

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION : 2020 WAIRC 00933

CORAM : INDUSTRIAL MAGISTRATE J. HAWKINS

HEARD : WEDNESDAY, 21 OCTOBER 2020

DELIVERED : FRIDAY, 27 NOVEMBER 2020

FILE NO. : M 43 OF 2020

BETWEEN : MARIO ALVAREZ PTY LTD

CLAIMANT

AND

FAIR WORK OMBUDSMAN

RESPONDENT

CatchWords : INDUSTRIAL LAW – *Fair Work Act 2009* (Cth) – Review of the Compliance Notice pursuant to s 717 of the *Fair Work Act* (Cth) – Alleged contravention of cl 17.4 of the *Joinery and Building Trades Award 2010* (Cth) by failure to pay redundancy pay – Whether employees full time employment is terminated or changed to casual employment – Downgrading of employees position – Abandonment of employment

Legislation : *Fair Work Act 2009* (Cth)
Acts Interpretation Act 1901 (Cth)
Industrial Relations Act 1979 (WA)

Instrument : *Joinery and Building Trades Award 2010* (Cth)

Case(s) referred to in reasons: : *Hindu Society of Victoria (Australia) Inc v Fair Work Ombudsman* (2016)
Hana Express Group Ltd v Fair Work Ombudsman (2020) 350 FLR 359
Miller v Minister of Pensions [1947] 2 All ER 372
Workpac Pty Ltd v Rossato [2020] FCAFC 84
Berkley Challenge Pty Ltd v United Voice [2020] FCAFC 113
Buckman v Barnawatha Abattoirs Pty Ltd [1994] 140 IR 376
Harrison v FLSmidth Pty Ltd [2018] FWC 6695
Khayan v Navitas English Pty Ltd (2017) 273 IR 44

Ancor Limited v Construction, Forestry, Mining and Energy Union
(2005) 222 CLR 241

Deeney v Patrick Projects Pty Ltd (2019) FWC 1772

Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd (1989)
166 CLR 623

Result : Application to cancel Compliance Notice dismissed. Compliance Notice varied and confirmed.

Representation:

Claimant : Mr M. Alvarez (director) on behalf of the claimant

Respondent : Mr A. Willinge (of counsel) as instructed by Australian Government Solicitors

REASONS FOR DECISION

Introduction

- 1 Mario Alvarez Pty Ltd (the Claimant) sought a review of a Compliance Notice issued pursuant to s 717(1)(a) of the *Fair Work Act 2009* (Cth) (FW Act). The Compliance Notice had been given to the Claimant pursuant to s 716 of the FW Act by Ms Louise Claire Casey (Ms Casey), a Fair Work Inspector, employed by the Fair Work Ombudsman (the Respondent). The Compliance Notice alleged a contravention by the Claimant. A copy of Compliance Notice is attached to these reasons in Schedule 1.
- 2 The Compliance Notice related to an employee of Claimant, Mr Colin Wright (Mr Wright). Sadly, Mr Wright passed away on 26 August 2020. There is no dispute that Mr Wright was employed by the Claimant. The Compliance Notice stated that the Claimant did not pay Mr Wright redundancy pay under the *Joinery and Building Trades Award 2010* (Cth) (the Award) when his full-time employment was terminated by the Claimant.
- 3 The Claimant seeks a cancellation of the Compliance Notice. The Claimant does not dispute that it did not pay Mr Wright any redundancy pay but says it did not have to do so.
- 4 The Respondent however says the Compliance Notice should be varied and confirmed. The variation that the Respondent seeks is because the Compliance Notice referred to Mr Wright being owed six weeks' redundancy pay instead of seven weeks.
- 5 There is no dispute that Mr Wright was employed as a full-time stonemason and was paid pursuant to the Award. In particular, there is no dispute that the Award applies despite s 121(a) of the FW Act. The application of s 121 of the FW Act was not raised by the parties. In any event, cl 17.4(a) of the Award states as follows:
Clause 17.4 applies to an employee of a small business employer except for an employee who is excluded from redundancy pay under the NES by sections 121(1)(a), 123(1), 123(4)(a) or 123(4)(d) of the [FW] Act.
- 6 There is no dispute that Mr Wright had been continuously employed for a period of between three to four years. Section 121(1)(a) of the FW Act excludes redundancy pay for employees whose 'period of continuous service ... is less than 12 months'. Further, Mr Wright did not fall within any of the other exclusions referred to in s 123(1)(a), s 123(4)(a) and s 123(4)(d) of the FW Act because:

- a) Mr Wright was not employed for a specified period, task or season (s 123(1)(a) of the FW Act);
 - b) Mr Wright was not employed as an apprentice (s 123(4)(a) of the FW Act); and
 - c) Nor was there any evidence Mr Wright was 'an employee prescribed by the regulations as an employee to whom' subdivision 11A of the FW Act applied.
- 7 There is also no dispute that in 2019 the Claimant's director, Mr Mario Alvarez (Mr Alvarez), raised concerns with Mr Wright and another employee, Mr Robert Rowan (Mr Rowan), about the decline in the Claimant's business. On or about 5 December 2019, the Claimant wrote to Mr Wright by letter which stated as follows:

Dear Colin

Termination of Full-time Employment

As per my previous verbal communication, we are sorry to notify you that your employment with Andes Stone Works in the capacity of the Full-time Stone Mason position will terminate at 1pm on December 20th, 2019. Your final payment including accrued annual leave will be paid during the following week.

As discussed, we are able to offer you employment on a casual basis up until Andes Stone Works is no longer operating.

Should you have any queries, please don't hesitate to contact me. We'd like to thank you for the contribution you've made during your time at Andes Stone Works.

Kindly sign below to indicate receipt of this notice.

Sincerely,

Mario Alvarez

Owner

- 8 Following receipt of this correspondence, Mr Wright requested that the Claimant provide him with two separate letters to encompass what had been written to him on 5 December 2019. Those letters were provided to Mr Wright by the Claimant on or about 10 December 2019. The first of those letters still dated 5 December 2019 stated:

Dear Colin

Termination of Full-time Employment

As per my previous verbal communication, we are sorry to notify you that your employment with Andes Stone Works in the capacity of Full-time Stone Mason position will terminate at 1pm on December 20th, 2019. Your final payment including accrued annual leave will be paid during the following week.

Should you have any queries, please don't hesitate to contact me. We'd like to thank you for the contribution you've made during your time at Andes Stone Works.

Kindly sign below to indicate receipt of this notice.

Sincerely,

Mario Alvarez

Owner

- 9 The second of those letters also dated 5 December 2019 provided to Mr Wright on or about 10 December 2019 read as follows:

Dear Colin

Offer of Casual Employment

As discussed, we are able to offer you employment on a casual basis up until Andes Stone Works is no longer operating.

Kindly sign below to indicate receipt of this offer.

Sincerely,

Mario Alvarez

Owner

- 10 The reason for these two letters being provided was for the purposes of Mr Wright accessing Centrelink benefits. Further, there is no dispute that Mr Wright's last day of attending employment was 16 December 2019. On 18 December 2019, Mr Wright's wife and daughter contacted the Claimant to advise that Mr Wright was very sick and would not be returning to work.
- 11 At [6] of the Originating Claim (the Claim) the Claimant says it did not commit any contravention of the Award because:
- a. *properly characterised, the Amended Documents [the two further letters dated 5 December 2019 provided by the Claimant to Mr Wright] constituted a change of Mr Wright's employment conditions agreed by him in a manner similar to that contemplated in clause 12.7(e) of the Award; and*
 - b. *given that Mr Wright had not been terminated and remained in employment of the Claimant, no redundancy pay was payable.*
- 12 Effectively, the Claimant says that Mr Wright's employment was not terminated as he either was offered casual employment with the Claimant or accepted casual employment with the Claimant.
- 13 Further, although not particularised, the Claimant may also be seeking to suggest that Mr Wright abandoned his employment and as a result was not entitled to redundancy pay.
- 14 The Respondent, however, says that the Compliance Notice should be confirmed. It also says that there was a mistake in the Compliance Notice which is non-contentious. The Respondent says the Compliance Notice should be varied as Mr Wright's length of service was between three to four years. Accordingly, the Respondent says, pursuant to cl 17.4(d) of the Award, the correct period of redundancy pay was seven weeks, not six weeks, as expressed in the Compliance Notice.

Burden Of Proof And Jurisdiction

- 15 The jurisdiction of Western Australian Industrial Magistrate Court to review a Compliance Notice is set out in Schedule 2 of these reasons. The Claimant wants the Compliance Notice cancelled. As such, it is required to prove that this should occur on the balance of probabilities.¹
- 16 The standard is well accepted and means 'more probable than not'.²
- 17 In respect to the Respondent's application to vary the Compliance Notice, the Respondent bears the burden of proof on the balance of probabilities.
- 18 When I say I am 'satisfied' in these reasons, I mean I am satisfied upon the balance of probabilities.

Evidence

Ms Casey

- 19 Ms Casey's evidence is set out in her witness statement.³ At the hearing she was made available for cross-examination but was not subject to any cross-examination by the Claimant. Ms Casey's evidence was simply to outline the steps she had undertaken and the documents she had received prior to issuing the Compliance Notice. Her evidence referred to a letter from the Claimant's solicitor dated 15 January 2020. That letter indicated that the intention and effect of the letters dated 5 December 2019 written to Mr Wright was to change his employment status from a full-time permanent employee to that of a casual employee and that the change in status of Mr Wright's employment conditions was by mutual consent. As a result, the Claimant's solicitors denied that the Claimant had terminated Mr Wright's employment. I note however that there was no written evidence to establish that Mr Wright consented to the change in his employment conditions.
- 20 At [12] of Ms Casey's witness statement, she sets out the reasonable belief as to why a contravention of cl 17.4 and cl 26.4 of the Award had occurred. Specifically it was that:
- a. *The Award [applied] to the Claimant.*
 - b. *The Claimant employed Mr Wright on or around 16 February 2016 or 6 June 2016 to 20 December 2019.*
 - c. *Mr Wright ceased to be employed by the Claimant by termination at the Claimant's initiative because the Claimant no longer required the job done by Mr Wright to be done by anyone.*
 - d. *Mr Wright [was] entitled to redundancy payments in accordance with clauses 17.4 and 26.4 of the Award.*
 - e. *The Claimant contravened clauses 17.4 and 26.4 of the Award in relation to Mr Wright by failing to pay him the applicable redundancy payment, based on his length of service at the end of his employment.*
- 21 Ms Casey formed the view that 'Mr Wright ceased to be employed by the Claimant by termination at the Claimant's initiative'.
- 22 In [13] of Ms Casey's witness statement she indicated that '*the Claimant ended Mr Wright's full time employment*' and that the reason for the '*termination was that [the] business was slow and there was not enough work. Therefore, [she] considered that the entitlement to redundancy applied*'. Her statement indicates that simply because '*the Claimant offered Mr Wright a casual employment contract did not detract from the termination of [his] full time employment conditions*'.
- 23 Attached to her witness statement is a copy of her 'Decision Record' of 4 February 2020. In that 'Decision Record' it refers to information received from Mr Alvarez in which he maintained that he had not told '*people the business was closing as he wasn't sure what was going to happen*' and whether he would keep the business '*trading for 3 months, six months, he didn't know*'. Ms Casey's record indicates that Mr Alvarez suggested that business was slow and '*that's why he said the full time employment was ending and [that] he would keep people on as [a] casual*'.
- 24 As far as Mr Alvarez was concerned, Mr Wright's employment had not ended, and he had not been '*sacked*'. Mr Wright still had a job but there were simply insufficient hours to keep Mr Wright employed on a full-time basis.

- 25 Ms Casey was not subject to any cross-examination and as a result I can accept her evidence in full and find it reliable.

Mr Rowan

- 26 The Claimant relied upon the evidence of Mr Rowan, a foreman with the Claimant, which was in the form of a witness statement and his oral evidence at hearing. His evidence was to the effect that he and Mr Wright had had ongoing discussions with Mr Alvarez, that the Claimant's business was not doing well and that they should start to look for alternative work. His evidence was that as the end of financial year in 2019 came closer Mr Alvarez advised him and Mr Wright that he was expecting to have work after the financial year and that he *'was thinking to keep the business running up to Christmas'*. His evidence was that Mr Alvarez asked if Mr Rowan and Mr Wright wanted to stay until that time and that he and Mr Wright agreed to stay. He explained however Mr Alvarez approached both he and Mr Wright in December 2019 to inform them that if they wanted to continue with the Claimant for a few more months, work was coming up. In particular, Mr Rowan's evidence was that:

Mario told us if we agreed to work as casual employment as the work booked was not sufficient to keep us on fulltime basis.

- 27 He explained both he and Mr Wright received the letters of 5 December 2019 from Mr Alvarez. Mr Rowan explained that he agreed to the offer of casual employment. However, his evidence at trial was that both he and Mr Wright were aware of what was going on and that is why he and Mr Wright signed the letters from the Claimant. He did confirm that when Mr Wright initially received the letter of 5 December 2019, Mr Wright had indicated that he had spoken with his wife and would not sign the letter. Mr Wright wanted Mr Alvarez to re-write the letter in two separate letters requesting *'a letter stating "termination of Employment" ... with the purpose of sending it to centre-link'* to start claiming unemployment benefits and the second letter being the offer of permanent casual employment.
- 28 In his witness statement Mr Rowan stated that *'the second letter [which I presume to be the letter of 5 December 2019] was an offer of permanent casual position which Colin agreed and signed, therefore Colin signed both letters'*. In cross-examination Mr Rowan was asked whether by that comment he was stating that Mr Wright agreed because he signed the letter. In answer Mr Rowan said:

No really agreed, you know, you have to understand this, we - there's three of us that work together, so it's a small business. We have a letter, we also have ... we talk a lot ... we had a lot of verbal agreement ... [s]o we already knew what was going on in regards to going from sort of fulltime employment to casual employment.

...

[S]o when we knew what was going on that's why we signed the letter.

- 29 Mr Rowan agreed that Mr Wright's last day coming to work was 16 December 2019 and was aware that Mr Wright had been diagnosed with a terminal illness. Mr Rowan accepted that the question of whether Mr Wright's employment was terminated was a legal question.
- 30 Mr Rowan was a reliable witness. However, his evidence in respect to the issue of whether Mr Wright accepted the offer of casual employment was very general and lacked particularity.
- 31 Mr Rowan did not refer to any particular statement or discussion between himself and Mr Wright concerning Mr Wright accepting the offer of casual employment. At best he suggested that all

three men, Mr Alvarez, himself and Mr Wright, discussed the situation in respect to the Claimant's business.

32 Given the general nature of Mr Rowan's evidence it was insufficient to satisfy me that an inference could be drawn that by signing the letters of 5 December 2019 Mr Wright was accepting the Claimant's proposal of casual employment.

33 Given the general nature of Mr Rowan's evidence where it conflicts with the evidence of Ms Casey's, I find it unreliable and give it no weight.

Issues For Determination

34 Did cl 12.7(e) of the Award permit Mr Wright's employment to be changed from full-time to casual employment?

35 Was Mr Wright's employment terminated?

36 Did Mr Wright abandon his employment?

Determination

Did cl 12.7(e) of the Award permit Mr Wright's employment to be changed from full-time to casual?

37 Paragraph 6(a) of the Claim suggests that any possible change in Mr Wright's employment from full-time to casual employment was permitted by cl 12.7(e) of the Award. That clause provides:

Once a casual employee has elected to become and been converted to a full-time or part-time employee, the employee may only revert to casual employment by written agreement with the employer.

38 Simply put, this clause permits a casual employee being able to elect to become a full-time or part-time employee. It makes no mention of a full-time employee changing to a casual employee.

39 This issue was not pressed by the Claimant. In any event when read in context, this clause has no application to the facts of this case.

40 Simply put, this clause permits a casual employee being able to elect to become a full-time or part-time employee. It makes no mention of a full-time employee changing to a casual employee.

Was Mr Wright's employment terminated?

41 The primary position of the Claimant is that Mr Wright's employment was not terminated but that he remained employed as a casual employee.

42 To determine this issue requires an examination of the two letters of 5 December 2019 and any other relevant evidence.

43 One of the letters was headed, '*Termination of Full-time Employment*'. It states that Mr Wright's employment '*in the capacity of the Full-time Stone Mason position will terminate at 1pm on December 20th, 2019*'. It referred to final payments and accrued leave.

44 The letter is unambiguous and makes clear that Mr Wright's employment as a full-time stonemason was being terminated.

45 There is no dispute that the Claimant offered Mr Wright a casual employment. But it was only an offer. Although the letter asked Mr Wright to sign the letter to confirm receipt, it did not state directly that by signing, Mr Wright accepted the offer.

46 Additionally, the Claimant's proposal of casual employment lacked particularity as to the conditions of the offer. It was therefore incapable of acceptance.

- 47 In any event, it cannot be inferred that by his conduct Mr Wright accepted the proposal of casual employment by the Claimant. Mr Wright dated the acknowledgement of receipt of the letters of 5 December 2019 on Friday, 13 December 2019. Mr Wright did not return to work after Monday, 16 December 2019 and his family advised the Claimant on 18 December 2019 that he was too sick to return to work. I give no weight to Mr Rowan's evidence as to whether Mr Wright accepted the Claimant's offer of casual employment for the reasons previously expressed.
- 48 However, even if Mr Wright can be said to have accepted the proposal of casual employment it does not preclude a finding that Mr Wright's full-time employment was terminated. Such change would have been fundamental and has been considered to be significant.⁴
- 49 As a full-time employee, Mr Wright's employment was a guaranteed 38 hours per week plus annual leave and other entitlements. As a casual, Mr Wright had no guarantee of work and the potential of no work. As a casual employee Mr Wright would have therefore had fewer entitlements such as annual leave, paid personal/carer's leave and redundancy pay (see s 86 and s 96 of the FW Act).
- 50 If the Claimant's position is correct, it would result in an absurd situation where the Claimant could change Mr Wright's employment from full-time to casual. The Claimant could then employ Mr Wright for a short period, even a day, and end his employment, resulting in the loss of redundancy pay; being clearly an unfair result.⁵
- 51 It has been accepted that where there is profound downgrading of an employee's position this constitutes a termination of employment.⁶ Further, in *Harrison v FLSmidth Pty Ltd*⁷ it was found that an employee can be dismissed (at the initiative of the employer) where there is a significant reduction in pay and duties, even if they remain employed.
- 52 Accordingly, even if I had been satisfied that Mr Wright accepted the proposal of casual employment, this would have been a profound downgrading of his position and would have constituted a termination of employment in any event.
- 53 A further issue that requires determination in respect to the issue of 'termination' is whether such termination was '*at the employer's initiative because the employer no longer requires the job done by the employee or to be done by anyone*'.
- 54 Clause 17.4(c) of the Award states as follows:
- Subject to paragraphs (f) and (g), an employee is entitled to be paid redundancy pay by the employer if the employee's employment is terminated:*
- (i) *at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or*
- (ii) *because of the insolvency or bankruptcy of the employer.* (emphasis added)
- 55 I am satisfied that Mr Wright's employment was terminated at the initiative of the Claimant and was the principle contributing factor which resulted in Mr Wright's termination of employment.⁸ The letters of 5 December 2019 from the Claimant to Mr Wright:
- a) were on the Claimant's letterhead;
 - b) were addressed to Mr Wright;
 - c) were entitled '*Termination of Full-time Employment*';

- d) used the words ‘*We are sorry to notify you that your employment with Andes Stone Works in the capacity of the Full-time Stone Mason position will terminate at 1pm on December 20th, 2019*’.
- e) refers to a final payment;
- f) gives thanks to Mr Wright for his contribution;
- g) asks Mr Wright to acknowledge receipt of the letter by signing; and
- h) makes no mention that Mr Wright was agreeing to the proposal or had, in fact, suggested it.

56 I am also satisfied that the Claimant no longer required the job of stonemason to be done by Mr Wright or anyone. In *Amcor Limited v Construction, Forestry, Mining and Energy Union*⁹ the High Court considered whether employees of the employer were entitled to redundancy payments following a merger. Despite the merger, all employees kept their job and entitlements. At [44] the High Court made clear that the relevant enquiry:

[W]ether employment in a particular kind of work then being undertaken was to come to an end. If that employment was to come to an end, it was necessary to consider why that was to happen. Was it because the employer no longer wanted the job, then being done by the employee, done by anyone? Or was it ‘due to the ordinary and customary turnover of labour’ ...

[T]he emphasis was upon a ‘job’ becoming redundant rather than a worker becoming redundant.

57 Although not factually exactly the same, the decision of *Deeney v Patrick Projects Pty Ltd*¹⁰ is relevant. In that case a number of employees were made redundant and claimed they had been unfairly dismissed. It was found:

I am satisfied that the [employers] no longer required the applicants’ jobs to be performed by anyone because of the changes in the operational requirements of the [employers’ business] ... The fact that casual opportunities still remained does not detract from the need to reduce the full time permanent workforce.

58 Further, Mr Alvarez, in his discussions with Ms Casey on 31 January 2020, said he was not sure how long the business would keep trading but that the business was slow and there was not enough work and that is why Mr Wright’s employment was ending. Likewise, Mr Rowan’s evidence was that Mr Alvarez told Mr Rowan and Mr Wright that the Claimant’s business was not doing well and that the work booked was not sufficient to keep him and Mr Wright employed full-time. Further, there was no evidence that anyone else was being employed to undertake Mr Wright’s job. Nor is there any evidence that this usually happened in the Claimant’s business or was due to the normal turnover of labour. The evidence establishes that the job came to an end as there was not enough work. As stated in *Berkley Challenge Pty Ltd v United Voice*:¹¹

Terminations arising from adverse economic circumstances ... are not ‘ordinary and customary turnover of labour’.

59 For the reasons previously expressed at [41] to [58], I therefore find that:

- a) Mr Wright’s full-time employment was terminated on 20 December 2019;
- b) That the termination of Mr Wright’s full-time employment was at the initiative of the Claimant because the Claimant no longer required the job performed by Mr Wright to

be done by anyone and this was not due to the Claimant's ordinary and customary turnover of labour.

Did Mr Wright abandon his employment?

- 60 A further possible issue that needs to be determined is whether Mr Wright abandoned his employment. An abandonment of employment is akin to a contractual 'repudiation'. It is well established that to determine whether a repudiation occurs has to be determined objectively by *'the conduct of the relevant party' that such conduct 'conveys to a reasonable person ... repudiation or disavowal either of the contract as a whole or of a fundamental obligation under it'*.¹²
- 61 Mr Wright had been employed between three to four years. On the Claimant's own evidence it establishes that Mr Wright attended work on 16 December 2020. Further, the letter from the Claimant to Mr Wright said that his full-time employment was terminating on 1.00 pm on 20 December 2019. In addition, there is clear evidence that Mr Wright's family advised the Claimant on 18 December 2019 of Mr Wright's ill health and that he would not be returning to work. On the basis of this evidence, when viewed objectively, it is insufficient to convey that Mr Wright disavowed his employment contract with the Claimant.

Variation Of Compliance Notice

- 62 The Respondent seeks a variation of the Compliance Notice. Mr Wright was employed from February or June 2016 until 20 December 2019. He was therefore employed between three and four years. Pursuant to cl 17.4(d) of the Award the correct number of weeks for three to four years of employment is seven weeks redundancy pay.
- 63 Ms Casey's evidence at [14] of her witness statement explains the error she made in the calculation of the redundancy pay. This issue does not take the Claimant by surprise and the Claimant's solicitors were aware of this issue.¹³
- 64 This change is simply being sought to match the entitlement referred to in the Award. As a result, I consider I am able to vary the Compliance Notice pursuant to s 717(3) of the FW Act.

Orders

- 65 Accordingly, based on the findings above, I am satisfied that the Claimant has not proven that it has not committed a contravention by not paying Mr Wright redundancy pay in accordance with cl 17.4 of the Award.
- 66 It is therefore ordered as follows:
- (1) The application by the Claimant to cancel the Compliance Notice is dismissed.
 - (2) Pursuant to s 717(3) of the FW Act the Compliance Notice issued on 12 February 2020 is varied by substituting the words '7 weeks' wages' for '6 weeks' wages' where those words appear in the table at [6] of the Compliance Notice.

(3) The varied Compliance Notice is otherwise confirmed.

**J HAWKINS
INDUSTRIAL MAGISTRATE**

¹ See *Hindu Society of Victoria (Australia) Inc v Fair Work Ombudsman* (2016) 304 FLR 264 [28] - [29], [32] - [35]; *Hana Express Group Ltd v Fair Work Ombudsman* (2020) 350 FLR 359 [49], [54].

² See *Miller v Minister of Pensions* [1947] 2 All ER 372.

³ Exhibit 2.

⁴ See *Workpac Pty Ltd v Rossato* [2020] FCAFC 84 [27] - [30], [31], [35] - [36], [57], [65] - [68] (Broomberg J); [14] - [322], [412], [475], [477], [478] - [479] (White J).

⁵ See *Berkley Challenge Pty Ltd v United Voice* [2020] FCAFC 113 [172]

⁶ See *Buckman v Barnawatha Abattoirs Pty Ltd* [1994] 140 IR 376 (Smith J)

⁷ *Harrison v FLSmith Pty Ltd* [2018] FWC 6695 [33], [36] - [38].

⁸ See *Khayan v Navitas English Pty Ltd* (2017) 273 IR 44 [75].

⁹ *Ancor Limited v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241 [43] - [44], [54].

¹⁰ *Deeney v Patrick Projects Pty Ltd* (2019) FWC 1772 [78].

¹¹ *Berkley Challenge Pty Ltd v United Voice* [2020] FCAFC 113 [237].

¹² See *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623.

¹³ See pages 25 and 35 of the witness statement of Ms Casey.

Schedule 1 – Compliance Notice

FWO GOLD COAST
PO BOX 1945 SURFERS PARADISE QLD 4217

COMPLIANCE NOTICE

(issued under section 716(2) of the *Fair Work Act 2009* (Cth))

Date of Issue: 12 February 2020

Name of Employer: MARIO ALVAREZ PTY LTD
 Trading as Andes Stone Works

ABN/ACN (if applicable): 81 125 839 358 / ACN 125 839 358

Employer Contact/

Director (if applicable): MARIO ALVAREZ

I **LOUISE CASEY**, being a duly appointed Fair Work Inspector, reasonably believe that Mario Alvarez Pty Ltd trading as Andes Stone Works (**Employer**) has contravened a term of the Joinery and Building Trades Award 2010 [MA000029] (**Award**), as described below. This Compliance Notice requires you to take steps to remedy the contraventions described below.

Rights and obligations under this Compliance Notice

1. Failure to comply with this Compliance Notice may contravene section 716(5) of the *Fair Work Act 2009* (Cth) (**FW Act**) and render you liable for a civil penalty (unless you have a reasonable excuse).
2. You may be liable to a civil remedy if you give false or misleading information or produce false or misleading documents. It is also a serious offence under the *Criminal Code* (Cth).
3. If you do not comply with this Compliance Notice, the Fair Work Ombudsman may, without further notice, commence legal action against you and/or individuals involved in your failure to comply with this Compliance Notice to recover any outstanding monies which this Compliance Notice requires you to pay and to seek civil penalties.
4. Complying with the Compliance Notice is not an admission that you contravened, or have been found to have contravened, the Award or the FW Act.
5. You may apply to the Federal Court, Federal Circuit Court or eligible State or Territory Court for a review of this Compliance Notice on either or both of the following grounds:
 - (a) you did not commit the contraventions set out in this Compliance Notice;
 - (b) this Compliance Notice does not comply with sections 716(2) or 716(3) of the FW Act.

Details of the contravention(s)

6. The Employer, on between 21 December 2019 and 28 December 2019 (**Period**), contravened the clause of the Award set out in the table below.

| No | Clause | Details of contravention(s) |
|-----|---------------|---|
| (a) | 17.4 and 26.4 | Redundancy pay for employee of small business employer contravention Failing to pay Colin Wright Redundancy pay of 6 weeks' wages at his base rate of pay for his ordinary hours of work no later than 7 days after the date on which the employee's Full Time employment terminated. (Entitlement). |

Required action under this Compliance Notice

7. In accordance with section 716(2) of the FW Act, I require you by Friday 13 March 2020 to:

Step 1 – calculate and rectify underpayments

- (a) In respect of the contravention referred to in row (a) of the table above:
- (i) in respect of Colin Wright's employment:
1. calculate the amount the Employer should have paid to Colin Wright during the Period in respect of the Entitlement;
 2. make a payment to Colin Wright of the amount referred to in (1) immediately above; and
 3. make a record of the information and amount referred to in (1) and the amount of the payment referred to in (2) immediately above (**Underpayment Rectification Information**).

Step 2 – Superannuation

- (b) calculate additional superannuation contributions required (if any) by clause 27 of the Award in respect of the amount required to be paid Mr Wright of the Employer as a result of Step 1.
- (c) in relation to Colin Wright who is owed such additional superannuation contributions, pay such additional superannuation contributions to Colin Wright's chosen Superannuation Fund.

Reasonable evidence of steps taken to comply with this Compliance Notice

8. In accordance with section 716(2) of the FW Act, I require you to produce the following reasonable evidence of your compliance with the actions specified in paragraph 7 above:
- (a) a schedule that sets out:
- (i) in relation to Mr Wright and in respect of the contravention that concerns Colin Wright, the Underpayment Rectification Information;

- (ii) in relation to Mr Wright, the additional superannuation contributions calculated for Mr Wright and paid to his Superannuation Fund in accordance with Step 2; and
 - (b) proof that full payment has been made to Mr Wright identified in Step 1 of the payments required to be made by Step 1 and Step 2, such as a bank transfer showing the transfer of funds to Mr Wright and his Superannuation Fund, or a copy of Mr Wright's payroll records showing the payments.
- 9. The evidence referred to above must be provided to the Fair Work Ombudsman by 20 March 2020 by email to louise.casey@fwo.gov.au or by post to The Fair Work Ombudsman, Attn: Louise Casey, PO Box 1945 Surfers Paradise QLD 4217.
- 10. You may be liable to a civil penalty or other civil remedy under the FW Act if you give false or misleading information or produce false or misleading documents in response to this Compliance Notice. You may also be liable for a criminal offence under the *Criminal Code* (Cth) if you do so.

Louise Casey



Fair Work Inspector
Fair Work Ombudsman

Schedule 2 – Jurisdiction of Western Australian Industrial Magistrates Court (IMC) to review a Compliance Notice

[1] Section 717(1) of the FW Act states:

717 Review of compliance notices

(1) A person who has been given a notice under section 716 may apply to the Federal Court, the Federal Circuit Court or an eligible State or Territory Court for a review of the notice on either or both of the following grounds:

- (a) the person has not committed a contravention set out in the notice;*
- (b) the notice does not comply with subsection 716(2) or (3). (emphasis added)*

- [2] Section 2C of the *Acts Interpretation Act 1901* (Cth) provides that reference to a ‘person’ includes ‘*corporate as well as an individual*’.
- [3] The IMC, being a court constituted by an industrial magistrate, is ‘***an eligible State or Territory Court***’: FW Act, s 12 (see definition of ‘***eligible State or Territory court***’ and ‘***magistrate court***’): and also *Industrial Relations Act 1979* (WA) s 81 and s 81B.
- [4] Accordingly, it is open to the IMC to review a Compliance Notice given to a person by a Fair Work Inspector on the grounds that the person has not committed a contravention set out in the Notice.
- [5] The extent of a court’s power to review has been the subject of detailed analysis – ***Hindu Society of Victoria (Australia) Inc v Fair Work Ombudsman*** (2016) 304 FLR 264.
- [6] Section 717 of the FW Act does not state what rules of evidence and procedure applies in a review of a Compliance Notice.
- [7] Section 551 of the FW Act requires the strict rules of evidence and procedure for civil matters to be applied when hearing proceedings relating to a contravention of a civil remedy provision.
- [8] Albeit, that s 717 is not defined under the FW Act as a civil remedy provision (see s 539 of the FW Act), the review requires a determination of whether the Claimant contravened the Award. A contravention of an Award (s 45) is a civil remedy provision (s 539 of the FW Act). Accordingly, I am satisfied s 551 of the FW Act applies to this application under s 717 of the FW Act.