

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION : 2020 WAIRC 00990

CORAM : INDUSTRIAL MAGISTRATE D. SCADDAN

HEARD : THURSDAY, 29 OCTOBER 2020

DELIVERED : THURSDAY, 17 DECEMBER 2020

FILE NO. : M 40 OF 2020

BETWEEN : KWOK FU CHAN

CLAIMANT

AND

FIRE PROTECTION SERVICES (WA) PTY LTD

RESPONDENT

CatchWords : INDUSTRIAL LAW – Small Claims Procedure under *Fair Work Act 2009* (Cth) – Failing to pay ordinary wages – Failing to pay an amount in lieu of notice of termination of employment – Failing to pay untaken paid annual leave on termination of employment – Using accrued annual leave entitlements to pay ordinary wages without agreement – Contravention of terms of *Electrical, Electronic and Communications Contracting Award 2010* (Cth) and *Fair Work Act 2009* (Cth)

Legislation : *Fair Work Act 2009* (Cth)
Corporation Act 2001 (Cth)
Taxation Administration Act 1953 (Cth)
Industrial Relations Act 1979 (WA)

Instruments : *Electrical, Electronic and Communications Contracting Award 2010* (Cth)

Case(s) referred to in reasons: : *McShane v Image Bollards Pty Ltd* [2011] FMCA 215
Mildren v Gabbusch [2014] SAIRC 15
Miller v Minister of Pensions [1947] 2 All ER 372
Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336

Result : Claim is proven

Representation:

Claimant : Self-represented

Respondent : Mr A. Smith on behalf of the Respondent (as a director)

REASONS FOR DECISION

- 1 Mr Kwok Fu Chan (the Claimant), claims \$16,601.13 (as amended from the original claim) alleging Fire Protection Services (WA) Pty Ltd (the Company) failed to comply with the *Electrical, Electronic and Communication Contracting Award 2010* (the Award) and the *Fair Work Act 2009* (Cth) (FWA) by:
 - failing to pay him 4 weeks pay in lieu of notice of termination of employment;
 - using his accrued annual leave entitlements to pay his ordinary wages without approval (and thus failing to pay untaken paid accrued annual leave upon termination of employment);
 - failing to pay him all ordinary wages owed; and
 - failing to pay an amount for his benefit to a superannuation fund for the amount not paid in lieu of notice of termination of employments and for all ordinary wages owed.
- 2 The Company denies the Claimant is entitled to the amounts as alleged or that it used the Claimant's annual leave entitlements without approval or that it owes the amounts claimed by the Claimant.

Background

- 3 The Claimant was born on 4 July 1970.¹
- 4 The Claimant was employed full time as an Installer by the Company from 6 January 2015 and ceased employment on 2 August 2019 (according to the Claimant) or 29 May 2019 or 10 June 2019 or 23 July 2019 or 2 August 2019 (according to the Company). One of the factual issues in dispute is the Claimant's final date of employment.
- 5 There was no written contract of employment between the Claimant and the Company. According to the Claimant, he attended the Company's office the day before he started work and filled in some forms. He did not know that a modern award applied to his employment until he received an email from Mr Alan Smith (Mr Smith), via the Fair Work Ombudsman (FWO), referencing the Award by the Company.²
- 6 The Claimant was paid \$37.50 per hour and worked 40 hours per week from Monday to Friday. His usual hours of work were 6.00 am to 2.00 pm or 6.30 am to 2.30 pm.
- 7 On 7 May 2019, the Claimant submitted an annual leave request for three weeks annual leave in July 2019, which was approved by the Company. The Claimant took approved annual leave from 27 June 2019 to 17 July 2019.
- 8 In May 2019, the Claimant was aware that the Company's business was quiet and there was a shortage of work. The last day the Claimant undertook work for the Company was on 28 May 2019. After that date, the Claimant did not carry out any further work for the Company for reasons each party disputes.
- 9 The Claimant elected the small claims procedure under s 548 of the FWA.
- 10 Schedule I of these reasons for decision outline the jurisdiction, practice, and procedure of the Western Australian Industrial Magistrates Court.
- 11 Schedule II of the reasons is the Claimant's computation of the amounts he says he is owed calculated from his payslips. Schedule II is a duplication of exhibit 5 tendered into evidence by the Claimant.

- 12 The Company is an Australian proprietary company limited by shares registered pursuant to the *Corporations Act 2001* (Cth) and operated a business installing and maintaining fire protection equipment such as fire alarms and fire control panels. The Company is a '**constitutional corporation**' within the meaning of that term in s 12 of the FWA and is a '**national system employer**' within the meaning of that term in s 14(1)(a) of the FWA. The Claimant is an individual who was employed by the Company and is a '**national system employee**' within the meaning of that term in s 13 of the FWA.
- 13 I am satisfied the Award *covered* the Company and the Claimant in the '**electrical services**' industry, having regard to the definition of '**electrical services**' in cl 4.8 of the Award. Further, I am satisfied the Award *applied* to the Claimant's employment having regard to not only the Company's acceptance of its application, but also having regard to the Award coverage referred to in cl 4.1 of the Award, and the roles and functions carried out by the Claimant relevant to the classifications within Schedule B of the Award. Further, the exclusions in cl 4.2 of the Award do not apply to the Claimant's employment.
- 14 The requirement to provide an employee with written notice of termination of employment is a minimum standard applicable to the employment of employees under s 117(2) of the FWA, and constitutes one of the National Employment Standards (NES): s 61(3) of the FWA when read with div 11 of pt 2 - 2 of the FWA.
- 15 Further, pursuant to s 117(2) of the FWA, an '*employer must not terminate an employee's employment unless*' the employer provides '*the **minimum period of notice***' under s 117(3) of the FWA or the employer pays '*to the employee ... payment in lieu of notice of at least the amount the employer would have been liable to pay to the employee ... at the full rate of pay for the hours the employee would have worked had the employment continued until the end of the minimum period of notice*'.

Issues For Determination

- 16 The following are issues for determination:
- Whether the Claimant was given written notice of termination of employment and when?
 - What was the Claimant's last day of employment?
 - Was the Company entitled to cash out or pay the Claimant's accrued annual leave entitlements in the manner it did?
 - Has the Company contravened the Award or the FWA?
 - What, if any, amounts are required to be paid by the Company to the Claimant?

Was The Claimant Given Written Notice Of Termination And When?

- 17 Clause 14 of the Award provides that notice of termination of employment by the employer is as required by the NES and s 117 of the FWA.
- 18 Therefore, if the Company terminated the Claimant's employment, it was required to give the Claimant written notice of termination of employment pursuant to s 117(1) of the FWA.

Evidence

- 19 The Claimant said that he never received written notice of termination of employment from the Company or any person authorised to give such notice on behalf of the Company. The Claimant

said that he had a conversation with Mr Smith in May 2019 about there being a shortage of work, but it never went beyond that.

- 20 Mr Smith said that he had a conversation with the Claimant on 6 May 2019 on site in Wellington Street, Perth during which he told the Claimant *'his position was to be made redundant due to a [shortage] of work ... and that his last day of work was 29 May 2019'*.³
- 21 Subsequent to this meeting, Mr Smith said he and the Claimant had a further conversation on site at Wellington Street, Perth during which the Claimant told him that *'he [the Claimant] was due to take leave in June and July' 2019* and Mr Smith agreed for the Claimant to *'check in'* after his leave to see if there was work available.⁴
- 22 The Claimant denied these two conversations took place as stated by Mr Smith and at most any conversation was general in nature and related to there being a downturn in work.
- 23 In oral evidence, Mr Smith said he was not sure if he gave something in writing to the Claimant but thought the Company did, although, he could not find the document. I note that no copy of written notice of termination of employment was produced by the Company and the Claimant denied that he was given written notice of termination of employment at any time or that any person at the Company spoke to him about his employment being terminated.
- 24 The Claimant says that the first time he was aware of his employment being terminated was after he contacted the FWO on 25 July 2019 and when he received an email from the FWO dated 20 August 2019 indicating Mr Smith believed he terminated the Claimant's employment and had given him notice.⁵
- 25 I note in the correspondence with the FWO, Mr Smith states that he provided the Claimant with 'verbal' notice of termination and commenced a *'4 week redundancy notice period'* with the Claimant on or around 6 May 2019 with the last day of work being 29 May 2019.⁶

Determination

- 26 I do not accept the Company gave the Claimant written notice of termination of employment. This is inconsistent with the contents of the email dated 13 August 2019 from Mr Smith to the FWO and a letter written by Mr Smith to the FWO (undated).⁷
- 27 Further, Mr Smith was unsure if written notice of termination was given but, conveniently, cannot find this document. The Claimant was adamant that he had not been given written notice of termination of employment and I accept that he had not.

What Was The Claimant's Final Day Of Employment?

Evidence

- 28 The Claimant contends that his last day of employment was 2 August 2019 where:
- he was paid approved annual leave from 27 June 2019 to 17 July 2019;⁸
 - he continued to receive payslips up to the receipt of a final payslip for the period 27 July 2019 to 2 August 2019 where he was paid at a base hourly rate.⁹ I note the Claimant received two different payslips for the same period (the second being Exhibit 3 where the base hourly rate had changed to unused holiday pay);¹⁰
 - on 18 September 2019, he received an email from the Company with an 'Employment Separation Certificate' which stated that his employment ceased on 2 August 2019 because there was a shortage of work;¹¹

- his statement of Construction Industry Long Service Scheme demonstrates that the Company continued to contribute to this scheme for the quarter July to September 2019;¹²
- he continued to accrue annual leave and superannuation contributions were made on all payslips from 23 May 2019 to 31 July 2019;¹³ and
- income statements from the Australian Taxation Office for the financial years 2018/2019 and 2019/2020 demonstrate that he was employed by the Company from 1 July 2019 to 2 August 2019.¹⁴

- 29 In contrast, the Claimant says the Company provided three different dates for the last day of his employment: 29 May 2019,¹⁵ 23 July 2019,¹⁶ and 2 August 2019.¹⁷
- 30 Mr Smith maintains the Claimant's last day of employment was 29 May 2019 and the Claimant did not attend work after this date. Mr Smith said the Claimant wanted to receive his accrued entitlements to be paid out on a weekly basis rather than in a lump sum. Accordingly, the Company paid the Claimant weekly and recorded those payments in payslips issued weekly from 12 June 2019 to 2 August 2019, save that the week ending 6 June 2019 was recorded as leave without pay as requested by the Claimant.¹⁸
- 31 Mr Smith stated that there was an error on the Claimant's 'Employment Separation Certificate' which recorded the Claimant's last day of employment as 2 August 2019 rather than 29 May 2019. This was because the last payment was made to the Claimant on 2 August 2019.
- 32 Mr Smith also referred to a document he says was signed by the Claimant on 29 May 2019 where there was a handwritten notation '*weekly payments as per Marco's request and discussion with IB*'.¹⁹
- 33 Further, the Company relied upon the evidence of Ms Irene Boxall (Ms Boxall), the Company's Accounts and Payroll Manager, who stated that after a meeting between the Claimant and Mr Smith on 10 June 2019 (between 2.30 pm and 3.00 pm) she confirmed with the Claimant that he wished to be paid his entitlements on an ongoing basis.²⁰
- 34 The 'IB' referred to in the document referred to by Mr Smith is Ms Boxall and I note that Ms Boxall had not seen this document prior to 29 May 2019. I also note Ms Boxall admitted there was a number of mistakes with respect to the dates on the Claimant's 'Employment Separation Certificate' and Income Statements and the contents of the Claimant's payslips. Further, in oral evidence, Ms Boxall was not as definitive about the date of 10 June 2019 being the date she confirmed with the Claimant the purported agreement of paying out his entitlements on a weekly basis. She suggested that it might have been a date around 10 June 2019.
- 35 Ms Boxall agreed that any purported verbal agreement for the Claimant to be paid his entitlements weekly was not reduced to writing. Ms Boxall also stated that because the weekly payslips were not 'termination' payslips, annual leave would continue to accrue, and superannuation would continue to be paid.
- 36 The Claimant disputes Mr Smith's and Ms Boxall's evidence and says that he did not agree to being paid his accrued entitlements each week (principally because he says he was not aware that his employment had been terminated) and that the Company used his accrued annual leave to pay his ordinary wages without his permission. In support of this, the Claimant refers, amongst other things, to an email he sent to Ms Boxall on 18 June 2019 expressly requesting her not to deduct any annual leave and to treat it as leave without pay.²¹

- 37 Further, the Claimant says that he continued to submit timesheets to the Company and when he returned from annual leave on 18 July 2019, he emailed the Company asking for the jobs that had been assigned to him.²²
- 38 Additionally, the Claimant says he retained the use of the Company's vehicle during this time until he sent an email to Ms Boxall on 26 June 2019 regarding the pickup of the vehicle from his home.²³
- 39 The Claimant and his wife, Ms Tak Ming Law (Ms Law), deny the Claimant attended a meeting with Mr Smith or Ms Boxall on 10 June 2019 because they were both at the Crown Casino for lunch between 12.00 pm and 3.00 pm, and Ms Law attached to her witness statement photographs of them at Crown Casino.²⁴
- 40 The Claimant agreed that he did not ask about jobs in any emails prior to the email sent on 16 July 2019. The Claimant did not think it was reasonable for him to attend the office when he considered himself to be employed after 28 May 2019 even though he did not get any work from 28 May 2019. The Claimant said that he telephoned Mr Smith on 28 May 2019 and he did not get a response from Mr Smith. The Claimant said he received a text message from one of the project managers. The Claimant also said that Ms Law telephoned Mr Smith on 29 May 2019 to ask about future work (see [50] below).

Determination

- 41 I do not accept the Company's evidence that the Claimant's last day of employment was 29 May 2019 for the following reasons:
- the repeated inconsistencies in the Company's dates was not satisfactorily explained. That is, the person entrusted with the Company's accounts, Ms Boxall, inserted 2 August 2019 on numerous official documents and she and Mr Smith gave no satisfactory account of why this purported mistake was continually made;
 - Mr Smith referred to at least two dates as the Claimant's final date of employment, being 29 May 2019 and 23 July 2019 demonstrating inconsistencies in his evidence;
 - none of the Company's contemporaneous documents support the Claimant's last day of employment being 29 May 2019. The only document that supports the Company's position is a highly suspicious memorandum with a handwritten notation. The document, rather than the handwritten notion, purports to be signed by the Claimant. Ms Boxall was not aware of this memorandum and it is inconsistent with an alleged meeting on 10 June 2019 where the Claimant is alleged to have confirmed that he wanted his accrued entitlements paid on a weekly basis. I place limited, if any, weight on the contents of the Company's memorandum dated 29 May 2019;
 - the Company continued to recognise the Claimant's approved annual leave, notwithstanding it had purportedly terminated his employment;
 - Mr Smith's letter to the FWO²⁵ states, amongst other things, that it was '[a]greed [for the Claimant] to remain on the payroll and happy to take days from that time until commencement of holiday period as unpaid', which is inconsistent with the Claimant's employment being terminated on 29 May 2019; and
 - I wholly reject that any meeting occurred on 10 June 2019 between the Claimant and Mr Smith. Ms Boxall was equivocal in her recollection of the exact date and it is

inconsistent with the Claimant's and Ms Law's evidence of their attendance at Crown Casino on the same day, supported by receipts and photographs.

- 42 In contrast, the Claimant's evidence consistently supports his contention that his last day of employment was 2 August 2019. This is not to say the Claimant undertook work for the Company between 29 May 2019 and 2 August 2019, but this is a separate issue to the Claimant's final day of employment with the Company.
- 43 I find on the balance of probabilities that the Claimant's final day of employment with the Company was 2 August 2019.
- 44 Consequential on this finding is that, in my view, the Company was not entitled to withhold payment of the Claimant's ordinary wages on the days the Claimant 'offered' to take leave without pay, namely 29 May 2019 and 30 May 2019 to 5 June 2019 (save for 3 June 2019). The Claimant continued to be employed by the Company until 2 August 2019. The FWA and the Award makes no provision for leave without pay other than for specific leave such as unpaid parental leave or unpaid carer's leave.
- 45 To the extent, the Company and the Claimant sought to vary any Award terms or engage in a flexible workplace arrangement (even if this was possible), no variation or arrangement had been reduced to writing with sufficient particularity. Further, I note the Claimant felt he had limited options and thus offered to take leave without pay, notwithstanding he had no requirement to do so while employed by the Company.
- 46 Regardless of a shortage of work, the Company had an obligation to act according to law with respect to the termination of the Claimant's employment and to ensure it complied with its requirements with respect to the payment of the Claimant's entitlements if the Claimant's employment was terminated. The Company could not 'hedge its bets'.

Was The Company Entitled To Cash Out Or Pay The Claimant's Accrued Annual Leave Entitlements In The Manner It Did?

Evidence

- 47 The gravamen of the Claimant's claim is that the Company, without his permission, used his accrued annual leave entitlements to pay his ordinary wages when the Company was experiencing a downturn in business.
- 48 The genesis of this is the lack of available work for the Claimant after 28 May 2019. That is, according to the Claimant at the end of his shift on 28 May 2019 he telephoned Mr Smith to obtain the job for the following day. Mr Smith did not return his telephone call.²⁶
- 49 When Mr Smith did not respond to his telephone call, the Claimant submitted his timesheet for the week and recorded 29 May 2019 as leave without pay. The Claimant was paid for four days for the week ending 29 May 2019.²⁷
- 50 According to Ms Law, she telephoned Mr Smith on 29 May 2019 at 9.27 am and complained about her husband not receiving any work and requested the Claimant be assigned work quickly. Ms Law said Mr Smith told her he would try and fix the problem. They spoke for approximately five minutes.²⁸
- 51 For the week ending 5 June 2019 the Claimant again sent in his timesheet recording the time as leave without pay, where he was not allocated any work by the Company, but he was paid for one day being the public holiday on 3 June 2019.²⁹

- 52 According to the Claimant from 6 June 2019 the Company started to use his accrued annual leave entitlements to pay his ordinary wages without his permission or without notice to him.³⁰
- 53 The Claimant says that the Company continued to pay him for the remainder of the period up to 2 August 2019 by using his accrued annual leave entitlements, and that the only period the Company was authorised to pay his annual leave entitlements was from 27 June 2019 to 17 July 2019 when he was on approved annual leave.
- 54 On 18 June 2019, the Claimant emailed Ms Boxall and requested her not to deduct any annual leave for that week and to treat that week as leave without pay. The Company continued to issue payslips where the Claimant was recorded to be paid 40 hours of 'Holiday Pay'.³¹
- 55 The Claimant commenced approved annual leave on 27 June 2019 and concluded annual leave on 17 July 2019. On 16 July 2019, the Claimant emailed Mr Smith that he was returning to work on 18 July 2019 and asked what jobs would be assigned to him.³²
- 56 The Claimant says that he received no response from Mr Smith and followed up the previous email with another email sent to Mr Smith on 22 July 2019.³³
- 57 Ms Law says that she spoke with Mr Smith on 20 June 2019 at 1.46 pm and requested Mr Smith to stop using the Claimant's accrued annual leave as wages to which, she says, Mr Smith said that the money was better off with the Claimant than with him. Ms Law says that she told Mr Smith to '*stick with leave without pay for the period 13-26 June 2019*'.³⁴
- 58 The Company relies on two factors to support its contention that it could pay out the Claimant's accrued annual leave entitlements on a weekly basis:
- (1) firstly, it had the Claimant's consent to do so; and
 - (2) the memorandum dated 29 May 2019³⁵ gave effect to the Claimant's consent.
- 59 The Claimant stridently denies both of these factors.

Could the Company cash out or pay the Claimant's annual leave entitlements weekly?

- 60 The Claimant denied any agreement with the Company to continue to pay his wages by using his accrued annual leave entitlements or to pay out the same entitlements on a weekly basis.
- 61 Clause 28 of the Award provides for annual leave. Clause 28.1(a) states that '[a]nnual leave is provided for in the NES'. That is, the Claimant was '*entitled to 4 weeks paid annual leave*' which accumulates each year: s 87(1) and s 87(2) of the FWA.
- 62 At the cessation of employment, any untaken paid accrued annual leave is to be paid to the employee by the employer: s 90(2) of the FWA.
- 63 '*Paid annual leave must not be cashed out, except [relevantly] in accordance with cashing out terms included in a modern award*' under s 93 of the FWA: s 92 of the FWA.
- 64 Section 93(2) of the FWA provides that the terms of a modern award providing for the cashing out of annual leave '*must require that:*
- (a) *paid annual leave must not be cashed out if the cashing out would result in the employee's remaining accrued entitlement ... being less than 4 weeks;*
 - (b) *each cashing out of a particular amount of paid annual leave must be by a separate agreement in writing between the employer and the employee; and*

(c) *the employee must be paid ... the full amount that would have been payable to the employee*'.

65 Further, s 93(3) and s 93(4) of the FWA provides that a '*modern award ... may include terms requiring an employee ... to take paid annual leave in particular circumstances*', provided the circumstances are reasonable, and a '*modern award may include terms otherwise dealing with the taking of paid annual leave*'.

66 Clause 28.11 of the Award outlines the circumstances relevant to the cashing out of paid annual leave, including that the '*cashing out of a particular amount of paid annual leave must be the subject of a separate agreement under clause 28.11*' of the Award.

67 Clause 28.11(c) of the Award states that '[a]n employer and an employee may agree in writing to the cashing out of a particular amount of accrued paid annual leave by the employee' (emphasis added). However, any agreement '*must state the amount of leave to be cashed out and the payment to be made to the employee for it; and the date on which the payment is to be made*': cl 28.11(d) of the Award.

68 Further, an agreement of this type:

- '*must be signed by the employer and employee*': cl 28.11(e) of the Award;
- '*must not result in the employee's remaining accrued entitlement to paid annual leave being less than 4 weeks*': cl 28.11(g) of the Award; and
- ensure the '*maximum amount of accrued ... annual leave that may be cashed out in any period of 12 months is 2 weeks*': cl 28.11(h) of the Award.

69 An example of the type of agreement between an employee and employer for the cashing out of annual leave is contained in Schedule I of the Award.

70 Therefore, to the extent the Company could vary the terms and conditions of the Award as it related to annual leave, it could only do so in accordance with cl 28.11 of the Award.

71 It is common ground that save for the memorandum dated 29 May 2019, there is no signed written agreement between the Company and the Claimant:

- that agrees to the Claimant's accrued leave entitlements being paid out in a particular amount;
- for each week, the Claimant's accrued annual leave entitlement was paid; and
- identifying the date on which the payment was to be made.

72 Further, it is apparent given the number of weeks the Claimant's accrued annual leave entitlements were paid, the maximum amount of two weeks in a 12 month period was exceeded.

73 Section 324(1) of the FWA provides that an '*employer may deduct an amount from an amount payable to an employee*', but only in respect of the reasons given in s 324(1)(a) to s 324(1)(d), and none of these reasons apply in the Claimant's case.

74 Therefore, in the circumstances, and having regard to only the Company's evidence, taken at its highest, the Company was not entitled to pay or cash out the Claimant's accrued annual leave entitlements on a weekly basis, where:

- any oral agreement between Mr Smith and the Claimant did not, and could not, comply with cl 28.11 of the Award; and

- the memorandum dated 29 May 2019 did not comply with cl 28.11 of the Award.
- 75 Therefore, in the circumstances, the Company was not entitled to pay the Claimant's accrued annual leave entitlements on a weekly basis (whether in lieu of wages or otherwise) pursuant to any alleged oral agreement (even if I was to accept such an agreement, in fact, existed) or pursuant to the memorandum dated 29 May 2019 (even if I was to accept the authenticity of the memorandum).
- 76 While I have considered the situation from the circumstance most favourable to the Company (where the Company was non-compliant with the Award and the FWA), this does not mean I accept the Company's evidence concerning any purported oral agreement between the Company and the Claimant to pay the Claimant's accrued annual leave entitlements weekly.
- 77 I found Mr Smith's evidence to be less than satisfactory about meetings held with the Claimant in May 2019 and the lack of a notice of termination of employment was instructive. I did not accept that a meeting occurred between Mr Smith and the Claimant on 10 June 2019. There were numerous inconsistencies in official documents completed by Ms Boxall and Mr Smith on behalf of the Company, which were not satisfactorily explained by them.
- 78 Overall, the Company's actions were inconsistent with having terminated the Claimant's employment on 29 May 2019 and more consistent with using the Claimant's accrued annual leave entitlements to pay the Claimant's ordinary wages during a downturn in business.
- 79 Accordingly, if it is necessary to do so, I do not accept Mr Smith's evidence that there was an oral agreement between he and the Claimant to pay the Claimant's accrued annual leave entitlements on a weekly basis. Further, I have considerable doubt about the authenticity of the memorandum dated 29 May 2019 where the essential handwritten notation is in red pen and not counter-signed by the Claimant. I place very little, if any, weight on the reliability of this document.
- 80 I prefer the Claimant's evidence where he denied any oral agreement between him and Mr Smith for the Company to pay out his accrued annual leave entitlements on a weekly basis.
- 81 Therefore, having regard to the Claimant's evidence, the Company was not authorised to pay the Claimant's accrued annual leave entitlements on a weekly basis, either in lieu of ordinary wages or at all, because there was no agreement to do so.

Has The Company Contravened The Award Or The FWA?

- 82 I am satisfied the Claimant has proven to the requisite standard the following:
- his final day of employment by the Company was 2 August 2019;
 - he was not given written notice of termination of employment;
 - he was not paid any amount in lieu of notice of termination;
 - there was no written or oral agreement between the Claimant and the Company to cash out or pay out the Claimant's accrued annual leave entitlements on a weekly basis or at all;
 - the Company did not pay his ordinary wages while he remained employed by the Company for the following periods:
 - 29 May 2019;
 - 30 May 2019 to 5 June 2019, save for 3 June 2019;

- 6 June 2019 to 12 June 2019;
 - 13 June 2019 to 19 June 2019;
 - 20 June 2019 to 26 June 2019;
 - 18 July 2019 to 24 July 2019;
 - 25 July 2019 to 31 July 2019; and
 - 1 August 2019 to 2 August 2019.
- instead of paying ordinary wages, the Company paid the equivalent time using the Claimant's accrued annual leave entitlements or did not pay him at all;
 - there was no other basis upon which the Company could forego paying his ordinary wages while he remained employed by the Company and the Company could not use his accrued annual leave entitlements to pay the Claimant's ordinary wages;
 - the Company failed to comply with cl 28.11 of the Award in cashing out or paying his annual leave entitlements on a weekly basis;
 - but for the Company using the claimant's accrued annual leave entitlements to pay ordinary wages, he would have accrued 196.72 hours in untaken paid annual leave;
 - the Company failed to pay the Claimant untaken paid annual leave upon the termination of his employment; and
 - consequential upon:
 - the Company's failure to pay an amount in lieu of written notice of termination of employment, the Company has not paid an amount to a superannuation fund for his benefit for that period; and
 - the Company's failure to pay all of his ordinary wages, the Company has not paid an amount to a superannuation fund for his benefit for all ordinary wages.
- 83 In failing to give the Claimant written notice of termination of employment, the Company contravened cl 14 of the Award and s 117(1) of the FWA.
- 84 In failing to pay the Claimant an amount in lieu of notice of termination of employment, the Company contravened cl 14 of the Award and s 117(2) of the FWA.
- 85 In failing to pay the Claimant an amount in lieu of notice of termination, the Company contravened s 44 of the FWA and such a contravention is a civil remedy provision: s 539(2) of the FWA, pt 2 - 1, item 1.
- 86 In failing to pay the Claimant's wages for ordinary hours of work while he remained employed by the Company, the Company contravened cl 22 of the Award.
- 87 In failing to pay the Claimant's wages for ordinary hours of work while he remained employed by the Company, the Company contravened s 45 of the FWA and such a contravention is a civil remedy provision: s 539(2) of the FWA, pt 2 - 1, item 2.
- 88 In failing to cash out or pay the Claimant accrued annual leave entitlements in accordance with cl 28.11 of the Award, the Company contravened cl 28.11(a) of the Award.
- 89 In failing to comply with cl 28.11 of the Award, the Company contravened s 45 of the FWA and such a contravention is a civil remedy provision: s 539(2) of the FWA, pt 2 - 1, item 2.

- 90 In failing to pay the Claimant untaken paid annual leave upon termination of employment, the Company contravened s 90(2) of the FWA.
- 91 In failing to pay the Claimant untaken paid annual leave upon termination of employment, the Company contravened s 44(1) of the FWA and such a contravention is a civil remedy provision: s 539(2) of the FWA, pt 2 - 1, item 1.
- 92 In failing to pay superannuation contributions to a superannuation fund for the Claimant's benefit, the Company contravened cl 23.2 of the Award.
- 93 In failing to comply with cl 23.2 of the Award, the Company contravened s 45 of the FWA and such a contravention is a civil remedy provision: s 539(2) of the FWA, pt 2 - 1, item 2.

Outcome

- 94 Section 545(3) of the FWA enables an eligible State court (of which the IMC is an eligible State court) to '*order an employer to pay an amount to, or on behalf of, an employee of the employer if the court is satisfied that:*
- (a) *the employer was required to pay the amount under this Act or a fair work instrument; and*
 - (b) *the employer has contravened a civil remedy provision by failing to pay the amount'*.
- 95 Therefore, there are three preconditions to an order by the IMC under s 545(3) of the FWA:
- (1) an amount payable by the employer to the employee;
 - (2) a requirement to pay the amount by reference to an obligation under the FWA or a fair work instrument; and
 - (3) the failure to pay constitutes a civil remedy provision under s 539(1) and s 539(2) of the FWA.
- 96 I note further that the Claimant elected the small claims procedure. Thus, the amount referred to in s 548(1)(a) and s 548(1A)(a) of the FWA refers to '*an amount that an employer was required to pay to ... an employee:*
- (i) *under [the FWA] or a fair work instrument; or*
 - (ii) *because of a safety net contractual entitlement; or*
 - (iii) *because of an entitlement of the employee arising under subsection 542(1)' of the FWA.*
- 97 Having regard to the findings made and to the contraventions identified, I find the following amounts are required to be paid by the Company to the Claimant:
- \$7,377 – being 196.72 hours of untaken paid annual leave accrued at the time of termination of employment paid at the rate of \$37.50 per hour.
 - \$6,000 – being four weeks payment in lieu of notice of termination paid at the rate of \$37.50 per hour.³⁶
 - \$2,416.53 – being the underpayment of ordinary wages on 29 May 2019, the week of 30 May 2019 to 5 June 2019, the week of 25 July 2019 to 31 July 2019 and 1 August 2019 to 2 August 2019.³⁷
- 98 Further, I find \$807.60 is required to be paid by the Company to a superannuation fund for the benefit of the Claimant.

Result

99 I make the following orders:

- Pursuant to s 545(3) and s 548(1A) of the FWA and subject to any liability to the Commissioner of Taxation under the *Taxation Administration Act 1953* (Cth), the Company is to pay to the Claimant the amount of \$15,793.53 within 30 days of the date of this order.
- Pursuant to s 545(3) and s 548(1A) of the FWA, the Company is to pay to a superannuation fund for the benefit of the Claimant the amount of \$807.60 within 30 days of the date of this order.

D. SCADDAN
INDUSTRIAL MAGISTRATE

-
- ¹ Exhibit 1 – Witness Statement of Kwok Fu Chan dated 21 October 2020 at Attachment 19.
 - ² Exhibit 1, Attachment 17.
 - ³ Exhibit 8 – Witness Statement of Alan Smith dated 23 October 2020 [1].
 - ⁴ Exhibit 8 [2].
 - ⁵ Exhibit 1 [44] - [45] and Attachment 17.
 - ⁶ Exhibit 1 – Attachment 17.
 - ⁷ Exhibit 1 – Attachment 17.
 - ⁸ Exhibit 1 [29] and payslips 234, 235 and 236.
 - ⁹ Exhibit 2 – payslip 239.
 - ¹⁰ Exhibit 1 [39] - [41].
 - ¹¹ Exhibit 1 [55] - [56] and Attachment 19.
 - ¹² Exhibit 1 [63] and Attachment 20.
 - ¹³ Exhibit 1 [64] and payslips 229 to 238.
 - ¹⁴ Exhibit 1 [65], [66], Attachment 21 and Attachments 22.
 - ¹⁵ Email from Mr Smith to FWO dated 13 August 2019.
 - ¹⁶ Exhibit 1, Attachment 18 – Statement of Service dated 9 September 2019.
 - ¹⁷ Exhibit 1, Attachment 19 – Employment Separation Certificate; Exhibit 1 [68].
 - ¹⁸ Exhibit 8 [5] - [7].
 - ¹⁹ Exhibit 9 – final page of the Company’s copy of records.
 - ²⁰ Exhibit 10 – Witness Statement of Irene Boxall dated 29 September 2020.
 - ²¹ Exhibit 1, Attachment 7.
 - ²² Exhibit 1, Attachment 5 and Attachments 12.
 - ²³ Exhibit 1, Attachment 10.
 - ²⁴ Exhibit 7 – Witness Statement of Tak Ming Law dated 5 October 2020 [13] - [17] and attached restaurant receipts and photographs.
 - ²⁵ Exhibit 1, Attachment 17.
 - ²⁶ Exhibit 1 [9] - [11].
 - ²⁷ Payslip 229.
 - ²⁸ Exhibit 7 [5] - [11].
 - ²⁹ Payslip 230.
 - ³⁰ Exhibit 1 [18].
 - ³¹ Exhibit 9 – Payslip 231, 232, 233.
 - ³² Exhibit 1 [30] - [31] and Attachment 11.
 - ³³ Exhibit 1 [33] and Attachment 12.
 - ³⁴ Exhibit 7 [18] - [21].
 - ³⁵ Exhibit 9 – last page
 - ³⁶ Noting the Claimant is over 45 years of age and worked for a continuous period of at least two years and was employment by the Company for approximately 4.5 years.
 - ³⁷ I accept the Claimant’s computation of amounts owed as provided in exhibit 5 and having regard to the Claimant’s payslips.

Schedule I: Jurisdiction, Practice And Procedure Of The Western Australian Industrial Magistrates Court (IMC) 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 FWA.
- [2] The IMC, being a court constituted by an industrial magistrate, is an '*eligible State or Territory court*': FWA s 12 (see definitions of '*eligible State or Territory court*' and '*magistrates court*'); *Industrial Relations Act 1979* (WA) s 81 and s 81B.
- [3] The application to the IMC must be made within six years after the day on which the contravention of the civil penalty provision occurred: FWA, s 544.
- [4] The civil penalty provisions identified in s 539 of the FWA include contravening a term of the NES and contravening a term of a modern award: FWA, s 44(1) and s 45, respectively.
- [5] An obligation upon an '*employer*' 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 12, s 14, s 42 and s 47. A NES entitlement of an employee 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 13, s 42 and s 47.

Small Claims Procedure

- [6] The FWA provides that in 'small claims proceedings, the court is not bound by any rules of evidence and procedure and may act in an informal manner and without regard to legal forms and technicalities': FWA s 548(3). In *McShane v Image Bollards Pty Ltd* [2011] FMCA 215 [7], Judge Lucev explained this provision as follows:

Although the Court is not bound by the rules of evidence, and may act informally, and without regard to legal forms and technicalities in small claims proceedings in the Fair Work Division, this does not relieve an applicant from the necessity to prove their claim. The Court can only act on evidence having a rational probative force.

Contravention

- [7] 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).
- [8] The civil penalty provisions identified in s 539 of the FWA includes:
- The Core provisions (including s 44(1) and s 45) set out in pt 2-1 of the FWA: FWA, s 61(2) and s 539.
- [9] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the court may make orders for:

- An employer to pay to an employee an amount that the employer was required to pay under the FWA: FWA, s 545(3).

[10] In contrast to the powers of the Federal Court and the Federal Circuit Court, an eligible State or Territory court has no power to order payment by an entity other than the employer of amounts that the employer was required to pay under the FWA. For example, the IMC has no power to order that the director of an employer company make payments of amounts payable under the FWA: *Mildren v Gabbusch* [2014] SAIRC 15.

Burden and standard of proof

[11] In an application under the FWA, the party making an allegation to enforce a legal right or to relieve the party of a legal obligation carries the burden of proving the allegation. The standard of proof required to discharge the burden is proof ‘on the balance of probabilities’. In *Miller v Minister of Pensions* [1947] 2 All ER 372, 374, Lord Denning explained the standard in the following terms:

It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say ‘we think it more probable than not’ the burden is discharged, but if the probabilities are equal it is not.

[12] In the context of an allegation of the breach of a civil penalty provision of the 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].

Schedule II - Payslips Breakdown Between 16th May 2019 To 2nd August 2019

PAYSIPS BREAKDOWN 16 MAY 2019 TO 2 AUG 2019

Fire Protection Services Pty Ltd payslips details:

Hourly Rate \$37.50

ACTUAL RECEIVED SECTION				WAGES RECONCILIATION SECTION					SUPER RECONCILIATION SECTION			HOLIDAY LEAVE RECONCILIATION SECTION			Cumulative Holiday Leave Hours Balance		
Payslip No.	Payment Date	Pay Period From & To	Description	Hours	Amount	Holiday Leave Accrued Hours	Year To Date Holiday Leave Hours	Gross Amount Received	Should Receive Gross Amount	Claiming Difference of wages in gross	Super Amount Received	Should Receive Super Amount	Claiming Difference of Super Amount	Holiday Leave Accrued Hours Stated on Payslip		Holiday Leave Hours Should have Accrued	Actual Booked Planned Leave
Payslip 228	23/05/2019	16-5 to 22-5	Base Hourly	40	\$ 1,500.00	3.08	284.69	\$ 1,500.00	\$ 1,500.00	\$ -	\$ -	\$ 142.50	\$ 142.50	3.08	3.08	3.08	284.69
Payslip 229	30/05/2019	23-5 to 29-5	Base Hourly	32	\$ 1,200.00	2.46	287.15	\$ 1,200.00	\$ 1,500.00	\$ 300.00	\$ -	\$ 114.00	\$ 142.50	\$ 28.50	2.46	3.08	287.77
Payslip 230	6/06/2019	30-5 to 5-6	Public Holiday	8	\$ 300.00	0.62	287.77	\$ 300.00	\$ 1,500.00	\$ 1,200.00	\$ -	\$ -	\$ 142.50	\$ 142.50	0.62	3.08	290.85
Payslip 231	13/06/2019	6-6 to 12-6	Holiday Pay	40	\$ 1,500.00	3.08	290.84	\$ 1,500.00	\$ 1,500.00	\$ -	\$ -	\$ 142.50	\$ 142.50	3.08	3.08	3.08	293.93
Payslip 232	20/06/2019	13-6 to 19-6	Holiday Pay	40	\$ 1,500.00	3.08	213.92	\$ 1,500.00	\$ 1,500.00	\$ -	\$ -	\$ 171.00	\$ 142.50	\$ 28.50	3.08	3.08	297.01
Payslip 233	27/06/2019	20-6 to 26-6	Holiday Pay	40	\$ 1,500.00	3.08	177	\$ 1,500.00	\$ 1,500.00	\$ -	\$ -	\$ 142.50	\$ 142.50	3.08	3.08	3.08	300.09
Payslip 234	4/07/2019	27-6 to 3/7	Holiday Pay	40	\$ 1,500.00	3.08	140.07	\$ 1,500.00	\$ 1,500.00	\$ -	\$ -	\$ 142.50	\$ 142.50	3.08	3.08	40	263.17 Booked Leave
Payslip 235	11/07/2019	4-7 to 10/7	Holiday Pay	40	\$ 1,500.00	3.08	103.15	\$ 1,500.00	\$ 1,500.00	\$ -	\$ -	\$ 142.50	\$ 142.50	3.08	3.08	40	226.25 Booked Leave
Payslip 236	18/07/2019	11-7 to 17/7	Holiday Pay	40	\$ 1,500.00	3.08	66.23	\$ 1,500.00	\$ 1,500.00	\$ -	\$ -	\$ 142.50	\$ 142.50	3.08	3.08	40	189.33 Booked Leave
Payslip 237	25/07/2019	18-7 to 24-7	Holiday Pay	40	\$ 1,500.00	3.08	29.31	\$ 1,500.00	\$ 1,500.00	\$ -	\$ -	\$ 142.50	\$ 142.50	3.08	3.08	3.08	192.41
Payslip 238	1/08/2019	25-7 to 31-7	Holiday Pay	29.31	\$ 1,098.94	2.25	2.25	\$ 1,098.94	\$ 1,500.00	\$ 401.06	\$ -	\$ 104.40	\$ 142.50	\$ 38.10	2.25	3.08	195.49
Payslip 239	2/08/2019	1-8 to 2-8	Base Hourly	2.25	\$ 84.53	0	0	\$ 84.53	\$ 600.00	\$ 515.47	\$ -	\$ -	\$ 57.00	\$ 57.00	0	1.23	196.72
								\$ 14,683.47	\$ 17,100.00	\$ 2,416.53	\$ -	\$ 1,386.90	\$ 1,624.50	\$ 237.60			