or specific deterrence;
  - if the court is minded to impose a penalty, the appropriate amount is \$10,125 to \$15,225, considering the First Respondent's conduct and the totality principle;
  - any penalty should be paid to the Commonwealth consolidated revenue;
  - it is entitled to the benefit of the statutory aggregation provision in s 557(1) of the FWA as the contraventions were all committed by the First Respondent and arose out of a 'course of conduct', reducing the number of contraventions to a maximum of seven;
  - beyond s 557(1) of the FWA, the court has an additional sentencing discretion to further group contraventions that have some common elements;
  - the First Respondent agrees with the submissions made by the Claimant that it is appropriate to group several of the contraventions together so as to reflect a single course of conduct and, accordingly, it would be open for the court to group the:
    - o 'penalty rate' contraventions between 2012 and March 2014 and June 2015 and August 2015, all of which involve a contravention of cl 34 of the Award;
    - o 'penalty rate' contraventions between March 2014 and June 2015, all of which involve a contravention of cl 34 of the Award;
    - o 'annual leave' contraventions for payment of annual leave and annual leave loading both of which involve a contravention of cl 35.2 of the Award;
    - o 'access' contraventions relating to access to the NES and Award, both of which involve a contravention of cl 5 of the Award; and
    - o 'record keeping' contraventions relating to the making and keeping of employee records, which relate to contraventions of s 535 of the FWA,
  - it acknowledges that regard must be had for the separate legal quality of the obligations it has failed to observe, but says that the integrity and character of these obligations would be maintained if the court grouped the proposed 14 contraventions as:

- o minimum wage contravention;
  - o penalty contraventions between 2012 – March 2014 and June 2015 – August 2015;
  - o penalty contraventions between March 2014 – June 2015;
  - o superannuation contravention;
  - o annual leave contraventions;
  - o personal leave contraventions;
  - o access contraventions; and
  - o records contraventions,
- if the court adopted these groupings, the total number of contraventions of s 45 of the FWA would be six (reduced from thirteen) and total number of contraventions of s 535(1) of the FWA would be reduced to one (from three); and
  - in total there would be seven contraventions in respect of which the court could consider applying a penalty.
- 21 The Claimant's characterisation of the First Respondent's conduct as 'deliberate' and 'seriously negligent' is not borne out by the evidence where the Claimant has failed to adequately make allowance for the various attempts by the First Respondent to resolve the claim prior to hearing.
- 22 There is no evidence before the court as to the effect of the contraventions on the Claimant.
- 23 There is no dispute that throughout the course of employment the Claimant received payslips and was provided with incremental pay increases over the years demonstrating the First Respondent's intentions to comply with its obligations under the FWA, rather than a wilful attempt to deceive the Claimant and deprive him of any benefit.
- 24 At various times the First Respondent paid the Claimant in excess of the minimum entitlements under the Award.
- 25 The Claimant's submissions for wanting to impart a 'substantial personal deterrent penalty' on the basis that the First Respondent 'expressed no contrition' and that the First Respondent principal's attitude was 'cavalier and amounts to egregious conduct' are not supported by the findings of the court which stated: Mr Johnson accepted certain errors had been made, and the First Respondent offered to remedy the discrepancies once they had been identified, and settle the Claimant's claim above the amount claimed by him.
- 26 It is unfair to describe the First Respondent's conduct as 'cavalier' in circumstances where it employed a bookkeeper and restaurant manager to assist in obligation compliance.
- 27 The First Respondent has not previously been found by a court to have contravened any workplace laws to which it is bound.
- 28 The First Respondent is a small to medium sized private business and does not have dedicated human resources personnel, but a bookkeeper and restaurant manager are engaged to assist with its payroll administration and Award complication. It is not a business of 'vast resources'.
- 29 The First Respondent submits detriment occurred prior to the finding of any contravention by way of the Claimant's public statements regarding the proceedings published in the Fremantle Herald newspaper, namely in April 2018, the Claimant participated in an interview for an article where he alleged, he had been underpaid approximately \$70,000 and states he was sacked and not allowed appropriate sick leave. Further, on or around 29 April 2019, the Claimant participated in a further article in the Fremantle Herald which details the Claimant as 'alleging underpaid wages and discrimination in the workplace'.
- 30 It is submitted that consideration should be given to the impact the Claimant's public statements have had on the First Respondent's reputation locally, particularly as there were no findings that the First Respondent's actions were deliberate or racially motivated.
- 31 The First Respondent has learnt from the experience of these proceedings and has taken additional steps to ensure mistakes previously made are not repeated, including reviewing its systems and payslips to ensure future compliance, engaging lawyers to provide a fact sheet setting out its obligations under the Award, moved copies of the NES and the Award to a noticeboard visible and easily accessible to its current employees, has been open throughout the proceedings about its mistakes and has made a number of attempts to resolve the claim with the Claimant.
- 32 Therefore, the First Respondent rejects the Claimant's classification of it expressing 'no contrition' and states it has not exhibited a 'cavalier' attitude or engaged in 'egregious conduct' where multiple offers to resolve the claim demonstrate the First Respondent has taken the claims seriously and taken steps to try resolve, including upping its offers without any movement from the Claimant.
- 33 There is nothing in the circumstances of this case that identify it as an appropriate vehicle to send a message to the restaurant industry and cautions using FWO research or statistics where 'statistics such as these are meaningless without other information': *Fair Work Ombudsman v Mamak Pty Ltd & Ors* [2016] FCCA 2104 (per Judge Smith).
- 34 The various contraventions were the result of inadvertence on the First Respondent's part and the Claimant's attempt to characterise the contraventions as deliberate is not supported by the evidence.
- 35 The relatively small quantum of the underpayment and the bulk of the underpayment is attributable to long service leave, which would have been paid if there had been any finality to the Claimant's employment or if he had accepted one of the many settlement offers put to him.

- 36 This is not a case in which penalties should be ordered to the Claimant where the First Respondent offered to pay in excess of the total sum claimed by the Claimant prior to the hearing and it submits the Claimant withheld on the basis he considered he was likely to obtain substantial penalties and therefore financial benefit.
- 37 The payment of penalties personally should not encourage the maintenance of a claim once all reasonable attempts to resolve it have been made, including offers in amounts in excess of the quantum of the claim.

#### **Determination On Penalty**

- 38 The maximum penalty with respect to each contravention of s 44 and s 45 of the FWA by the First Respondent is 60 penalty units which equates to between \$51,000 and \$63,000, given the First Respondent is a body corporate.<sup>1</sup>
- 39 The maximum penalty with respect to each contravention of s 535 of the FWA by the First Respondent is 30 penalty units which equates to \$31,500 given the First Respondent is a body corporate.<sup>2</sup>
- 40 The effect of s 557(1) of the FWA is that two or more contraventions of the FWA are taken to constitute a single contravention if they are committed by the same person and arose out of a course of conduct by that person.
- 41 I have had regard to the parties' submissions and to the findings in the substantive decision and I find that certain contraventions by the First Respondent are properly characterised as a single contravention where there is commonality in the conduct or the contravention flows from a course of conduct. I adopt the First Respondent's grouping of the contraventions as follows:
- minimum wage contravention (June to August 2015);
  - penalty contraventions (July 2012 to March 2014 and June 2015 to August 2015);
  - penalty contraventions (March 2014 to June 2015);
  - superannuation contravention;
  - annual leave contraventions (including annual leave loading);
  - personal leave contraventions;
  - access contraventions (the Award and NES); and
  - records contraventions.
- 42 The following considerations are significant in assessing penalties in this case:
- the determination of the claim required consideration of the Award and its applicability to work carried out by the Claimant;
  - the First Respondent failed in that context to pay the Claimant the correct award rates relevant to ordinary pay, penalty rates, annual leave, annual leave loading and personal leave (the superannuation follows as a result). While any underpayment has serious consequences for a claimant and must be treated accordingly by the court, in this case the contraventions were not of the flagrant disregard often seen in the restaurant industry;
  - the First Respondent has not been found to have previously contravened the FWA;
  - while there was a course of conduct because of the failure of the First Respondent to pay relevant award rates, the First Respondent accounted to the Claimant for wages paid and entitlements owed and increased pay rates over the time period. Therefore, in that sense, the First Respondent did not attempt to 'hide' any contraventions;
  - Mr Johnson, on behalf of the First Respondent, admitted the First Respondent's shortcomings and, I accept, the First Respondent made efforts to resolve the claim before the hearing;
  - the First Respondent has taken significant steps to ensure future compliance and employed others to carry out administrative duties to comply with the Award and the FWA;
  - together this demonstrates, if not contrition, a willingness to learn from the proceedings and a commitment not to repeat the conduct;
  - the First Respondent is a small to medium sized private business;
  - a degree of proportionality is required when regard is had to each contravention (for example, the total personal leave entitlement owed is \$44.53);
  - the Claimant's behavior was, at times, unsatisfactory both in relation to imprudent comments made to the media and the allegations made but not substantiated; and
  - there is a high need for general deterrence to ensure compliance and vigilance in an industry where employees are often disadvantaged or prejudiced because they are unskilled, English is their second language and/or they are often migrants lacking knowledge of their entitlements (I accept that this does not wholly apply in the Claimant's case).
- 43 In light of the above, considerations of punishment and specific deterrence are less important in this case than the need to deter employers more generally in contraventions of the FWA. The conduct in all the circumstances is properly categorised in the low range.
- 44 While criminal penalties import notions of retribution and rehabilitation, the primary purpose of a civil penalty is to promote the public interest in compliance with the law and not as an additional award of compensation for financial or emotional stress, hurt feelings, inconvenience or legal fees.<sup>3</sup>

45 For these reasons, and taking into account the principles of totality, the penalties to be applied are:

|   | <b>Maximum</b> | <b>Penalty applied</b> |
|---|----------------|------------------------|
| Minimum wage contravention (June to August 2015)                              | \$51,000       | \$5,000                |
| Penalty contraventions (July 2012 to March 2014 and June 2015 to August 2015) | \$51,000       | \$5,000                |
| Penalty contraventions (March 2014 to June 2015)                              | \$51,000       | \$5,000                |
| Superannuation contravention  | \$51,000       | \$2,500                |
| Annual leave contraventions (including annual leave loading)                  | \$63,000       | \$2,500                |
| Personal leave contraventions   | \$63,000       | \$1,500                |
| Access contraventions (Award and NES)   | \$63,000       | \$3,000                |
| Records contraventions  | \$63,000       | \$2,500                |
| <b>Total</b>  |                | <b>\$27,000</b>        |

46 The Claimant seeks an order pursuant to s 546(3)(c) of the FWA that the penalties be paid to him and, while the Claimant's conduct is a factor for consideration, an order is made that the First Respondent pay the penalty of \$27,000 to the Claimant.

#### **Respondents' Application For Costs**

47 Pursuant to s 570(1) of the FWA a party to proceedings in relation to a matter arising under the FWA may be ordered by the court to pay costs incurred by another party to the proceedings only in accordance with subsection (2), s 569 or s 569A.

48 Relevant to the application, subsection (2)(b) provides that a party may be ordered to pay costs only if the court is satisfied that the party's unreasonable act or omission cause the other party to incur costs.

49 The Respondents have applied for costs and rely upon the affidavit of Layla Louise Langridge affirmed 5 August 2019 in support of the application.

50 As I understand the Respondents' submission on costs, it says:

- the Claimant's rejection of its offer on 26 March 2019 constitutes an unreasonable act which warrants an order of indemnity costs from that date;
- there are several authorities which confirm a failure to accept a reasonable offer of settlement may constitute an unreasonable act or omission;
- an offer made in excess of the entire quantum of the claim is a reasonable offer;
- it was an unreasonable act to pursue the claim after the date upon which the Respondents had offered to pay the quantum sought;
- the Claimant's expectations regarding potential settlement and/or penalty outcomes of the claim were unattainable and unrealistic;
- two Magistrates warned the Claimant of the potential for an adverse costs order and he still proceeded with his claim with seemingly very little regard or due consideration that the matter may not be determined wholly in his favour; and
- the Claimant also had the benefit of professional advice, guidance and representation and it is not a matter in which he should have been ignorant.

51 Further, the Respondents submit the Claimant failed to conduct his case in a reasonable manner throughout proceedings including:

- making the Respondents respond to four different iterations of his claim;
- pursuing a default judgement application which had no reasonable prospects of success;
- continuing to pursue the claim after 8 March 2019;
- continuing to pursue the claim after 26 March 2019 when the offer was more than that of his claim;
- continuing to pursue the claim after 27 March 2019 after the risks of an adverse costs order were raised by Industrial Magistrate Flynn;
- continuing to pursue the claim after 3 April 2019 after the risks of an adverse costs order were reiterated by Industrial Magistrate Scaddan;
- failing to institute reasonable counter offers or negotiations in response to the offers of settlement extended to him demonstrating an unwillingness to compromise and genuinely consider the Respondents' attempts to settle; and
- the Claimant was determined to pursue the matter to hearing notwithstanding the issues with his claim.

52 The Respondents say they have incurred total costs since 26 March 2019 of \$37,946.

53 As I understand the Claimant's submission in response to the application for costs, he says:

- the rejection of the Respondents' offer was not unreasonable in the circumstances;

- the Respondents' purported 'Calderbank' offer of \$45,000 was to be taxed as an employment termination payment if the Claimant discontinued the claims against the Respondents;
- the 'Calderbank' offer was imprecise, not marked 'without prejudice save as to costs', failed to provide a reasonable time period in which to be considered, did not state the costs advantage, did not make provision for costs separate from the principal offer and it was not clear (amongst other things);
- the Claimant's first language is not English, and he was not given a reasonable time to consider the offer with the assistance of an interpreter;
- there were no defects identified in the Claimant's evidence;
- the Respondents' offer was ambiguous where the Respondents' sought indemnity costs on one hand and solicitor/client costs on another;
- an offered sum subject to taxation as an 'employment termination payment' would preclude the Claimant from claiming a tax deduction in respect of the Claimant's legal expenses;
- the Respondents' representative has not been forthcoming on all matters relevant to settlement discussions and has improperly disclosed the content of without prejudice settlement discussions;
- in light of the Respondents' late disclosure of information, it was not unreasonable for the Claimant to conclude the claim would proceed to trial;
- civil penalty proceedings are a prosecution and the Claimant is entitled to claim for a penalty to be imposed; and
- the costs amount is imprecise.

#### **Determination On Costs Application**

54 In *Ryan v Primesafe* [2015] FCA 8, Mortimer J states (omitting citations) at [64] - [65]:

*The discretion conferred by the confined terms of s 570(2) should be exercised cautiously, and the case for its exercise should be clear. The reason for caution is the potential for discouraging parties' pursuit in a complete and robust way of the claims for contravention which they seek to make under the Fair Work Act, or the defence of such claims. The policy behind s 570 is to ensure that the spectra of costs being awarded if a claim is unsuccessful does not loom so large in the mind of potential applicants (in particular, in my opinion) that those with genuine grievances and an arguable evidentiary and legal basis for them are put off commencing or continuing proceedings. It is an access to justice provision. Insofar as it operates to the benefit of respondents, it is designed to ensure respondents feel free to pursue arguable legal and factual responses to the claims made against them'.*

55 In *Fair Work Ombudsman v Skilled Offshore (Australia) Pty Ltd (No 2)* [2015] FCA 1509, Gilmour J states (omitting citations):

- [8] *The purpose of s 570 is to ensure that litigants, including respondents, are not deterred from 'complete[ly] and robust[ly]' defending claims for contravention.*
- [9] *In light of this purpose, costs will rarely be awarded under [s 570] and exceptional circumstances are required to justify the making of such an order. Courts should be particularly cautious before finding that a party has engaged in an unreasonable act or omission, lest that discourages parties from pursuing litigation in the manner which they deem best.*
- [10] *That a party has a 'self-evidently weak case' is not enough to warrant a costs order. There must be 'a higher level of criticism or disapprobation' Indeed, costs were not awarded against the FWO even though elements of the FWO's case were 'artificial and unsatisfactory' and 'potentially bizarre'.*
- [11] *Where a party relies on s 570(2)(b), the Court must be satisfied of two matters: there must be an unreasonable act or omission; and that act or omission must have 'caused' costs to be incurred.*
- [12] *The pursuit of a case by a party in circumstances where, on the materials before the party at the time, there was no substantial prospect of success may constitute an unreasonable act or omission. However, that an argument is ultimately not accepted does not mean it is unreasonable to put it.*
- [13] *Even if the Court is satisfied of a s 570(2) precondition, it retains a discretion not to order costs.*

56 In *Rentuza v Westside Auto Wholesale* [2009] FMCA 1022, Lucev FM states (omitting citations):

- [27] *Whether a party has engaged in an unreasonable act or omission depends upon an objective analysis of the particular circumstances of the case.*
- [28] *The exercise of the discretion in s 570(2)(b) is not necessarily engaged because:*
- (a) *a party does not conduct litigation efficiently;*
  - (b) *a concession is made late;*
  - (c) *a party may have acted in a different or timelier fashion;*
  - (d) *a party has adopted a genuine but misguided approach.*

57 In *McDonald v Parnell Laboratories (Aust) (No 2)* [2007] FCA 2086<sup>4</sup> (referred to in *Australian Licensed Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd (No 2)* [2011] FCA 394 [29]), Buchanan J considered that costs could be awarded against a party for refusing a reasonable offer for settlement, on the basis it constitute 'an unreasonable act or omission, [which] caused another party to the proceeding to incur costs in connection with the proceeding'.

58 Further, in *Australian Licensed Aircraft Engineers Association* [31], Barker J stated:

*It is open to the Court to have regard to the without prejudice exchanges that culminated in the respondent rejecting a final offer of settlement made on behalf of the applicant on 6 January 2011 just before trial in order to determine whether the unreasonable act or omission of the respondent caused the applicant to incur costs.*

59 Ms Langridge deposes to the Respondents making the following offers of settlement:

- on 4 April 2018, the Respondents offered to settle the claim for \$13,377.30 comprising \$6,117.56 for potential underpayment and \$7,259.74 for long service leave owed. The Claimant offered to settle for \$75,000. The Claimant was represented at this time;
- on 8 March 2019, the Respondents offered to settle the claim for \$20,000 if the Claimant agreed to discontinue the claim. The offer was open until 22 March 2019 and the Respondents advised that no further offers would be made, however, the Claimant was put on notice of a cost's application on a solicitor/client basis, if the Claimant's claim was determined for less than \$20,000. The Claimant was represented at this time;
- on 26 March 2019, the parties attended a pre-trial conference. The Respondents' representative read a pre-prepared statement and identified several issues that were also referred to by the IMC in the reasons for decision and identified to the Claimant at the conference. In addition, the Respondents made a further offer of settlement of \$32,399.12 comprising \$17,039.27 for purported unpaid wages between July 2012 and February 2017, \$7,259.74 for long service leave entitlements, \$5,474.67 for unpaid annual leave entitlements, \$1,006.78 for unpaid annual leave loading entitlements and \$1,618.73 for unpaid superannuation contributions. The Claimant provided to the Respondents his own assessment of the penalties to be applied to the claim.
- on 26 March 2019,<sup>5</sup> the Respondents' representative wrote to the Claimant's representative seeking to resolve the claim with an offer of settlement of \$45,000 to be taxed as an employment termination payment if the Claimant discontinued the claim. The correspondence also noted that this amount exceeded the quantum of the Claimant's claim, which at the time was approximately \$39,000. The Claimant was again forewarned of a potential costs application and advised the letter would be produced to the court if necessary. The offer was open to 2 April 2019;
- on 27 March 2019, at a second direction's hearing before Industrial Magistrate Flynn, the Respondents reiterated the offer of \$45,000 to be taxed as an employment termination payment. The offer was an open offer. The Claimant was represented;
- on 29 March 2019, the Respondents' representative again wrote to the Claimant's representative seeking to resolve the claim with an offer of settlement of \$45,000 to be taxed as an employment termination payment if the Claimant discontinued the claim. In this letter the Respondents' representative informed the Claimant's representative that it intended to pursue indemnity costs if the claim was determined less than that offered; and
- on 3 April 2019, at the commencement of the hearing, the Respondents again reiterated its offer of settlement and the court adjourned to allow the Claimant to consider the offer with the assistance of an interpreter. The Claimant was represented.

60 From the court file, the following observations are made:

- the claim originally sought the payment of \$57,000;
- the Claimant was represented from approximately January 2018;
- an amended statement of claim sought to increase the amount claimed by approximately \$15,000;
- in October 2018, the Claimant lodged a second amended statement of claim seeking payment of an amount of \$39,544.64 for various alleged contraventions, a decrease of approximately \$33,000 from the first amended statement of claim;
- in November 2018, the Respondents lodged an amended response to the second amended statement of claim;
- in February 2019, the Claimant lodged his witness statement;
- on 13 March 2019, the Respondents lodged three witness statements for witnesses who gave evidence at the hearing on behalf of the Respondents;
- on 13 March 2019, the parties attended at a direction's hearing and the Respondents' representative informed the court that the Respondents had engaged an accountant to reconcile the amount sought with an intention to put a further offer of settlement to the Claimant. On that basis the claim was adjourned to 27 March 2019 to facilitate a possible settlement;
- on 26 March 2019, the Claimant lodged three additional witness statements, including a second witness statement by the Claimant;
- on 27 March 2019, a second directions hearing occurred before Industrial Magistrate Flynn (referred to above);
- on 28 March 2019, a draft amended statement of agreed facts was lodged with the court; and
- on 2 April 2019, the parties lodged submissions and a tender bundle.

61 Therefore, by the time the parties appeared at the second directions hearing on 27 March 2019, the parties' evidentiary and legal position ought to have been well known.

- 62 On 27 March 2019, Industrial Magistrate Flynn expressed concern about the proper consideration of an offer made in excess of the claimed amount. His Honour cautioned the Claimant and his representative against holding out for the payment of a civil penalty and seeking retribution. Similar comments were made at the commencement of the hearing on 3 April 2019.
- 63 Ultimately, at the conclusion of the hearing the Claimant was successful, in part, although significantly the Claimant was unsuccessful against Mr Johnson, unsuccessful in demonstrating that he was terminated as opposed to abandoning his employment and unsuccessful in demonstrating that he was a Cook Grade 4.
- 64 The amount the Claimant was found to have been underpaid (by various contraventions) was \$13,679.21 of which long service leave was the most significant portion and the least significant issue (given it had been admitted). This amount is significantly less than that offered by the Respondents from 8 March 2019 onwards, significantly less than the amount claimed by the Claimant in the second amended statement of claim and approximately the same amount offered by the Respondents on 4 April 2018.
- 65 In fact, the amount awarded to the Claimant inclusive of a civil penalty is less than the amount offered by the Respondents from 26 March 2019 onwards.
- 66 At the time the offer was made on 26 March 2019 the Claimant faced not only the usual contingencies and risks associated with litigation but also held within his knowledge an appreciation of the facts of his case, including the knowledge of any weakness associated with being unable to prove to the requisite standard the termination of his employment and accessorial liability of Mr Johnson. The offer represented a commercial settlement for all parties.
- 67 Certainly, on 3 April 2019 the court facilitated reconsideration of the offer of settlement with the assistance of the interpreter. However, the Claimant, had he thought it necessary to do so, could have sought the assistance of an interpreter at any time prior, along with his representative, to consider any of the offers.
- 68 In my view, this is a case where the Claimant, contrary to observations made by the court, held out for the payment of a civil penalty in circumstances where a reasonable offer had been made in excess of the amount claimed by him. In so doing, I am satisfied, and I find, that the Claimant's refusal of the offer from 26 March 2019 was an unreasonable act by him and that this unreasonable act caused the Respondents to incur further costs associated with and at the hearing.
- 69 Accordingly, I am satisfied that the Respondents have demonstrated that this is an appropriate occasion to award costs pursuant to s 570 of the Act on the basis that they have incurred costs from 26 March 2019 because of the Claimant's unreasonable act in failing to accept the offer on 26 March 2019.
- 70 I am not persuaded purported tax implications as suggested by the Claimant provide a basis for his refusal of the offer where there are possible tax implications (a matter for the Commissioner of Taxation) in any event. Nothing in the associated correspondence suggests otherwise.
- 71 While I am satisfied that it is appropriate that the Claimant pay costs, I also recognise that the Claimant was partly successful in establishing his claim. In my view, where he was partly successful in proving his claim, I consider it appropriate he pay 50% of the Respondents' costs incurred from 26 March 2019 to 4 April 2019 (including the hearing dates) on a solicitor/client basis (not indemnity basis).
- 72 The amount of costs is to be taxed if not agreed.

### **Orders**

- 73 Subject to any liability (if any) to the Commissioner of Taxation pursuant to the *Taxation Administration Act* (Cth), the First Respondent is to pay to the Claimant within 28 days:
- \$13,152.46 on account of underpayments as identified; and
  - a pecuniary penalty of \$27,000.
- 74 Further, the First Respondent is ordered to pay within 28 days:
- \$526.75 in superannuation contribution to the relevant superannuation fund for the benefit of the Claimant; and
  - interest on the judgment amount of \$13,679.21 fixed in the amount of \$2,205.94.
- 75 The Claimant is to pay 50% of the Respondents' costs on a solicitor/client basis for costs incurred from 26 March 2019 to 4 April 2019 (inclusive) to be taxed if not agreed.

### **D. SCADDAN**

#### **INDUSTRIAL MAGISTRATE**

<sup>1</sup> The contravention period was from 1 July 2012 to September 2017 and the penalty rates per penalty unit occurred was increased over this time. I accept that the appropriate rate per penalty unit is \$170 for pre-2017 monetary contraventions and \$210 for post-2017 monetary and non-monetary contraventions.

<sup>2</sup> See footnote 1.

<sup>3</sup> *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate; Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46 [55] (referring to *Trade Practices Commission v CSR Ltd* [1990] FCA 521).

<sup>4</sup> This case dealt with costs under s 824 of the *Workplace Relations Act 1996* (Cth).

<sup>5</sup> See 'LL7' - I note the letter date is 8 March 2019, however, the contents of the letter are clearly referable to the mediation on 26 March 2019 and the letter was sent to the Claimant's representative.

**Schedule I: Jurisdiction, Practice And Procedure Of The Industrial Magistrates Court (WA) Under The Fair Work Act 2009 (Cth)**

**Jurisdiction**

- [1] An employee, an employee organisation 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. The Industrial Magistrates Court (WA) (IMC), being a court constituted by an industrial magistrate, is 'an eligible State or Territory court': s 12 of the FWA (see definitions of 'eligible State or Territory court' and 'Magistrates Court'); *Industrial Relations Act 1979* (WA), s 81, s 81B.
- [2] The application to the IMC must be made within six years after the day on which the contravention of the civil penalty provision occurred: s 544 of the FWA.
- [3] The civil penalty provisions identified in s 539 of the FWA include:  
Section 45 – contravention of a modern award  
Section 535 – failing to keep prescribed records of employment
- [4] 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': s 14, s 12 of the FWA. 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': s 13 of the FWA. It is not in dispute and it was found that the First Respondent is a corporation to which paragraph 51(xx) of the Constitution applies and that the Claimant was employed by the First Respondent.
- [5] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the court may make orders for a person to pay a pecuniary penalty: s 546 of the FWA.

**Burden And Standard Of Proof**

- [6] In an application under the Act, the Claimant carries the burden of proving the claim. 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.*
- [7] 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; (1938) 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].*
- [8] Where in this decision it is stated that a finding has been made, the finding is made on the balance of probabilities. Where it is stated that a finding has not been made or cannot be made, then no finding can be made on the balance of probabilities.

**Practice And Procedure Of The Industrial Magistrates Court**

- [9] The *Industrial Relations Act 1979* (WA) provides that, except as prescribed by or under the FWA, the powers, practice and procedure of the IMC is to be the same as if the proceedings were a case under the *Magistrates Court (Civil Proceedings) Act 2004* (WA): s 81CA. Relevantly, regulations prescribed under the *Industrial Relations Act 1979* (WA) provide for an exception: a court hearing a trial is not bound by the rules of evidence and may inform itself on any matter and in any manner as it thinks fit: regulation 35(4).
- [10] In *Sammur v AVM Holdings Pty Ltd [No2]* [2012] WASC 27, Commissioner Sleight examined a similarly worded provision regulating the conduct of proceedings in the State Administrative Tribunal and made the following observation (omitting citations):  
*... The tribunal is not bound by the rules of evidence and may inform itself in such a manner as it thinks appropriate. This does not mean that the rules of evidence are to be ignored. The more flexible procedure provided for does not justify decisions made without a basis in evidence having probative force. The drawing of an inference without evidence is an error of law. Similarly, such error is shown when the tribunal bases its conclusion on its own view of a matter which requires evidence [40].*

**Schedule II: Pecuniary Penalty Orders Under The Fair Work Act 2009 (Cth)**

**Pecuniary Penalty Orders**

- [1] The FWA provides that the IMC may order a person to pay an appropriate pecuniary penalty if the court is satisfied that the person has contravened a civil remedy provision: s 546(1). The maximum penalty for each contravention by a natural person, expressed as a number of penalty units, set out in a table found in s 539(2) of the Act: s 546(2) of the Act. If the

- contravener is a body corporate, the maximum penalty is five times the maximum number of penalty units proscribed for a natural person: s 546(2) of the Act.
- [2] The rate of a penalty unit is set by s 4AA of the *Crimes Act 1914* (Cth): s 12 of the FWA. The relevant rate is that applicable at the date of the contravening conduct:
- |                             |       |
|-----------------------------|-------|
| Before 28 December 2012     | \$110 |
| Commencing 28 December 2012 | \$170 |
| Commencing 31 July 2015     | \$180 |
| Commencing 1 July 2017      | \$210 |
- [3] The purpose served by penalties was described by Katzmann J in *Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)* [2017] FCA 557 [338] in the following terms (omitting citations):
- In contrast to the criminal law, however, where, in sentencing, retribution and rehabilitation are also relevant, the primary, if not the only, purpose of a civil penalty is to promote the public interest in compliance with the law. This is achieved by imposing penalties that are sufficiently high to deter the wrongdoer from engaging in similar conduct in the future (specific deterrence) and to deter others who might be tempted to contravene (general deterrence). The penalty for each contravention or course of conduct is to be no more and no less than is necessary for that purpose.*
- [4] In *Kelly v Fitzpatrick* [2007] FCA 1080; 166 IR 14 [14], Tracey J adopted the following ‘non-exhaustive range of considerations to which regard may be had in determining whether particular conduct calls for the imposition of a penalty, and if it does the amount of the penalty’ which had been set out by Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7:
- The nature and extent of the conduct which led to the breaches.
  - The circumstances in which that conduct took place.
  - The nature and extent of any loss or damage sustained as a result of the breaches.
  - Whether there had been similar previous conduct by the respondent.
  - Whether the breaches were properly distinct or arose out of the one course of conduct.
  - The size of the business enterprise involved.
  - Whether or not the breaches were deliberate.
  - Whether senior management was involved in the breaches.
  - Whether the party committing the breach had exhibited contrition.
  - Whether the party committing the breach had taken corrective action.
  - Whether the party committing the breach had cooperated with the enforcement authorities.
  - The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements and
  - The need for specific and general deterrence.
- [5] The list is not ‘a rigid catalogue of matters for attention. At the end of the day the task of the court is to fix a penalty which pays appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public confidence in the statutory regime which imposes the obligations.’ (Buchanan J in *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8; 165 FCR 560 [91]).
- [6] ‘Multiple contraventions’ may occur because the contravening conduct done an employer: (a) resulted in a contravention of a single civil penalty provision or resulted in the contravention of multiple civil penalty provisions; (b) was done once only or was repeated; (c) was done with respect to a single employee or was done with respect to multiple employees.
- [7] The fixing of a pecuniary penalty for multiple contraventions is subject to s 557 of the FWA. It provides that two or more contraventions of specified civil remedy provisions (including contraventions of an enterprise agreement and a contravention on section 323 on the payments) by an employer are taken to be a single contravention if the contraventions arose out of a course of conduct by the employer. Subject to proof of a ‘course of conduct’, the section applies to contravening conduct that results in multiple contraventions of a single civil penalty provision whether by reason of the same conduct done on multiple occasions or conduct done once with respect to multiple employees: *Rocky Holdings Pty Ltd v Fair Work Ombudsman* [2014] FCAFC 62; (2014) 221 FCR 153; *Fair Work Ombudsman v South Jin Pty Ltd (No 2)* [2016] FCA 832 [22] (White J) The section does *not* to apply to case where the contravening conduct results in the contravention of multiple civil penalty provisions (example (a) above): *Grouped Property Services Pty Ltd (No 2)* [411] ff (Katzmann J).
- [8] The totality of the penalty must be re-assessed in light of the totality of the offending behaviour. If the resulting penalty is disproportionately harsh, it may be necessary to reduce the penalty for individual contraventions. *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560; 246 ALR 35; [2008] FCAFC 8; [47] – [52].
- [9] Section 546(3) of the FWA also provides:
- Payment of penalty**
- (3) *The court may order that the pecuniary penalty, or a part of the penalty, be paid to:*
- (a) *the Commonwealth; or*
  - (b) *a particular organisation; or*
  - (c) *a particular person.*

- [10] In *Milardovic v Vemco Services Pty Ltd (Administrators Appointed) (No 2)* [2016] FCA 244 [40] - [44], Mortimer J summarised the law (omitting citations and quotations) on this provision in light of *Sayed*:

*The power conveyed by s 546(3) is ordinarily to be exercised by awarding any penalty to the successful applicant. The initiating party is normally the proper recipient of the penalty as part of a system of recognising particular interests in certain classes of persons in upholding the integrity of awards and agreements the subject of penal proceedings. Where a public official vindicates the law by suing for and obtaining a penalty, it is appropriate that the penalty be paid to the Consolidated Revenue Fund. Otherwise, the general rule remains appropriate, that the penalty is to be paid to the party initiating the proceeding, with the 'Gibbs exception' (*Gibbs v The Mayor, Councillors and Citizens of City of Altona* [1992] FCA 553) that the penalty may be ordered to be paid to the organisation on whose behalf the initiating party has acted.*

## UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2019 WAIRC 00694

### WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**CITATION** : 2019 WAIRC 00694  
**CORAM** : COMMISSIONER T EMMANUEL  
**HEARD** : WEDNESDAY, 28 AUGUST 2019  
**DELIVERED** : FRIDAY, 6 SEPTEMBER 2019  
**FILE NO.** : B 71 OF 2019  
**BETWEEN** : BRIDIE CONROY  
 Applicant  
 AND  
 MR DESMOND ROUS  
 Respondent

**CatchWords** : Industrial law (WA) - denial of contractual benefits - whether the respondent was duly served with notice of the proceedings - claim for unpaid salary  
**Legislation** : *Industrial Relations Act 1979* (WA) s 7(1), s 27(1)(d), s 29(1)(b)(ii)  
*Industrial Relations Commission Regulations 2005* (WA) reg 24(2)(d)  
**Result** : Declaration made and order issued  
**Representation:**  
 Applicant : Mr J Dasey (of counsel)  
 Respondent : No appearance

#### Cases referred to in reasons:

*Hotcopper Australia Ltd v Saab* [2002] WASCA 190; (2002) 82 WAIG 2020

#### *Reasons for Decision*

- 1 Ms Conroy worked as a receptionist, and then later an accountant, for Mr Rous for over 20 years. She says that he owes her \$10,157.72 (gross) in unpaid salary under her contract of employment.
- No appearance by the respondent**
- 2 Mr Rous did not file a response to this claim, attend the conciliation conference or appear at the hearing. Despite being invited to authorise a representative to appear on his behalf or ask for an adjournment if he was unable to participate in proceedings, Mr Rous did neither.
- 3 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) *Industrial Relations Act 1979* (WA) (**IR Act**).
- 4 Service on the respondent in this matter may be effected by leaving the notice at, or sending it by pre-paid post to, Mr Rous' usual or last known place of abode or place of business: reg 24(2)(d) *Industrial Relations Commission Regulations 2005* (WA).
- 5 Ms Conroy tendered a document showing Mr Rous' registration details with the Australian Government Tax Practitioners' Board and an extract from the Yellow Pages in support of her evidence that Mr Rous' place of business is 24 Railway Parade in Midland. That is the same address that appears in the email signature used by Mr Rous when he wrote to my Associate. The notice of hearing was posted to that address three weeks before the hearing date.
- 6 Accordingly, I am satisfied Mr Rous has been duly served with notice of these proceedings and the Commission may proceed with the hearing in his absence.

**What must I decide?**

- 7 The principles that apply to denied contractual benefit claims are well settled. The claim must relate to an 'industrial matter' and be made by an employee. The benefit claimed must be one the employee is entitled to under a contract of service and not arise under an award or order of the Commission. The benefit must have been denied by the employer: *Hotcopper Australia Ltd v Saab* [2002] WASCA 190; (2002) 82 WAIG 2020.
- 8 To resolve this matter, I must decide whether Mr Rous employed Ms Conroy and owes her salary under her contract of employment.

**Ms Conroy's evidence**

- 9 Ms Conroy gave evidence at the hearing that she was employed under a written contract of employment by Mr Rous in 1999. She does not have a copy of the written contract of employment. She started as a receptionist and worked in several roles, eventually becoming a senior accountant in 2010. Ms Conroy's evidence is that she worked as a permanent, full-time employee since 1999. There was no break in her service. As a permanent employee, she could take sick leave and annual leave.
- 10 Ms Conroy gave evidence that her salary increased every few years, most recently about two years ago. The effect of her evidence is that in around March 2017 she and Mr Rous agreed that her salary would be \$88,000 (gross) per year, being \$3,384.62 (gross) each fortnight. She tendered Australian Tax Office group certificate documents and payslips in support of her evidence.
- 11 Ms Conroy says Mr Rous stopped paying her properly in January 2019. She was not paid her full salary over several months. Ms Conroy kept a spreadsheet between January and March 2019, noting the amount of salary that should have been paid each fortnight and how much she received. She tendered that spreadsheet in evidence.
- 12 Ms Conroy's evidence is that Mr Rous was due to pay her a fortnightly salary of \$3,384.62 (gross) on 19 January, 1 and 16 February and 1, 15 and 29 March 2019.
- 13 However, Ms Conroy says she was not paid her full salary on these dates as agreed. Instead, she received sporadic payments during that period that came to a total of \$10,150 (gross).
- 14 Ms Conroy resigned on 29 March 2019. Since that time, Ms Conroy says Mr Rous has continued to deny her contractual benefits of \$10,157.72 in unpaid salary.

**Consideration**

- 15 Ms Conroy's claim clearly relates to an industrial matter.
- 16 Ms Conroy was a credible witness. Her oral evidence was supported by documentary evidence. In particular, Ms Conroy's payslips confirmed that she was employed by Mr Rous on a full-time permanent basis and her salary was \$88,000 (gross) per year.
- 17 Without any evidence or argument from Mr Rous to contradict Ms Conroy, there is no reason for me to doubt her. I accept Ms Conroy's evidence.
- 18 I find that Ms Conroy has been employed by Mr Rous since 1999 under a written contract of employment. Her salary increased over that time and in around March 2017 they agreed Ms Conroy's salary would be \$88,000 (gross) per year.
- 19 Ms Conroy worked as a permanent full-time employee and was entitled to receive the benefit of her salary, being \$3,384.62 (gross) each fortnight, under her contract of employment. Mr Rous' email to Ms Conroy on 16 April 2019, with the subject 'B. Conroy outstanding wages', suggests that Mr Rous acknowledges he did not pay Ms Conroy for work she did. I accept Ms Conroy's evidence and find Mr Rous denied Ms Conroy her contractual benefit to \$10,157.72 (gross) by failing to pay her salary in full for work done between January and March 2019.
- 20 Ms Conroy's application is upheld. I will order that Mr Rous pay Ms Conroy \$10,157.72 (gross) within 14 days.

**2019 WAIRC 00695**

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
BRIDIE CONROY

**APPLICANT****-v-**

MR DESMOND ROUS

**RESPONDENT**

**CORAM** COMMISSIONER T EMMANUEL  
**DATE** FRIDAY, 6 SEPTEMBER 2019  
**FILE NO/S** B 71 OF 2019  
**CITATION NO.** 2019 WAIRC 00695

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|                       |                         |
|-----------------------|-------------------------|
| <b>Result</b>         | Order issued            |
| <b>Representation</b> |                         |
| <b>Applicant</b>      | Mr J Dasey (of counsel) |
| <b>Respondent</b>     | No appearance           |

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*Declaration and order*

HAVING heard from Mr J Dasey on behalf of the applicant and there being no appearance on behalf of the respondent;  
NOW THEREFORE the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA) –

1. DECLARES that the respondent denied the applicant her contractual benefit to salary.
2. ORDERS that the respondent pay the applicant \$10,157.72 (gross) within 14 days of the date of this order.

(Sgd.) T EMMANUEL,  
Commissioner.

[L.S.]

**2019 WAIRC 00653**

**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

|                  |   |                                |
|------------------|---|--------------------------------|
| <b>CITATION</b>  | : | 2019 WAIRC 00653               |
| <b>CORAM</b>     | : | SENIOR COMMISSIONER S J KENNER |
| <b>HEARD</b>     | : | MONDAY, 8 JULY 2019            |
| <b>DELIVERED</b> | : | THURSDAY, 22 AUGUST 2019       |
| <b>FILE NO.</b>  | : | B 54 OF 2019                   |
| <b>BETWEEN</b>   | : | KAREN KOBA                     |
|                  |   | Applicant                      |
|                  |   | AND                            |
|                  |   | CREST PERSONNEL PTY LTD        |
|                  |   | Respondent                     |

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|                        |   |  |
|------------------------|---|--|
| Catchwords             | : | <i>Industrial Relations Law (WA) - Contractual benefits claim - Claim for underpayment of wages in accordance with rate contained in written employment contract and assignment agreement - Respondent relied on doctrine of mistake - Principles applied - Daily rate agreed between the parties prior to written agreement - Doctrine of unilateral mistake applies - Unfair and inequitable to enforce payment - Order issued</i> |
| Legislation            | : | <i>Industrial Relations Act 1979</i> (WA)  |
| Result                 | : | Application dismissed  |
| <b>Representation:</b> |   |  |
| Counsel:               |   |  |
| Applicant              | : | In person  |
| Respondent             | : | Mr M Procopio of counsel   |
| Solicitors:            |   |  |
| Respondent             | : | Procopio Legal   |

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

*David Securities Pty Ltd and Others v Commonwealth Bank of Australia* (1992) 175 CLR 353

*Hotcopper Australia Ltd v David Saab* [2001] WAIRC 03827; (2001) 81 WAIG 2704

*New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662

**Case(s) also cited:**

*Triantopoulos v Shell Company of Australia Ltd* [2011] WAIRC 00004; (2011) 91 WAIG 67

*Reasons for Decision*

**Background**

- 1 The applicant commenced employment with the respondent, a labour hire business, on 1 May 2014. On 8 May 2014, the parties entered into a written “On-Hire Employee Employment Agreement”. Part of the parties’ arrangement was an Assignment

Agreement, also executed on 8 May 2014, that “on-hired” the applicant as a Procurement Specialist to the host organisation, Apache Energy Ltd. The Assignment Agreement was for the period of 1 May 2014 to 31 March 2015. As a Procurement Specialist, the applicant was required to purchase items on behalf of Apache.

- 2 Prior to the applicant’s employment with the respondent, the applicant was contracted to Apache through an alternative labour hire company, Black Gold Solutions. In September 2013, Apache enacted changes to the engagement and administration of contracts, which included consolidating its pool of personnel agencies to seven, and excluding BGS. To commence further assignments to Apache, the applicant was required to be employed with an alternative labour hire company of her choice, from those that remained on the panel of agencies utilised by Apache. It was around this time that the applicant contacted Mr Gallacher, a consultant of the respondent, and the parties commenced email discussions.

#### **Discussions leading up to the Agreement**

- 3 On 8 April 2014, Mr Gallacher sent an email to the applicant requesting the applicant’s daily or hourly pay rate. On the same date, the applicant responded and advised that her daily rate (inclusive of superannuation) was \$458.99. On 17 April 2014, Ms Anderson, a contract administrator at Apache, sent an email to Mr Gallacher, copying in the applicant, which advised that the applicant’s daily rate was in fact \$472.46. This was due to a 2.7% increase that the applicant was eligible for. On 17 April 2014, the applicant replied to Ms Anderson’s email advising that the rate of \$472.46 was also incorrect as the applicant’s role had recently increased to include service orders. It was not at all clear what this meant, as the applicant had provided her rate of pay to Mr Gallacher, as requested and nothing was further said about it. Mr Gallacher was not copied into this email. These emails were tendered as exhibit A2.
- 4 The applicant gave evidence that six days into her employment, she was provided with the Agreement and the Assignment Agreement, already signed by the respondent. The applicant said she noticed some “obvious differences” from her previous employment contract with BGS. The notice period had been reduced from seven to five days, her hours had increased from 37 and a half per week to 40 hours per week and she could no longer claim overtime.
- 5 The Assignment Agreement contained a higher daily pay rate than the rate of \$472.46 discussed between the applicant and Mr Gallacher. Clause 9 read as follows:

#### **9. Daily Rate of Pay**

Your rate of pay on this assignment, unless otherwise advised in writing, shall be

##### **Pay Rate 1st April 2014 – 30<sup>th</sup> June 2014**

Office Rate: \$536.24 per day (inc Super 9.25%)

Site Rate: \$616.68 per day (inc Super 9.25%)

Offshore Rate: \$713.20 per day (inc Super 9.25%)

##### **Pay Rate 1st July 2014 – 31st March 2015**

Office Rate: \$537.47 per day (inc Super 9.5%)

Site Rate: \$618.09 per day (inc Super 9.5%)

Offshore Rate: \$714.83 per day (inc Super 9.5%)

This daily rate of pay includes all entitlements as set out in your Employment Agreement.

Your pay period will be fortnightly

- 6 The respondent submitted that the daily pay rates specified in the Assignment Agreement were in error. The applicant’s daily remuneration rate was mistakenly specified as being the general rates charged by the respondent to Apache in respect of the respondent’s service provided to Apache, and not the daily rate of pay for the applicant. The respondent says the error was obvious and would have been apparent to the applicant, who did not provide any specific explanation or evidence as to how her role changed, to warrant a \$75 to \$80 increase per day. The parties entered into the Assignment Agreement to confirm the agreed remuneration and the length of the applicant’s placement, not to increase the previously agreed daily pay rate, on the respondent’s submissions.
- 7 The applicant’s position was that the increased daily rate was not unexpected. This was due to the noticeable differences in her contract conditions, as outlined above. Additionally, the applicant said labour hire agencies apply varying mark-ups which alter the rate payable to employees. The applicant did not discuss these changes with Mr Gallacher as in her mind, the higher rate made sense. She submitted that the email chain between the applicant, Mr Gallacher and Ms Anderson (exhibit A2) was inconclusive as both the applicant and Ms Anderson provided incorrect rates that were based on a 37-hour week and not a 40-hour week. There was also a suggestion in the applicant’s evidence of change in duties at about the time that she commenced with the respondent, but this was vague and unclear. It certainly was not said that there was such a change in duties and responsibilities to warrant a large increase in pay. There was also no reference to this in the correspondence between the applicant and the respondent, prior to her commencement. In any event, the applicant accepted that at no time did anyone from the respondent suggest to her, or agree, prior to receiving the Assignment Agreement, that she would be receiving an increase in her then daily rate of \$75 to \$80.
- 8 The applicant’s original claim was for the denied contractual benefits of payments in the sum of \$31,280.04 and overtime in the sum of \$10,883.77. The applicant abandoned the claim for overtime and proceeded with the claim for unpaid wages.

#### **Discussions after commencement of employment**

- 9 On 6 June 2014, the applicant sent an email to Mr Gallacher asking him to follow up on her “back pay” to 1 April 2014. The applicant says this was payable to her due to her rate increase in the Assignment Agreement. The applicant also requested a follow up on the first half of her incentive bonus, a bonus received by employees for signing up with the respondent. The applicant sent a

second email to Mr Gallacher on 11 June 2014, confirming she had reviewed her payslip and had not received any back pay or portion of her incentive bonus. The applicant requested an update. The applicant followed up again by email on 17, 21 and 22 July 2014. As to the back pay, this needs to be put in context. The evidence revealed that the additional 2.7% to be paid to the applicant, was also to apply for the final few months of the applicant's employment with BGS. The applicant agreed that the amount in issue was \$248.40. This was referred to in the applicant's emails to Mr Gallacher of 6 and 11 June 2014 (see exhibit R4). The applicant was also following up on payment of the first half of her sign on bonus.

- 10 On 23 July 2014, Mr Gallacher emailed the applicant and advised that the respondent had included incorrect rates in the applicant's Assignment Agreement and attached a revised agreement with adjusted rates (see exhibit R6). On 29 July 2014, the applicant replied to Mr Gallacher asking if the respondent could process her pay earlier than usual for this pay period. The applicant said she had budgeted using the rates in her Assignment Agreement and had consequently fallen short. She did not say anything about or dispute what Mr Gallacher had said regarding the respondent's error in the schedule to the Assignment Agreement (see exhibit R7). The applicant did not sign the document sent to her by Mr Gallacher with the revised daily rates of pay.
- 11 The respondent submitted that the applicant was paid the agreed rate of \$472.46 throughout the period of her employment and curiously, the applicant did not raise a complaint at the time of Mr Gallacher's email of 23 July 2014, or at all, throughout the remainder of her employment. The applicant's assignment to Apache was extended for a further year on 1 April 2015 to 31 March 2016, at the rate of \$473.54. Again, the respondent submitted that the applicant raised no objection to being paid this amount. A copy of the second Assignment Agreement was tendered as exhibit R9. The second Assignment Agreement contained the same rate as the corrected first Assignment Agreement. Again, as with the corrected Assignment Agreement sent by Mr Gallacher to the applicant on 23 July 2014, the second Assignment Agreement was also not signed by the applicant, although she worked under these terms and conditions and was paid at the rate specified in it for the duration of her employment under it. Additionally, on the evidence, at no time from 1 April 2015 to 31 March 2016, did the applicant raise any issue with her daily rate of pay, as set out in the second Assignment Agreement.
- 12 The applicant ceased working for the respondent in March 2016. The applicant said the delay in commencing these proceedings was due to the fact she was previously unaware she could pursue contractual benefits after her employment with the respondent had ceased.

#### **Denied contractual benefits – general principles**

- 13 The principles applied in denied contractual benefits claims are well settled. The claim must relate to an "industrial matter"; the claimant must be an employee; the claimed benefit must be a "contractual benefit" as being one to which the employee is entitled under their contract of service; the relevant contract must be one of service; the benefit must not arise under an award or order of the Commission; and the benefit must have been denied by the employer: *Hotcopper Australia Ltd v David Saab* [2001] WAIRC 03827; (2001) 81 WAIG 2704 at 2707.

#### **Mistake**

- 14 The respondent relied upon the doctrine of mistake. It submitted that at common law, mistake comprehends not merely just a belief arising from an erroneous conclusion to a matter of fact or law, but also comprehends a mistaken belief arising from inadvertence to, or ignorance of the existence of a fact or legal requirement. In this regard, the respondent relied upon the High Court decision of *David Securities Pty Ltd and Others v Commonwealth Bank of Australia* (1992) 175 CLR 353. The respondent further submitted that had the respondent paid the incorrect rate specified in the Assignment Agreement to the applicant, that the applicant would have been under an obligation to make restitution for the difference in accordance with the doctrine of mistake (*New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662).
- 15 As a matter of contractual principle, common mistake occurs when the employer and employee have agreed the terms of the employment contract, however the written document does not accurately reflect the agreement. A unilateral mistake in contract law can arise when one party mistakenly believes that a written agreement is accurate, while the other party is aware of the mistake and acts unconscionably in relation to it (See generally *Chitty on Contracts Volume 1 General Principles*, Twenty Seventh Edition, Chapter 5).
- 16 A court can grant the rectification of a contract to accurately reflect the common intention of the parties. An employer asserting that the employment contract contains a mistake will need to establish that the parties agreed to the term prior to recording the agreement in writing; the written contract does not accurately reflect the agreement; that it was the continuing intention of the parties, from the time the term was agreed until the time the written contract was formed, that the term remained as agreed; and if rectification were to be granted, the written contract would give effect to the common intention of the parties.

#### **The Agreement**

- 17 The Agreement, read with the Assignment Agreement, provides different daily pay rates for office, onsite and offshore work. The listed amounts increased slightly from the period 1 April 2014 – 30 June 2014 to the period 1 July 2014 – 31 March 2015. Clause 10 of the Agreement, titled 'rate of pay' reads as follows:

#### **10. RATE OF PAY**

- 10.1. Your hourly or daily rate of pay when performing an Assignment will be as set out in the Assignment Agreement.
- 10.2. CREST pays you above the minimum pay rate that is required by the relevant Workplace Laws, and all the monetary obligations imposed on CREST under those Workplace Laws, including the relevant modern award, are included in the amounts that CREST pays you.
- 10.3. This means that all monetary entitlements - including but not limited to overtime, allowances, penalties, loadings and other amounts to which you are or may become

entitled under any Workplace Law - are satisfied by, and may be offset against the amount you are paid in excess of the minimum required pay rate.

- 10.4. If the provisions of any Workplace Law entitle you to any other amounts by way of wages, penalties, allowances, contributions, or any other entitlement whatsoever, this will be absorbed in and set off against the rates, entitlements and benefits set out in this Employment Agreement and the Assignment Agreement that applies to your employment.
- 10.5. The payment of a rate of pay on any particular Assignment shall not provide you with any right to continuing payment of such rate of pay on alternative Assignments.
- 10.6. Nothing in this Clause shall import the terms of any Workplace Law in to this Agreement.
- 10.7. During any Assignment, CREST will pay you in arrears the amount to which you are entitled by virtue of this Employment Agreement and the applicable Assignment Agreement less all taxes required by law. Your pay period will be as set out in the applicable Assignment Agreement.
- 10.8. You must not discuss your hourly rate of pay with anyone while you are engaged by CREST under this Agreement.
- 10.9. CREST will make superannuation contributions on your behalf in accordance with our legislative obligations.
- 10.10. If incorrect payments occur due to administrative problems or errors in interpreting or processing timesheets, these errors will be rectified by applying a negative or positive adjustment to your pay, as appropriate. This would usually occur in the next pay period.
- 10.11. CREST reserves the right to reclaim any amounts overpaid in error. You agree that any overpayments are immediately repayable by you to CREST as a debt. You agree that overpayments may be deducted from any monies owed to you by CREST, in the next week's pay period or upon termination of assignment, as applicable. If no such monies are owing to you, you agree to repay the amount immediately, unless we have agreed alternative repayments terms.

- 18 Clause 9 of the Assignment Agreement specified the daily rates of pay as provided at par 5 above. Clause 12 of the Agreement titled "hours of work" was as follows:

**12. HOURS OF WORK**

- 12.1. Your ordinary hours of work will be specified in the Crest Assignment Agreement or as otherwise prescribed by any applicable Workplace Law. You may be required to work reasonable additional hours in accordance with the Act.
- 12.2. Where an hourly rate is shown in the Schedule, your rate of pay incorporates payment for any additional amounts payable such as overtime rates, penalties, loadings or like payments under any Workplace Law for the hours of work you perform.
- 12.3. Where a daily rate is shown in the Schedule, you may be required to perform additional hours of work on a particular day where this is reasonably required by the Client. Your remuneration incorporates payment for all hours worked, including any additional amounts payable for overtime, penalties, loadings or like payments under any Workplace Law for the hours of work you perform.
- 12.4. In some cases, the Client may have a policy that provides for additional amounts to be paid to you in respect of additional hours. Where the Client agrees to apply these additional payments in respect of an Assignment, CREST will pass the additional payments on to you. This does not give rise to a legal right or benefit enforceable by you.

- 19 Clause 6 of the Assignment Agreement specified the hours of work as follows:

**6. Hours of work**

Your ordinary hours of work will be

Based on a minimum of 9 hour working day Monday to Thursday and on Friday balance of hours to makeup the total of 40 hours.

The daily rate shall apply to any overtime worked in excess 45 hours per week or travel.

Provided it is approved in advance by the Client.

- 20 On the termination of her employment with the respondent, the applicant commenced work with another labour hire firm, Competentia. The applicant remained working for Apache as an "on hire" employee, on similar terms to her arrangement with the respondent. Notably, the evidence was that the rates of pay that the applicant was paid by Competentia, for largely the same services performed for Apache (which subsequently changed its name to Quadrant Energy), were very similar to the daily rates the respondent submitted were the correct rates. These rates were paid to the applicant by the respondent, throughout the course of the applicant's employment. While I do not place too much weight on this evidence, it puts the rates discussed between the applicant and the respondent prior to her commencement in the respondent's employment, in context.

- 21 Evidence on behalf of the respondent was given by Mr Dworakowski who is the company's owner. He outlined how the respondent business operates. He testified that at the material times, Apache provided the rates that it agreed to pay for staff, and the respondent then added its margin for the fees to provide the services. Therefore, according to Mr Dworakowski, the respondent did not have any direct involvement in the negotiation of the rates of pay to be paid to the applicant. In effect, the respondent paid the rates as stipulated by Apache. He referred to the purchase order from Apache to the respondent for the provision of procurement services. A copy of the purchase order was exhibit R15. Mr Dworakowski said that it was clear from the purchase order that the rate which was inserted into the Agreement and the Assignment Agreement between the applicant and the respondent, incorrectly cited the rates that the respondent charged Apache for its services, which contained the respondent's margin.
- 22 Once Mr Gallacher saw the mistake, he sent a revised Assignment Agreement with the correct rates to the applicant on 23 July 2014. The revised and corrected rates were the rates originally proposed by the applicant, plus a 2.7% increase that she was entitled to at that time. The respondent did not at any time, pay the applicant the higher rate that was mistakenly included in the Assignment Agreement. At all material times, the rate paid to the applicant by the respondent was the rate that the applicant originally advised she was then receiving from Apache, including the 2.7% increase, and as contained in the documents sent to the applicant by Mr Gallacher to correct the Agreement, on 23 July 2014.

### Consideration

- 23 I have no hesitation in concluding on the evidence that the daily rates included in the applicant's original Assignment Agreement document contained the wrong rates and those rates were included in the document by Mr Gallacher in error. Those rates were the rates to be paid by Apache to the respondent for the provision of the applicant's services to Apache as a procurement specialist. These rates included the margin payable to the respondent by Apache, as exhibit R15 makes clear. It would simply be nonsensical and defy commercial logic for the respondent to pay to the applicant the daily rate that Apache was contractually obliged to pay to the respondent, which would mean that no margin would be payable to the respondent for the provision of the applicant's services. In effect the applicant's services would be provided to Apache by the respondent free of charge.
- 24 The fact that the respondent had made an error in the Assignment Agreement document was made plain by Mr Gallacher's email to the applicant of 23 July 2014. Notably, in response, the applicant by email of 29 July 2014 to Mr Gallacher, did not raise any objection to what Mr Gallacher had said. Also, the applicant asked whether it was possible for her to receive her pay earlier, because she had budgeted her spending on the higher rates. The matter of not being paid the higher incorrect rates cited in the Assignment Agreement document and any subsequent claim of underpayment of her daily rates generally, was never again raised by the applicant, either for the remainder of her employment by the respondent or since that time, until the commencement of these proceedings. The only matter raised by the applicant with the respondent thereafter related to her "sign on" bonus, as revealed in email exchanges between the applicant and Mr Gallacher in late August 2014 (see exhibit R8). There was a query in relation to the applicant's "on site" daily rate as contained in an email from the applicant to Mr Gallacher dated 17 July 2014 (see exhibit R5), but thereafter there appears nothing on the evidence that this issue, or any other matter as to the applicant's daily rates generally, was further raised or pursued by the applicant.
- 25 Furthermore, the initial correspondence between the applicant and the respondent in April 2014 (see exhibit R1) is entirely consistent with the applicant and the respondent agreeing on the rates that Apache was paying the applicant when she was engaged by her former labour hire agency. Mr Gallacher requested on 8 April 2014, that the applicant provide her then daily rate of pay and advise who her supervisor was. On the same day, the applicant responded to Mr Gallacher and gave her daily rate as \$458.99 per day and told him who her supervisor was. Then, on 9 April 2014, Mr Gallacher responded to the effect that a purchase order would be obtained (from Apache) and confirmation of arrangements in documents would follow. On 17 April 2014, Ms Anderson from Apache advised both Mr Gallacher and the applicant that in fact the applicant's rate should be \$472.46 per day, which would include the 2.7% increase the applicant was then entitled to. I consider that this chain of correspondence evidenced an agreement between the applicant and the respondent for the applicant to be employed by the respondent at her then rate of pay, plus 2.7%, as advised by Ms Anderson.
- 26 This email correspondence is also consistent with Mr Dworakowski's evidence that the respondent was not involved in negotiations for daily rates of pay for the applicant, as this was set by Apache. The respondent simply was advised of the rate and would then add its margin for services to it. This is reflected in exhibit R15, the purchase order for the supply of the applicant's services by the respondent to Apache. The difference in the rates reflects the respondent's mark up of 13.5% or \$63.93 per day on the applicant's then daily rate. The figure of \$473.54 in exhibit R15 as the applicant's daily rate, reflected the increase in the compulsory superannuation guarantee contribution from 9.25% to 9.5%, as at March 2015.
- 27 I am therefore satisfied that based on the correspondence in April 2014 between the applicant and the respondent to which I have referred, the agreed daily rate for the applicant's engagement to commence with the respondent in the provision of services to Apache was \$472.46, rising to \$473.54 per day in March 2015. There was no evidence of any agreement between the applicant and the respondent, prior to the applicant's commencement in employment, for the higher daily rates to be paid, for any reason. As I have indicated, any such purported agreement would be commercially nonsensical. Additionally, I am satisfied that the sign on bonus was a significant factor in the applicant's decision to request employment by the respondent, to continue her work with Apache.
- 28 Regrettably in this case, an error was made in the completion of the Assignment Agreement document by Mr Gallacher of the respondent. This error was recognised and was corrected by the respondent in July 2014. The written documents signed by the parties in this case at the commencement of the applicant's employment, did not accurately reflect the agreement reached by them at an earlier point. The respondent communicated this to the applicant as soon as the error was detected and she was aware of the mistake from that time, if not earlier. The doctrine of unilateral mistake applies.

- 29 In any event, even if this doctrine does not strictly apply, as a matter of equity and good conscience under s 26(1)(a) of the Act, it would be unfair and plainly inequitable to hold the respondent to a document that was so clearly provided and executed in error, and which did not truly accord with the agreement the parties reached in relation to rates of pay. Accordingly, the application must be dismissed.

|                       |  |                         |
|-----------------------|--|-------------------------|
|                       |  | <b>2019 WAIRC 00654</b> |
| <b>PARTIES</b>        | WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION<br>KAREN KOBÁ | <b>APPLICANT</b>        |
|                       | -v-  |                         |
|                       | CREST PERSONNEL PTY LTD  | <b>RESPONDENT</b>       |
| <b>CORAM</b>          | SENIOR COMMISSIONER S J KENNER                                   |                         |
| <b>DATE</b>           | THURSDAY, 22 AUGUST 2019   |                         |
| <b>FILE NO/S</b>      | B 54 OF 2019   |                         |
| <b>CITATION NO.</b>   | 2019 WAIRC 00654   |                         |
| <b>Result</b>         | Application dismissed  |                         |
| <b>Representation</b> |  |                         |
| <b>Applicant</b>      | In person  |                         |
| <b>Respondent</b>     | Mr M Procopio of counsel   |                         |

*Order*

HAVING heard the applicant on her own behalf and Mr M Procopio of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed.

[L.S.]

(Sgd.) S J KENNER,  
Senior Commissioner.

|                       |   |                         |
|-----------------------|---|-------------------------|
|                       |   | <b>2019 WAIRC 00631</b> |
| <b>PARTIES</b>        | WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION<br>MR CONNOR GEOFFREY LIDDELOW | <b>APPLICANT</b>        |
|                       | -v-   |                         |
|                       | THE TRUSTEE FOR M4 UNIT TRUST   | <b>RESPONDENT</b>       |
| <b>CORAM</b>          | COMMISSIONER D J MATTHEWS   |                         |
| <b>DATE</b>           | FRIDAY, 16 AUGUST 2019  |                         |
| <b>FILE NO/S</b>      | B 45 OF 2019  |                         |
| <b>CITATION NO.</b>   | 2019 WAIRC 00631  |                         |
| <b>Result</b>         | Order made  |                         |
| <b>Representation</b> |   |                         |
| <b>Applicant</b>      | In person   |                         |
| <b>Respondent</b>     | No appearance   |                         |

*Order*

HAVING HEARD from the applicant in person on Friday, 2 August 2019 and there being no appearance for or on behalf of the respondent, I, the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby order that the name of the respondent in this matter be amended to 'Richard Trainer'.

[L.S.]

(Sgd.) D J MATTHEWS,  
Commissioner.

2019 WAIRC 00657

## WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**CITATION** : 2019 WAIRC 00657  
**CORAM** : COMMISSIONER D J MATTHEWS  
**HEARD** : FRIDAY, 2 AUGUST 2019  
**DELIVERED** : THURSDAY, 29 AUGUST 2019  
**FILE NO.** : B 45 OF 2019  
**BETWEEN** : CONNOR GEOFFREY LIDDELOW  
                   Applicant  
                   AND  
                   RICHARD TRAINER  
                   Respondent

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**CatchWords** : Denied contractual benefits claim - Proceeded in the absence of respondent - Applicant not paid salary and accrued annual leave entitlement  
**Legislation** : *Industrial Relations Act 1979 s26*  
**Result** : Application granted  
**Representation:**  
**Counsel:**  
**Applicant** : In person  
**Respondent** : No appearance

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*Reasons for Decision*

(Given extemporaneously at the conclusion of proceedings – as edited by Commissioner Matthews)

- 1 I proceed in the absence of the respondent in this matter, because, despite being properly served by the Western Australian Industrial Relations Commission with notice of the hearing, the respondent did not put in an appearance and was not outside the hearing room when called by my Associate.
- 2 These proceedings were commenced against “The Trustee for M4 Unit Trust”.
- 3 The contract of employment produced by the applicant and dated 5 February 2019 was between “M4 Unit Trust as Trustee for the M4 Unit trust” and the applicant.
- 4 That description of an entity seemed nonsensical to me and I enquired of the applicant as to whom he had dealt with in relation to his employment and the execution of the contract. He gave evidence that in relation to both he dealt exclusively with a person named Richard Trainer.
- 5 On the basis of the applicant’s evidence, I am of the view that the applicant’s true employer was Richard Trainer. I consider that it is consistent with equity, good conscience and the substantial merits of the case to amend the respondent to “Richard Trainer”. I have a concern that the case would be affected by “technicalities and legal forms” if I do not make such an order.
- 6 The applicant gave evidence he was employed from 29 January 2019 to 7 March 2019 with the respondent and that during the period of that employment he was not paid for certain hours he worked, and that, at the end of his employment, he did not receive a payout for the annual leave he had accrued during the course of his employment. He also says he was not given notice, or paid money in lieu of notice, when he was dismissed on 7 March 2019.
- 7 The applicant gave evidence that, at the hourly rate of pay provided for in his contract, being \$19.30, the relevant amounts he is owed are:
  - (1) for outstanding salary, an amount of \$1,906.84, which is the application of 98.8 hours to \$19.30;
  - (2) for accrued leave \$314.98, which is the application of 16.32 hours to \$19.30; and
  - (3) for the two-week period of notice, an amount of \$1,466.80, being the application of 76 hours to \$19.30.
- 8 I will order each of these amounts. I accept that the applicant is an honest witness and when he told me that he worked 98.8 hours for which he was not paid I accept that. I accept that he was not paid out his accrued leave upon dismissal and I accept that he was not paid a sum of money in lieu of notice.
- 9 For the sake of completeness, clause 10 of the contract provides the amount of \$19.30 per hour. Clause 25 and clause 27 provide that upon termination of employment the employer will compensate the employee for any accrued but unused annual leave. And in relation to termination and the payment of a notice period, clause 65 provides the employee and employer agree that reasonable and sufficient notice of termination of employment by the employer is the greater of two weeks or any minimum notice required by law.

10 Of course, notice is not payable, nor is an employee entitled to work out a notice period, where an employee is sacked for gross misconduct, but nothing even resembling that is present here. It would seem that, on the evidence of the applicant, which I accept, the respondent just grabbed at a couple of days of absence and somehow cooked that up into a lack of application on the part of the applicant, justifying his dismissal. This, of course, is ridiculous.

11 There will be an order that Richard Trainer pay to Connor Geoffrey Liddelov the sum of \$3,688.62 forthwith.

**2019 WAIRC 00632**

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
MR CONNOR GEOFFREY LIDDELOW  
**APPLICANT**

**-v-**  
RICHARD TRAINER  
**RESPONDENT**

**CORAM** COMMISSIONER D J MATTHEWS  
**DATE** FRIDAY, 16 AUGUST 2019  
**FILE NO/S** B 45 OF 2019  
**CITATION NO.** 2019 WAIRC 00632

**Result** Order made  
**Representation**  
**Applicant** In person  
**Respondent** No appearance

*Order*

HAVING HEARD from the applicant in person on Friday, 2 August 2019 and there being no appearance for or on behalf of the respondent, I, the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby order that the respondent pay to the applicant the sum of \$3,688.62 forthwith.

[L.S.]

(Sgd.) D J MATTHEWS,  
Commissioner.

**2019 WAIRC 00633**

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
SHILNA MALDE  
**APPLICANT**

**-v-**  
THE TRUSTEE FOR M4 UNIT TRUST  
**RESPONDENT**

**CORAM** COMMISSIONER D J MATTHEWS  
**DATE** FRIDAY, 16 AUGUST 2019  
**FILE NO/S** B 69 OF 2019  
**CITATION NO.** 2019 WAIRC 00633

**Result** Order made  
**Representation**  
**Applicant** In person  
**Respondent** No appearance

*Order*

HAVING HEARD from the applicant in person on Friday, 2 August 2019 and there being no appearance for or on behalf of the respondent, I, the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby order that the name of the respondent in this matter be amended to 'Richard Trainer'.

[L.S.]

(Sgd.) D J MATTHEWS,  
Commissioner.

**2019 WAIRC 00661****WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

**CITATION** : 2019 WAIRC 00661  
**CORAM** : COMMISSIONER D J MATTHEWS  
**HEARD** : FRIDAY, 2 AUGUST 2019  
**DELIVERED** : THURSDAY, 29 AUGUST 2019  
**FILE NO.** : B 69 OF 2019  
**BETWEEN** : SHILNA MALDE  
 Applicant  
 AND  
 RICHARD TRAINER  
 Respondent

---

CatchWords : Denied contractual benefits claim - Proceeded in the absence of respondent - Applicant not paid salary and accrued annual leave entitlement  
 Legislation : *Industrial Relations Act 1979* s26  
 Result : Application granted  
**Representation:**  
 Counsel:  
 Applicant : In person  
 Respondent : No appearance

---

*Reasons for Decision*

(Given extemporaneously at the conclusion of proceedings – as edited by Commissioner Matthews)

- 1 I proceed in the absence of the respondent in this matter, because, despite being properly served by the Western Australian Industrial Relations Commission with notice of the hearing, the respondent did not put in an appearance and was not outside the hearing room when called by my Associate.
  - 2 These proceedings were commenced against "The Trustee for M4 Unit Trust".
  - 3 The contract of employment produced by the applicant and dated 31 January 2019 was between "M4 Unit Trust as Trustee for the M4 Unit trust" and the applicant.
  - 4 That description of an entity seemed nonsensical to me and I enquired of the applicant as to whom she had dealt with in relation to her employment and the execution of the contract. She gave evidence that in relation to both she dealt exclusively with a person named Richard Trainer.
  - 5 On the basis of the applicant's evidence, I am of the view that the applicant's true employer was Richard Trainer. I consider that it is consistent with equity, good conscience and the substantial merits of the case to amend the respondent to "Richard Trainer". I have a concern that the case would be affected by "technicalities and legal forms" if I do not make such an order.
  - 6 Before commencing employment with the respondent on 31 January 2019, the applicant had signed a contract, which gave her \$20.25 an hour in terms of remuneration (clause 10) and also gave her an entitlement to annual leave and an entitlement to a payout of any accrued annual leave at the time her employment ended (clauses 25 and 27).
  - 7 The applicant gave evidence, which I accept as she appeared to be an honest and truthful witness, that she was not paid for a total of 114.66 hours that she worked, totalling \$2,313.77. The applicant also gave evidence that she did not get paid for one public holiday and that she did not get a payout for the annual leave she had accrued during her period of employment, totalling \$734.06.
  - 8 An order will be made that Richard Trainer pay to Ms Shilna Malde the sum of \$3,047.83 forthwith.
-

2019 WAIRC 00634

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
SHILNA MALDE **APPLICANT**

**-v-**  
RICHARD TRAINER **RESPONDENT**

**CORAM** COMMISSIONER D J MATTHEWS  
**DATE** FRIDAY, 16 AUGUST 2019  
**FILE NO/S** B 69 OF 2019  
**CITATION NO.** 2019 WAIRC 00634

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**Result** Order made  
**Representation**  
**Applicant** In person  
**Respondent** No appearance

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*Order*

HAVING HEARD from the applicant in person on Friday, 2 August 2019 and there being no appearance for or on behalf of the respondent, I, the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby order that the respondent pay to the applicant the sum of \$3,047.83 forthwith.

[L.S.]

(Sgd.) D J MATTHEWS,  
Commissioner.

2019 WAIRC 00635

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
SHILNA MALDE **APPLICANT**

**-v-**  
THE TRUSTEE FOR M4 UNIT TRUST **RESPONDENT**

**CORAM** COMMISSIONER D J MATTHEWS  
**DATE** FRIDAY, 16 AUGUST 2019  
**FILE NO/S** U 69 OF 2019  
**CITATION NO.** 2019 WAIRC 00635

---

**Result** Order made  
**Representation**  
**Applicant** In person  
**Respondent** No appearance

---

*Order*

HAVING HEARD from the applicant in person on Friday, 2 August 2019 and there being no appearance for or on behalf of the respondent, I, the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby order that the name of the respondent in this matter be amended to 'Richard Trainer'.

[L.S.]

(Sgd.) D J MATTHEWS,  
Commissioner.

2019 WAIRC 00662

## WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**CITATION** : 2019 WAIRC 00662  
**CORAM** : COMMISSIONER D J MATTHEWS  
**HEARD** : FRIDAY, 2 AUGUST 2019  
**DELIVERED** : THURSDAY, 29 AUGUST 2019  
**FILE NO.** : U 69 OF 2019  
**BETWEEN** : SHILNA MALDE  
                   Applicant  
                   AND  
                   RICHARD TRAINER  
                   Respondent

---

**CatchWords** : Unfair dismissal claim - Proceeded in the absence of respondent - Applicant unfairly dismissed - Reinstatement and re-employment impracticable - Compensation ordered  
**Legislation** : *Industrial Relations Act 1979 s26*  
**Result** : Application granted  
**Representation:**  
**Counsel:**  
**Applicant** : In person  
**Respondent** : No appearance

---

*Reasons for Decision*

(Given extemporaneously at the conclusion of proceedings – as edited by Commissioner Matthews)

- 1 I proceed in the absence of the respondent in this matter, because, despite being properly served by the Western Australian Industrial Relations Commission with notice of the hearing, the respondent did not put in an appearance and was not outside the hearing room when called by my Associate.
- 2 These proceedings were commenced against “The Trustee for M4 Unit Trust”.
- 3 The contract of employment produced by the applicant and dated 31 January 2019 was between “M4 Unit Trust as Trustee for the M4 Unit trust” and the applicant.
- 4 That description of an entity seemed nonsensical to me and I enquired of the applicant as to whom she had dealt with in relation to her employment and the execution of the contract. She gave evidence that in relation to both she dealt exclusively with a person named Richard Trainer.
- 5 On the basis of the applicant’s evidence, I am of the view that the applicant’s true employer was Richard Trainer. I consider that it is consistent with equity, good conscience and the substantial merits of the case to amend the respondent to “Richard Trainer”. I have a concern that the case would be affected by “technicalities and legal forms” if I do not make such an order.
- 6 The applicant was employed by the respondent on 31 January 2019. Her employment lasted until April 2019. On 8 April 2019, the respondent sent an email to the applicant sacking her.
- 7 In that email the respondent essentially contended that the applicant had not been performing her role in accordance with expectations and the agreed rate of “website builds” per week. These are allegations that the applicant disputes entirely. She gave evidence she was doing a good job and I have no reason to disbelieve her. She appeared to me to be entirely honest and credible.
- 8 The respondent also contends in the email that the applicant’s contract of employment provided for a three-month trial. I have read the contract of employment. There is no reference in it to a three-month trial or any probationary period. In any event, it is still possible for a dismissal to be unfair where it occurs during a probationary period. A probationary period does not give an employer carte blanche authority to treat people however they like.
- 9 The circumstances of the applicant’s dismissal were certainly unfair. You cannot simply overnight, or suddenly, tell someone they are not performing at the expected level and sack them. An employer has to discuss any shortcomings identified and give the employee a chance to improve. An employee has to be warned of the implications of not improving and given a chance to improve and to complete their obligations under the contract. That is what fairness requires, you cannot just unilaterally sack someone on the basis of alleged poor performance without more, even if the person is on probation.
- 10 Therefore, I have no hesitation in finding that the termination of the applicant was unfair. The applicant does not seek reinstatement with the respondent, that is fair enough. The respondent is clearly a very bad employer. Reinstatement is the primary remedy, but if I consider it to be impracticable, and I do so here, then I may move to other matters such as re-employment or compensation. Re-employment again is not feasible, the respondent is a bad employer.

- 11 So, we move then to the question of compensation. Given that the respondent had resolved in his mind to end the employment of the applicant, the question is how long would that have taken to achieve that in a fair way. The respondent did not come along to explain his concerns with the applicant's performance. On the basis of the applicant's evidence and her presentation in court, which was one of an earnest and capable human being, I have no reason to believe that she would not have gone on performing at a good level into the future and that the respondent, short of operational difficulties within the business, would have continued to employ her.
- 12 I have not heard anything from the respondent about any difficulties within his business, so I have no basis whatsoever upon which to come to any conclusion other than the applicant would have continued in the employment of the respondent into the indeterminate future and for that reason I order the maximum compensation under the *Industrial Relations Act 1979*, which is six months' of salary, which in the applicant's case would be an amount of \$20,007.
- 13 So, the order will be that Mr Trainer pay to Ms Malde the sum of \$20,007 forthwith.

2019 WAIRC 00636

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES** SHILNA MALDE **APPLICANT**

-v-

RICHARD TRAINER **RESPONDENT**

**CORAM** COMMISSIONER D J MATTHEWS

**DATE** FRIDAY, 16 AUGUST 2019

**FILE NO/S** U 69 OF 2019

**CITATION NO.** 2019 WAIRC 00636

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**Result** Order made

**Representation**

**Applicant** In person

**Respondent** No appearance

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*Declaration and Order*

HAVING HEARD from the applicant in person on Friday, 2 August 2019 and there being no appearance for or on behalf of the respondent, I, the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby:

1. DECLARE that the applicant was unfairly dismissed by the respondent; and
2. ORDER that the respondent pay to the applicant the sum of \$20,007.00 forthwith.

[L.S.]

(Sgd.) D J MATTHEWS,  
Commissioner.

2019 WAIRC 00629

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES** JESSICA STANWAY **APPLICANT**

-v-

M4 UNIT TRUST / M4 MARKETING **RESPONDENT**

**CORAM** COMMISSIONER D J MATTHEWS

**DATE** FRIDAY, 16 AUGUST 2019

**FILE NO/S** B 80 OF 2019

**CITATION NO.** 2019 WAIRC 00629

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|                       |               |
|-----------------------|---------------|
| <b>Result</b>         | Order made    |
| <b>Representation</b> |               |
| <b>Applicant</b>      | In person     |
| <b>Respondent</b>     | No appearance |

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*Order*

HAVING HEARD from the applicant in person on Friday, 2 August 2019 and there being no appearance for or on behalf of the respondent, I, the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby order that the name of the respondent in this matter be amended to ‘Richard Trainer’.

[L.S.]

(Sgd.) D J MATTHEWS,  
Commissioner.

**2019 WAIRC 00660**

**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

|                  |   |                           |
|------------------|---|---------------------------|
| <b>CITATION</b>  | : | 2019 WAIRC 00660          |
| <b>CORAM</b>     | : | COMMISSIONER D J MATTHEWS |
| <b>HEARD</b>     | : | FRIDAY, 2 AUGUST 2019     |
| <b>DELIVERED</b> | : | THURSDAY, 29 AUGUST 2019  |
| <b>FILE NO.</b>  | : | B 80 OF 2019              |
| <b>BETWEEN</b>   | : | JESSICA STANWAY           |
|                  |   | Applicant                 |
|                  |   | AND                       |
|                  |   | RICHARD TRAINER           |
|                  |   | Respondent                |

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|                        |   |   |
|------------------------|---|---|
| CatchWords             | : | Denied contractual benefits claim - Proceeded in the absence of respondent - Applicant not paid salary and accrued annual leave entitlement |
| Legislation            | : | <i>Industrial Relations Act 1979</i> s26  |
| Result                 | : | Application granted   |
| <b>Representation:</b> |   |   |
| Counsel:               |   |   |
| Applicant              | : | In person   |
| Respondent             | : | No appearance   |

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*Reasons for Decision*

(Given extemporaneously at the conclusion of proceedings – as edited by Commissioner Matthews)

- 1 I proceed in the absence of the respondent in this matter, because, despite being properly served by the Western Australian Industrial Relations Commission with notice of the hearing, the respondent did not put in an appearance and was not outside the hearing room when called by my Associate.
- 2 These proceedings were commenced against “M4 Unit Trust / M4 Marketing”.
- 3 The contract of employment produced by the applicant and dated 31 January 2019 was between “M4 Unit Trust as Trustee for the M4 Unit trust” and the applicant.
- 4 That description of an entity seemed nonsensical to me and I enquired of the applicant as to whom she had dealt with in relation to her employment and the execution of the contract. She gave evidence that in relation to both she dealt exclusively with a person named Richard Trainer.
- 5 On the basis of the applicant’s evidence, I am of the view that the applicant’s true employer was Richard Trainer. I consider that it is consistent with equity, good conscience and the substantial merits of the case to amend the respondent to “Richard Trainer”. I have a concern that the case would be affected by “technicalities and legal forms” if I do not make such an order.
- 6 Before commencing employment with the respondent on 19 November 2018, the applicant had signed a contract, which gave her \$19.30 an hour in terms of remuneration (clause 10) and also gave her an entitlement to annual leave and an entitlement to the payout of any accrued annual leave at the time her employment ended (clauses 25 and 27).

- 7 The applicant gave evidence that she was not paid for a total of 38 hours, being her last week of work 3 April 2019 to 9 April 2019 amounting to \$733.40. The applicant also gave evidence that she did not get a payout for her annual leave that had been accrued by her during her period of employment, amounting to \$2,143.73.
- 8 I found the applicant to be a truthful witness and have no reason at all to doubt that her evidence is honest and accurate.
- 9 An order will be made that Mr Richard Trainer pay to Ms Jessica Stanway the sum of \$2,877.13 forthwith, being the total of \$733.40 and \$2,143.73.
- 10 Also, as the applicant seeks it, an order will be made that Mr Trainer make deposits into Ms Stanway's REST Superannuation Fund account, the details of which Ms Stanway has provided to Mr Trainer, totalling \$1,461.60 forthwith.

2019 WAIRC 00630

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES** JESSICA STANWAY **APPLICANT**

-v-

RICHARD TRAINER **RESPONDENT**

**CORAM** COMMISSIONER D J MATTHEWS

**DATE** FRIDAY, 16 AUGUST 2019

**FILE NO/S** B 80 OF 2019

**CITATION NO.** 2019 WAIRC 00630

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**Result** Orders made

**Representation**

**Applicant** In person

**Respondent** No appearance

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*Orders*

HAVING HEARD from the applicant in person on Friday, 2 August 2019 and there being no appearance for or on behalf of the respondent, I, the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby order:

1. THAT the respondent pay to the applicant the sum of \$2,877.13 forthwith; and
2. THAT the respondent deposit into the applicant's REST superannuation fund account, the details of which have been provided by the applicant to the respondent, the sum of \$1,461.60 forthwith.

[L.S.]

(Sgd.) D J MATTHEWS,  
Commissioner.

2019 WAIRC 00627

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES** HAMZA SUALEH **APPLICANT**

-v-

THE TRUSTEE FOR M4 UNIT TRUST **RESPONDENT**

**CORAM** COMMISSIONER D J MATTHEWS

**DATE** FRIDAY, 16 AUGUST 2019

**FILE NO/S** B 95 OF 2019

**CITATION NO.** 2019 WAIRC 00627

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|                       |               |
|-----------------------|---------------|
| <b>Result</b>         | Order made    |
| <b>Representation</b> |               |
| <b>Applicant</b>      | In person     |
| <b>Respondent</b>     | No appearance |

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*Order*

HAVING HEARD from the applicant in person on Friday, 2 August 2019 and there being no appearance for or on behalf of the respondent, I, the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby order that the name of the respondent in this matter be amended to 'Richard Trainer'.

(Sgd.) D J MATTHEWS,  
Commissioner.

[L.S.]

**2019 WAIRC 00659**

**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

|                  |   |   |
|------------------|---|---|
| <b>CITATION</b>  | : | 2019 WAIRC 00659  |
| <b>CORAM</b>     | : | COMMISSIONER D J MATTHEWS   |
| <b>HEARD</b>     | : | FRIDAY, 2 AUGUST 2019   |
| <b>DELIVERED</b> | : | THURSDAY, 29 AUGUST 2019  |
| <b>FILE NO.</b>  | : | B 95 OF 2019  |
| <b>BETWEEN</b>   | : | HAMZA SUALEH<br>Applicant<br>AND<br>RICHARD TRAINER<br>Respondent |

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|                        |   |   |
|------------------------|---|---|
| CatchWords             | : | Denied contractual benefits claim - Proceeded in the absence of respondent - Applicant not paid salary and accrued annual leave entitlement |
| Legislation            | : | <i>Industrial Relations Act 1979</i> s26  |
| Result                 | : | Application granted   |
| <b>Representation:</b> |   |   |
| Counsel:               |   |   |
| Applicant              | : | In person   |
| Respondent             | : | No appearance   |

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*Reasons for Decision*

(Given extemporaneously at the conclusion of proceedings – as edited by Commissioner Matthews)

- 1 I proceed in the absence of the respondent in this matter, because, despite being properly served by the Western Australian Industrial Relations Commission with notice of the hearing, the respondent did not put in an appearance and was not outside the hearing room when called by my Associate.
  - 2 These proceedings were commenced against "The Trustee for M4 Unit Trust".
  - 3 The letter of offer produced by the applicant that was accepted by the applicant to be his contract of employment in this matter was between "M4 Unit Trust as Trustee for the M4 Unit Trust" and the applicant.
  - 4 That description of an entity seemed nonsensical to me and I enquired of the applicant as to whom he had dealt with in relation to his employment and the execution of the contract. He gave evidence that in relation to both he dealt exclusively with a person named Richard Trainer.
  - 5 On the basis of the applicant's evidence, I am of the view that the applicant's true employer was Richard Trainer. I consider that it is consistent with equity, good conscience and the substantial merits of the case to amend the respondent to "Richard Trainer". I have a concern that the case would be affected by "technicalities and legal forms" if I do not make such an order.
  - 6 The applicant was employed by the respondent from 8 May 2019 to 22 May 2019, when he resigned from his employment. The applicant had a contract, which provided he be paid \$40,000 a year payable fortnightly. He gave evidence, which I accept given he appeared to be an honest and truthful witness, that he was never paid, despite the fact that he worked those nine days.
  - 7 I will make an order for the sum the applicant seeks, being \$1,384.65.
  - 8 My order will be that that amount be paid by Richard Trainer to the applicant forthwith.
-

2019 WAIRC 00628

|                     |  |                   |
|---------------------|--|-------------------|
| <b>PARTIES</b>      | WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION<br>HAMZA SUALEH | <b>APPLICANT</b>  |
|                     | -v-<br>RICHARD TRAINER   |                   |
|                     |  | <b>RESPONDENT</b> |
| <b>CORAM</b>        | COMMISSIONER D J MATTHEWS  |                   |
| <b>DATE</b>         | FRIDAY, 16 AUGUST 2019   |                   |
| <b>FILE NO/S</b>    | B 95 OF 2019   |                   |
| <b>CITATION NO.</b> | 2019 WAIRC 00628   |                   |

|                       |               |
|-----------------------|---------------|
| <b>Result</b>         | Order made    |
| <b>Representation</b> |               |
| <b>Applicant</b>      | In person     |
| <b>Respondent</b>     | No appearance |

*Order*

HAVING HEARD from the applicant in person on Friday, 2 August 2019 and there being no appearance for or on behalf of the respondent, I, the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby order that the respondent pay to the applicant the sum of \$1,384.65 forthwith.

(Sgd.) D J MATTHEWS,  
Commissioner.

[L.S.]

### SECTION 29(1)(b)—Notation of—

| Parties                   |   | Number     | Commissioner                   | Result       |
|---------------------------|---|------------|--------------------------------|--------------|
| Christos-Vasiliou Hatzis  | Koutsouvelis Family Trust T/A Olympus Windows & Doors     | U 74/2019  | Commissioner T Emmanuel        | Discontinued |
| Christos-Vasiliou Hatzis  | Koutsouvelis Family Trust T/A Olympus Windows & Doors     | B 74/2019  | Commissioner T Emmanuel        | Discontinued |
| Craig Robert Dunne        | Jurien Bay Quality Meats                                  | U 44/2019  | Commissioner D J Matthews      | Discontinued |
| Eleece Bridge             | Jesi Hair Studio  | U 102/2019 | Commissioner T B Walkington    | Discontinued |
| Jack Bainbridge           | Jeffrey Mathlin CVR Crushing Equipment                    | B 149/2018 | Commissioner D J Matthews      | Discontinued |
| Janet Campbell            | Moore River Roadhouse                                     | U 73/2019  | Commissioner T B Walkington    | Discontinued |
| Lisa-Ann Smith            | Tranby College  | B 43/2019  | Commissioner D J Matthews      | Discontinued |
| Lisa-Ann Smith            | Tranby College  | U 43/2019  | Commissioner D J Matthews      | Discontinued |
| Nancy Randall             | Ben Trager Homes Pty Ltd                                  | B 17/2019  | Commissioner T B Walkington    | Discontinued |
| Paul Lindsay              | Gary and Beverly A Clark of Granite Transformations North | U 132/2018 | Commissioner D J Matthews      | Discontinued |
| Peter Kirkpatrick         | Greencross Limited (ACN 119 778 865)                      | B 129/2018 | Commissioner T Emmanuel        | Discontinued |
| Shaeley Kirley            | The Trustee for Jandalah Family Trust                     | U 77/2019  | Commissioner T Emmanuel        | Discontinued |
| Valentina Toscano         | Jaeger Hair Design  | U 100/2019 | Senior Commissioner S J Kenner | Discontinued |
| Vanessa Tina Lanciano     | Sue Thomson Solicitors                                    | B 108/2019 | Senior Commissioner S J Kenner | Discontinued |
| Windy Patrick John Willis | The Trustee for WA Labour Services Trust                  | U 115/2019 | Commissioner T B Walkington    | Discontinued |

**CONFERENCES—Notation of—**

| Parties  |   | Commissioner | Conference Number | Dates      | Matter  | Result       |
|--|---|--------------|-------------------|------------|---|--------------|
| Health Service Union of Western Australia (Union of Workers)         | The Chief Executive North Metropolitan Health Service   | Emmanuel C   | PSAC 2/2019       | 07/02/2019 | Dispute re reclassification of union members      | Discontinued |
| Health Service Union of Western Australia (Union of Workers)         | The Chief Executive North Metropolitan Health Service   | Emmanuel C   | PSAC 2/2019       | 07/02/2019 | Dispute re reclassification of union members      | Discontinued |
| Health Services Union of Western Australia (Union of Workers)        | Western Australian Country Health Service               | Emmanuel C   | PSAC 27/2018      | 21/09/2018 | Dispute re grievance procedure for a union member | Discontinued |
| Independent Education Union of Western Australia, Union of Employees | The Roman Catholic Archbishop of Perth                  | Matthews C   | C 15/2019         | N/A        | Dispute re union member's employment              | Discontinued |
| Western Australian Prison Officers' Union of Workers                 | Minister for Corrective Services, Department of Justice | Matthews C   | C 11/2019         | 06/08/2019 | Dispute re alleged unfair disciplinary action     | Discontinued |

**PROCEDURAL DIRECTIONS AND ORDERS—**

2018 WAIRC 00753

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
SIMON DING**PARTIES****APPLICANT**

-v-

FLYING FISH COVE PTY LTD (ACN: 009 163 544)

**RESPONDENT****CORAM**

SENIOR COMMISSIONER S J KENNER

**DATE**

TUESDAY, 25 SEPTEMBER 2018

**FILE NO/S**

B 102 OF 2018

**CITATION NO.**

2018 WAIRC 00753

**Result** Order issued**Representation****Applicant** No appearance required**Respondent** Ms E Belser of counsel*Order*

WHEREAS on 22 August 2018 the applicant filed a notice of claim of entitlement to a benefit under a contract of employment;  
AND WHEREAS on 20 September 2018 the respondent applied to the Commission for an order extending the time for the filing of a notice of answer in respect of the herein application pursuant to Regulation 36(1) of the Industrial Relations Commission Regulations, 2005;

AND WHEREAS the Commission has considered the application for an extension of time for filing a notice of answer in Chambers;

NOW THEREFORE the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

THAT the time for the filing of the notice of answer in the herein proceedings be and is hereby extended to 4 October 2018.

[L.S.]

(Sgd.) S J KENNER,  
Senior Commissioner.

2018 WAIRC 00756

|                       |  |                   |
|-----------------------|--|-------------------|
|                       | WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION |                   |
| <b>PARTIES</b>        | DAMON EASTAUGH                                     | <b>APPLICANT</b>  |
|                       | -v-  |                   |
|                       | FLYING FISH COVE PTY LTD (ACN: 009 163 544)        | <b>RESPONDENT</b> |
| <b>CORAM</b>          | SENIOR COMMISSIONER S J KENNER                     |                   |
| <b>DATE</b>           | TUESDAY, 25 SEPTEMBER 2018                         |                   |
| <b>FILE NO/S</b>      | B 103 OF 2018                                      |                   |
| <b>CITATION NO.</b>   | 2018 WAIRC 00756                                   |                   |
| <b>Result</b>         | Order issued                                       |                   |
| <b>Representation</b> |  |                   |
| <b>Applicant</b>      | No appearance required                             |                   |
| <b>Respondent</b>     | Ms E Belser of counsel                             |                   |

*Order*

WHEREAS on 22 August 2018 the applicant filed a notice of claim of entitlement to a benefit under a contract of employment;  
AND WHEREAS on 20 September 2018 the respondent applied to the Commission for an order extending the time for the filing of a notice of answer in respect of the herein application pursuant to Regulation 36(1) of the Industrial Relations Commission Regulations, 2005;

AND WHEREAS the Commission has considered the application for an extension of time for filing a notice of answer in Chambers;

NOW THEREFORE the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

THAT the time for the filing of the notice of answer in the herein proceedings be and is hereby extended to 4 October 2018.

[L.S.]

(Sgd.) S J KENNER,  
Senior Commissioner.

2019 WAIRC 00639

**APPEAL AGAINST THE DECISION FOR DISMISSAL ON 1 MARCH 2019**

|                     |  |                   |
|---------------------|--|-------------------|
|                     | WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION   |                   |
| <b>PARTIES</b>      | MATTHEW WILLIAM JONES  | <b>APPELLANT</b>  |
|                     | -v-  |                   |
|                     | CHIEF EXECUTIVE EAST METROPOLITAN HEALTH SERVICE   | <b>RESPONDENT</b> |
| <b>CORAM</b>        | PUBLIC SERVICE APPEAL BOARD<br>COMMISSIONER T EMMANUEL - CHAIR<br>MS J LOVE - BOARD MEMBER<br>MR D HILL - BOARD MEMBER |                   |
| <b>DATE</b>         | FRIDAY, 16 AUGUST 2019   |                   |
| <b>FILE NO.</b>     | PSAB 7 OF 2019   |                   |
| <b>CITATION NO.</b> | 2019 WAIRC 00639   |                   |
| <b>Result</b>       | Directions issued  |                   |
| <b>Appellant</b>    | Mr J Nicholas (of counsel)   |                   |
| <b>Respondent</b>   | Ms J Vincent (of counsel)  |                   |

*Direction*

HAVING heard from Mr J Nicholas (of counsel) on behalf of the appellant and Ms J Vincent (of counsel) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1975* (WA), directs –

1. THAT the respondent file outlines of evidence and documents, other than the agreed documents, on which it intends to rely by 21 August 2019.
2. THAT the appellant file written submissions by 4 September 2019.
3. THAT the respondent written submissions by 18 September 2019.
4. THAT discovery be informal.
5. THAT this matter be listed for a three-day hearing not less than seven days after respondent's written submissions are filed.
6. THAT the parties have liberty to apply.

(Sgd.) T EMMANUEL,  
Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

**2019 WAIRC 00698**

**APPEAL AGAINST THE DECISION FOR DISMISSAL ON 1 MARCH 2019**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

MATTHEW WILLIAM JONES

**PARTIES**

**APPELLANT**

**-v-**

CHIEF EXECUTIVE EAST METROPOLITAN HEALTH SERVICE

**RESPONDENT**

**CORAM**

PUBLIC SERVICE APPEAL BOARD  
COMMISSIONER T EMMANUEL - CHAIR  
MS J LOVE - BOARD MEMBER  
MR D HILL - BOARD MEMBER

**DATE**

WEDNESDAY, 11 SEPTEMBER 2019

**FILE NO.**

PSAB 7 OF 2019

**CITATION NO.**

2019 WAIRC 00698

|                   |                            |
|-------------------|----------------------------|
| <b>Result</b>     | Directions issued          |
| <b>Appellant</b>  | Mr J Nicholas (of counsel) |
| <b>Respondent</b> | Ms J Vincent (of counsel)  |

*Direction*

HAVING heard from Mr J Nicholas (of counsel) on behalf of the appellant and Ms J Vincent (of counsel) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1975* (WA), directs –

1. THAT the appellant file written submissions by 2 October 2019.
2. THAT the respondent file written submissions by 16 October 2019.
3. THAT discovery be informal.
4. THAT this matter be listed for a three-day hearing not less than seven days after respondent's written submissions are filed.
5. THAT the parties have liberty to apply.

(Sgd.) T EMMANUEL,  
Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2019 WAIRC 00696

**APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 17 JUNE 2019**

|                     |   |                   |
|---------------------|---|-------------------|
| <b>PARTIES</b>      | WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION<br>MAGDALEN KAOW LING FOO  | <b>APPELLANT</b>  |
|                     | -v-<br>FIONA STANLEY FREMANTLE HOSPITALS GROUP, SOUTH METROPOLITAN HEALTH SERVICE   | <b>RESPONDENT</b> |
| <b>CORAM</b>        | PUBLIC SERVICE APPEAL BOARD<br>COMMISSIONER T EMMANUEL - CHAIR<br>MR W EDWARDES - BOARD MEMBER<br>MS K BLYTH - BOARD MEMBER |                   |
| <b>DATE</b>         | MONDAY, 9 SEPTEMBER 2019  |                   |
| <b>FILE NO.</b>     | PSAB 12 OF 2019   |                   |
| <b>CITATION NO.</b> | 2019 WAIRC 00696  |                   |

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|                       |                         |
|-----------------------|-------------------------|
| <b>Result</b>         | Direction issued        |
| <b>Representation</b> |                         |
| <b>Appellant</b>      | Dr Y Fujita (as agent)  |
| <b>Respondent</b>     | Mr M Aulfrey (as agent) |

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*Direction*

HAVING heard Dr Fujita (as agent) on behalf of the appellant and Mr M Aulfrey (as agent) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 25 September 2019.
2. THAT the appellant file and serve her outlines of evidence (summaries of what each witness will say to the Board) and documents (not agreed) by 16 October 2019.
3. THAT this matter be listed for a directions hearing no sooner than 14 days after the appellant has filed her outlines of evidence and documents.
4. THAT discovery be informal.

(Sgd.) T EMMANUEL,  
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2018 WAIRC 00083

**APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 14 NOVEMBER 2017**

|                     |  |                   |
|---------------------|--|-------------------|
| <b>PARTIES</b>      | WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION<br>MS DONNA-MARIE JOHNSTON  | <b>APPELLANT</b>  |
|                     | -v-<br>ACTING DIRECTOR GENERAL, DEPARTMENT OF COMMUNITIES  | <b>RESPONDENT</b> |
| <b>CORAM</b>        | PUBLIC SERVICE APPEAL BOARD<br>COMMISSIONER D J MATTHEWS - CHAIRMAN<br>MRS L KENNEWELL - BOARD MEMBER<br>MR P BYNRE - BOARD MEMBER |                   |
| <b>DATE</b>         | TUESDAY, 6 FEBRUARY 2018   |                   |
| <b>FILE NO</b>      | PSAB 25 OF 2017  |                   |
| <b>CITATION NO.</b> | 2018 WAIRC 00083   |                   |

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|                       |                         |
|-----------------------|-------------------------|
| <b>Result</b>         | Orders made             |
| <b>Representation</b> |                         |
| <b>Appellant</b>      | Ms A Wallish as agent   |
| <b>Respondent</b>     | Ms A Gillespie as agent |

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*Orders*

HAVING heard Ms A Wallish as agent for the appellant and Ms A Gillespie as agent for the respondent the Public Service Appeal Board pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA) hereby orders:

1. That discovery be informal and occur by 6 March 2018;
2. That the matter be listed for a two day hearing on dates to be fixed;
3. That the parties have liberty to apply.

(Sgd.) D J MATTHEWS,  
Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

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**2019 WAIRC 00113**

**APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 14 NOVEMBER 2017**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

MS DONNA-MARIE JOHNSTON

**APPELLANT**

-v-

ACTING DIRECTOR GENERAL, DEPARTMENT OF COMMUNITIES

**RESPONDENT**

**CORAM**

PUBLIC SERVICE APPEAL BOARD  
COMMISSIONER D J MATTHEWS - CHAIRMAN  
MR P BYRNE - BOARD MEMBER  
MRS L KENNEWELL - BOARD MEMBER

**DATE**

THURSDAY, 7 MARCH 2019

**FILE NO**

PSAB 25 OF 2017

**CITATION NO.**

2019 WAIRC 00113

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|                       |                         |
|-----------------------|-------------------------|
| <b>Result</b>         | Orders issued           |
| <b>Representation</b> |                         |
| <b>Appellant</b>      | In person               |
| <b>Respondent</b>     | Ms J Vincent of counsel |

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*Order*

HAVING heard the appellant in person and Ms Vincent, of counsel, for the respondent on Thursday, 7 March 2019, the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

1. That the appellant file and serve a witness statement setting out all factual matters relevant to her appeal by 4:00 pm on Friday, 29 March 2019;
2. That if the appellant fails to comply with order 1 the appeal, without reversion to her, be struck out for want of prosecution.

(Sgd.) D J MATTHEWS,  
Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

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2019 WAIRC 00174

**APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 14 NOVEMBER 2017**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

MS DONNA-MARIE JOHNSTON

**APPELLANT**

-v-

ACTING DIRECTOR GENERAL, DEPARTMENT OF COMMUNITIES

**RESPONDENT****CORAM**

PUBLIC SERVICE APPEAL BOARD

COMMISSIONER D J MATTHEWS - CHAIRMAN

MR P BYRNE - BOARD MEMBER

MRS L KENNEWELL - BOARD MEMBER

**DATE**

MONDAY, 1 APRIL 2019

**FILE NO**

PSAB 25 OF 2017

**CITATION NO.**

2019 WAIRC 00174

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|                       |                         |
|-----------------------|-------------------------|
| <b>Result</b>         | Orders issued           |
| <b>Representation</b> |                         |
| <b>Appellant</b>      | In person               |
| <b>Respondent</b>     | Ms J Vincent of counsel |

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*Order*

HAVING heard the appellant in person and Ms Vincent, of counsel, for the respondent on Thursday, 7 March 2019;

AND WHEREAS the Public Service Appeal Board made an order dated Thursday, 7 March 2019 that the appellant file and serve a witness statement setting out all factual matters relevant to her appeal by 4:00 pm on Friday, 29 March 2019;

AND WHEREAS the appellant emailed documents to the Western Australian Industrial Relations Commission on Wednesday, 27 March 2019;

AND WHEREAS the respondent informed the appellant via email on Wednesday, 27 March 2019 that the documents provided to the Western Australian Industrial Relations Commission by the appellant appeared to be relevant to the interlocutory application filed 22 November 2018 instead of the appeal to the Public Service Appeal Board filed 5 December 2017;

AND WHEREAS the appellant requested an extension for one week of the order dated Thursday, 7 March 2019 via email on Thursday, 28 March 2019;

AND WHEREAS the respondent informed the Public Service Appeal Board they did not object to the appellant's request for an extension;

NOW THEREFORE the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, and by consent, hereby orders:

1. That the appellant file and serve a witness statement setting out all factual matters relevant to her appeal by 4:00 pm on Friday, 5 April 2019;
2. That if the appellant fails to comply with order 1 the appeal, without reversion to her, be struck out for want of prosecution.

(Sgd.) D J MATTHEWS,  
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

**PUBLIC SERVICE APPEAL BOARD—**

2019 WAIRC 00116

**APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 16 OCTOBER 2018**

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
 JAMES CLARKE  
 APPELLANT

-v-  
 DIRECTOR GENERAL, DEPARTMENT OF JUSTICE  
 RESPONDENT

**CORAM** PUBLIC SERVICE APPEAL BOARD  
 SENIOR COMMISSIONER S J KENNER - CHAIRMAN  
 MR C BROWN - BOARD MEMBER  
 MR J CHAPMAN - BOARD MEMBER

**DATE** THURSDAY, 7 MARCH 2019

**FILE NO** PSAB 27 OF 2018

**CITATION NO.** 2019 WAIRC 00116

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**Result** Order issued

**Representation**

**Appellant** Mr M Amati

**Respondent** Mr R Andretich of counsel

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*Order*

WHEREAS the appellant sought and was granted leave to discontinue the application, the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the appeal be and is hereby discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,  
 Senior Commissioner,  
 On behalf of the Public Service Appeal Board.

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2019 WAIRC 00252

**APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 12 NOVEMBER 2018**

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
 MELISSA PAYNE  
 APPELLANT

-v-  
 DEPARTMENT OF JUSTICE  
 RESPONDENT

**CORAM** SENIOR COMMISSIONER S J KENNER

**DATE** WEDNESDAY, 29 MAY 2019

**FILE NO.** PSAB 6 OF 2019

**CITATION NO.** 2019 WAIRC 00252

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**Result** Directions issued

**Representation**

**Applicant** Mr S Harben of counsel

**Respondent** Ms J Vincent of counsel

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*Direction*

HAVING heard Mr S Harben of counsel on behalf of the appellant and Ms J Vincent of counsel on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

- (1) THAT the appellant file an amended notice of appeal by 5 June 2019.
- (2) THAT the respondent file a notice of answer by 12 June 2019.
- (3) THAT the issue of an extension of time to bring the appeal be heard as a preliminary issue.
- (4) THAT the appeal otherwise be adjourned to a date to be fixed.
- (5) THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,  
Senior Commissioner.

**2019 WAIRC 00647****APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 12 NOVEMBER 2018**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

MELISSA PAYNE

**APPELLANT**

-v-

DEPARTMENT OF JUSTICE

**RESPONDENT****CORAM**

PUBLIC SERVICE APPEAL BOARD  
SENIOR COMMISSIONER S J KENNER - CHAIRMAN  
MR M TAYLOR - BOARD MEMBER  
MR J LAMB - BOARD MEMBER

**DATE**

MONDAY, 19 AUGUST 2019

**FILE NO**

PSAB 6 OF 2019

**CITATION NO.**

2019 WAIRC 00647

**Result** Order issued**Representation****Appellant** Ms S Harben of counsel**Respondent** Ms J Vincent of counsel*Order*

WHEREAS the appellant sought and was granted leave to discontinue the application, the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the appeal be and is hereby discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,  
Senior Commissioner,  
On behalf of the Public Service Appeal Board.

**PUBLIC SERVICE APPEAL BOARD—Notation of—**

The following were matters before the Commission under the Public Service Appeal Board.

| Application Number | Parties               |                                  | Commissioner | Matter  | Dates | Result       |
|--------------------|-----------------------|----------------------------------|--------------|---|-------|--------------|
| PSAB 13/2019       | Denise Gallanagh Wood | Shire of Katanning               | Matthews C   | Appeal against the decision to take disciplinary action on 8 July 2019  | N/A   | Discontinued |
| PSAB 11/2019       | Zena Robinson         | East Metropolitan Health Service | Emmanuel C   | Appeal against the decision to take disciplinary action on 18 June 2019 | N/A   | Discontinued |

| Application Number | Parties                    |   | Commissioner | Matter   | Dates      | Result       |
|--------------------|----------------------------|---|--------------|--|------------|--------------|
| PSAB 32/2018       | Mr Tetani Rakete           | Director General, Department of Communities | Matthews C   | Appeal against the decision to terminate employment on 5 December 2018 | N/A        | Discontinued |
| PSAB 14/2018       | Ms Cheryl Margurite Soggee | Director General, Department of Justice     | Emmanuel C   | Appeal against the decision to take disciplinary action on 15 May 2018 | 29/08/2018 | Discontinued |

### RECLASSIFICATION APPEALS—Notation of—

| File Number | Appellant         | Respondent  | Commissioner | Decision     | Finalisation Date |
|-------------|-------------------|---|--------------|--------------|-------------------|
| PSA 12/2016 | Rosa Luyten       | Child and Adolescent Health Service as the employer | Emmanuel C   | Discontinued | 11/06/2019        |
| PSA 13/2016 | Beverley Maher    | Child and Adolescent Health Service as the employer | Emmanuel C   | Discontinued | 11/06/2019        |
| PSA 14/2016 | Rachel Ewen       | Child and Adolescent Health Service as the employer | Emmanuel C   | Discontinued | 11/06/2019        |
| PSA 15/2016 | Kathleen Scullion | Child and Adolescent Health Service as the employer | Emmanuel C   | Discontinued | 11/06/2019        |
| PSA 16/2016 | Susan Gardiner    | Child and Adolescent Health Service as the employer | Emmanuel C   | Discontinued | 11/06/2019        |
| PSA 17/2016 | Jodie Eeles       | Child and Adolescent Health Service as the employer | Emmanuel C   | Discontinued | 11/06/2019        |

### PUBLIC SECTOR MANAGEMENT ACT 1994—Notation of—

The following were matters before the Commission under the Public Sector Management Act 1994.

| Application Number | Parties        |                                  | Commissioner | Matter   | Dates      | Result       |
|--------------------|----------------|----------------------------------|--------------|--|------------|--------------|
| APPL 74/2018       | Stephen Parker | Minister for Corrective Services | Matthews C   | Referral to Commission under Public Sector Management Act 1994 | 11/02/2019 | Discontinued |

### ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Notation of—

The following were matters before the Commission sitting as the Road Freight Transport Industry Tribunal pursuant to s 38 of the *Owner-Drivers (Contracts and Disputes) Act 2007* that settled prior to an order issuing.

| Parties               | Commissioner | Application Number | Dates      | Matter                          | Result       |
|-----------------------|--------------|--------------------|------------|---------------------------------|--------------|
| LNH Transport Pty Ltd | Kenner SC    | RFT 5/2017         | 08/11/2017 | Dispute re outstanding payments | Discontinued |