

## WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

**CITATION** : 2020 WAIRC 00991

**CORAM** : INDUSTRIAL MAGISTRATE D. SCADDAN

**HEARD** : WEDNESDAY, 18 NOVEMBER 2020

**DELIVERED** : THURSDAY, 17 DECEMBER 2020

**FILE NO.** : M 66 OF 2020

**BETWEEN** : ERIN MCCORMACK

**CLAIMANT**

AND

MCL GROUP P/L

**RESPONDENT**

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**CatchWords** : INDUSTRIAL LAW – Small claim under the *Fair Work Act 2009* (Cth) – Claim for payment of redundancy pay – Whether the employer is a ‘small business employer’ and exempt from the requirement to pay redundancy

**Legislation** : *Fair Work Act 2009* (Cth)  
*Corporations Act 2001* (Cth)  
*Workers Compensation Act 1951* (ACT)  
*Industrial Relation Act 1979* (WA)

**Case(s) referred to in reasons:** : *Yaraka Holdings Pty Ltd v Giljevic* [2006] ACTCA 6  
*Chandler v Bed Bath N’ Table Pty Ltd* [2020] FWCFB 306  
*Ponce v DJT Staff Management Services Pty Ltd t/a Daly’s Traffic* [2010] FWA 2078  
*Baker v Orr, Chelsea Anne t/a Corr Hair Artistry* [2020] FWC 4696  
*Montgomery v Innovative Exterior & Landscaping* [2020] FWC 4316  
*Taylor v Auto Loans Group Pty Ltd t/a AutoCarLoans.com.au* [2018] FWC 1950  
*ACE Insurance Limited v Trifunovski* [2013] FCAFC 3  
*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** : The claim is dismissed

**Representation:**

Claimant : Self-represented

Respondent : Mr M. Cuthbert on behalf of the respondent (as a director)

**REASONS FOR DECISION**

- 1 The issue in dispute is the number of employees at the time of termination of employment and the requirement to pay redundancy pay pursuant to s 119(1)(a) of the *Fair Work Act 2009* (Cth) (FWA).
- 2 Ms Erin McCormack (Ms McCormack) contends MCL Group Pty Ltd (MCL) employed 19 employees at the time she was given written notice of termination of employment on 28 January 2020, and she is therefore entitled to an amount of redundancy pay equivalent of seven weeks at the base rate of pay for ordinary hours worked under s 119(2) of the FWA.
- 3 MCL contends that at the time Ms McCormack's employment was terminated on the grounds of redundancy, it was excluded from paying Ms McCormack redundancy pay because it was a '*small business employer*': s 121(1) of the FWA when read with s 23 of the FWA.
- 4 Ms McCormack elected the small claims procedure under s 548 of the FWA.
- 5 Schedule I of these reasons for decision outline the jurisdiction, practice and procedure of the Western Australian Industrial Magistrates Court (IMC).
- 6 MCL is an Australian proprietary company limited by shares registered pursuant to the *Corporations Act 2001* (Cth) (Corporations Act) and operates landscaping and maintenance gardening business to residential and commercial clients. MCL 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. Ms McCormack is an individual who was employed by MCL and is a '*national system employee*' within the meaning of that term in s 13 of the FWA.
- 7 The payment of redundancy pay is a minimum standard applicable to the employment of employees under s 61(2)(i) 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.

**Issue For Determination**

- 8 The principle legal issue for determination is whether at the time of Ms McCormack's termination of employment MCL was a '*small business employer*'. Resolution of this legal issue turns on determining the factual dispute concerning the employment status of seven people.

**Facts Not In Dispute**

- 9 MCL is owned by two shareholders: (a) 51% ordinary shares beneficially held by Mr Martin Cuthbert (Mr Cuthbert), sole director and secretary of MCL; and (b) 49% ordinary shares non-beneficially held by Ms Elizabeth Ann Cuthbert (Mrs Cuthbert), Mr Cuthbert's wife. Mrs Cuthbert holds the shares on trust for The Malixia Trust. While the family trust is an associated entity of MCL, it does not have any employees.<sup>1</sup>

- 10 As a result of a downturn in business and after seeking financial advice, Mr Cuthbert decided to make three employment positions redundant. One of the positions was Ms McCormack's role as office administrator and bookkeeper. On 28 January 2020, Ms McCormack and two other people were given written notice of termination on the grounds of redundancy.<sup>2</sup>
- 11 Ms McCormack worked during the four-week notice period and I infer was otherwise paid her accrued statutory entitlements.<sup>3</sup> Her last day of work was 25 February 2020.<sup>4</sup>
- 12 There are 12 former and current MCL employees that the parties agree were employed at the time of Ms McCormack's termination of employment and were included in MCL's count for the purposes of determining whether it was a '*small business employer*'.<sup>5</sup>
- 13 The seven people whose employment status is disputed are (the Disputed People):

<i>Name</i>	<i>Ms McCormack's suggested employment status</i>	<i>MCL's suggested employment status</i>
Mr James Rutherford (Mr Rutherford)	Casual – regular and systematic	Casual – not included in count
Mr Sebastian Gatt-Loading (Mr Gatt-Loading)	Casual – regular and systematic	Casual – not included in count
Ms Talen Stroot (Ms Stroot)	Casual – regular and systematic	Casual – not included in count
Ms Tanja Hughes (Ms Hughes)	Casual – regular and systematic	Casual – not included in count
Mr Anthony Martino (Mr Martino)	Casual – regular and systematic	Casual – not included in count
Mr Cuthbert	Full-time	Director/Secretary/Shareholder – not included in count
Mrs Cuthbert	Full-time	Shareholder – not included in count

- 14 The parties agree that the five employees described as 'casual' were casual employees of MCL, but MCL disputes that their casual employment was capable of being described as '*regular and systematic*'. MCL dispute that Mr Cuthbert and Mrs Cuthbert were its employees of any type.

### **The Employment Status Of The Disputed People**

#### **Meaning of '*small business employer*'**

- 15 Section 23(1) of the FWA provides that a '*national system employer is a **small business employer** at a particular time if the employer employs fewer than 15 employees at that time*'.<sup>6</sup>
- 16 Section 23(2) of the FWA provides the 'formula' for '*calculating the number of employees employed by the employer at a particular time*' and includes:
- '*all employees employed by the employer at the [particular] time*', save that any '*casual employee is not to be counted unless, at the time*' the person was employed '*on a regular and systematic basis*' (emphasis added).

- 17 Further, employees (if any) of *associated entities* are included in the count where ‘*associated entities are taken to be one entity*’ (emphasis added): s 23(3) of the FWA.
- 18 The count of employees also includes ‘*the employee ... whose employment is ... terminated*’ or is dismissed and ‘*any other employee ... whose employment is also terminated*’ or is dismissed: s 23(4) of the FWA. In Ms McCormack’s case, she was included by MCL in the count, as were the two other employees<sup>6</sup> whose employment was terminated on 28 January 2020. That is, Ms McCormack and the two other people were identified in the cohort of 12 agreed employees employed at the time of Ms McCormack’s termination of employment.

Meaning of ‘regular and systematic’

- 19 The term ‘*regular and systematic*’ is not defined in the FWA. Some guidance can be derived from other jurisdictions including the Australian Capital Territory Court of Appeal decision *Yaraka Holdings Pty Ltd v Giljevic* [2006] ACTCA 6.
- 20 In the joint judgement of Crispin P and Gray J, their Honours discussed, at [61] - [69], the meaning of ‘*regular and systematic*’ in the context of determining whether a worker was deemed to be employed for the purposes of s 11 of the *Workers Compensation Act 1951* (ACT). Similarly, at [89] - [92], Madgwick J also discusses the meaning of ‘*regular and systematic*’.
- 21 My understanding from those paragraphs are that the following principles can be drawn:
- regular ‘*may be constituted by frequent though unpredictable engagements*’. The term ‘*should be construed liberally*’ and is ‘*intended to imply some form of repetitive pattern*’;
  - systematic ‘*need not involve either predictability of engagements or any assurance of work at all*’ but ‘*implies something more than regularity ... [and] exhibits something that can be called a system, method or plan*’. It is sufficient that the pattern of employment or ‘*engagement occurs as a consequence of an ongoing reliance upon the worker’s services as an incident of the business*’;
  - it is the engagement or employment ‘*that must be regular and systematic ... [and] not the hours worked pursuant*’ to the engagement or employment; and
  - this may involve consideration of:
    - the contractual terms (if any);
    - ‘*the working relationship*’;
    - ‘*the period of engagement*’ or employment;
    - ‘*the frequency of work*’;
    - ‘*the number of hours worked*’;
    - ‘*the type of work*’; and
    - ‘*the normal arrangements for someone engaged to perform that type of work*’.
- 22 The principles in *Yaraka Holdings* have been applied recently in *Chandler v Bed Bath N’ Table Pty Ltd* [2020] FWCFB 306.
- 23 In *Chandler*, Ms Chandler’s casual employment as a sales assistant in a retail business was found to be ‘*regular and systematic*’ where she worked at least three days per week from July 2018 to February 2019. Importantly, there was a detailed position description from which Ms Chandler was employed to work in a particular operational structure in accordance with pre-established

and ongoing legal obligations, including a requirement to be available during the Christmas and New Year *black out* period. Further, Ms Chandler's employment was subject to a monthly roster system where she was required to indicate her availability to work in advance and then work shifts in accordance with the posted roster.

- 24 Ms McCormack also referred to *Ponce v DJT Staff Management Services Pty Ltd t/a Daly's Traffic* [2010] FWA 2078 and *Baker v Orr, Chelsea Anne t/a Corr Hair Artistry* [2020] FWC 4696.
- 25 In *Baker*, Ms Baker's casual employment in a hairdressing salon was found to be '*regular and systematic*' where it constituted frequent engagements each week with repetitive shifts commonly worked on Tuesdays, Thursdays and Saturdays from January 2019 to January 2020 where Ms Baker was informed two to three weeks in advance that her services were required.
- 26 In *Ponce*, Mr Ponce was employed as a casual traffic controller for approximately six weeks in September to October 2006 and from February 2008 to October 2009. Save for approximately six weeks, Mr Ponce worked every week from February 2008 to October 2009, including night and day shifts, and worked on average four days per week. This was Mr Ponce's only employment.
- 27 Commissioner Roe made the following observations:

[75] ... *the set of facts in each case must be examined and that, if the number of hours worked is small and the gaps between days and times worked is long and irregular this means that there needs to be other evidence that the employment of a casual is regular and systematic. Conversely, if there is a clear pattern or a roster for the hours and days worked then this would be strong evidence of regular and systematic employment.*

[76] *In situations where there is not a clear pattern or roster of hours and days worked or a clear agreed arrangement between the employer and the employee, then evidence of regular and systematic employment can be established where:*

- *The employer regularly offers work when suitable work is available at times when the employer knows that the employee has generally made themselves available; and*
- *Work is offered and accepted sufficiently often that it could no longer be regarded as simply occasional or irregular.*

[77] *Positive evidence of these two situations establishes regularity and a system to the employment. It is also positive evidence of a reasonable expectation of continuing employment on a regular and systematic basis. That is an expectation that this pattern of when work will continue to be offered and be accepted will continue.*

#### Associated entities and employed directors

- 28 Ms McCormack referred to s 50AAA of the Corporations Act and said Mr Cuthbert and Mrs Cuthbert were 'associated entities' of MCL.
- 29 In the first instance, in order to satisfy s 50AAA of the Corporations Act, the '*associate*' and the '*principal*' must be '*related bodies corporate*'.
- 30 Section 50 of the Corporations Act defines '*related bodies corporate*' as:

*Where a body corporate is:*

- (a) *a holding company of another body corporate; or*
- (b) *a subsidiary of another body corporate; or*

(c) a subsidiary of a holding company of another body corporate;  
the first-mentioned body and the other body are related to each other.

- 31 Mr Cuthbert and Mrs Cuthbert are natural persons and are neither holding companies nor subsidiaries. Accordingly, s 50AAA of the Corporations Act does not apply to them personally. Further, there was no evidence before the IMC that The Malixia Trust employed any employees.
- 32 Ms McCormack contends Mr Cuthbert and Mrs Cuthbert are employees of MCL. In Mr Cuthbert's case, she contends that Mr Cuthbert is an employed director and in Mrs Cuthbert's case, she contends that she is, in essence, a 'shadow' employed director or an employee.
- 33 MCL disputes Mr Cuthbert is an employed director and disputes Mrs Cuthbert is a 'shadow' employed director or an employee.
- 34 In *Montgomery v Innovative Exterior & Landscaping* [2020] FWC 4316, Deputy President Saunders found that the sole director of Innovative Exterior & Landscaping was an employee. He did so primarily, but not solely, on the basis that the sole director worked in the business on a full-time basis and was intimately involved in the day to day operation of the business. I note that there was limited discussion of any legal principles applied upon which the determination was made.
- 35 In *Taylor v Auto Loans Group Pty Ltd t/a AutoCarLoans.com.au* [2018] FWC 1950, Commissioner McKinnon found that the directors were not employees of Auto Loans Group Pty Ltd where there was not a contract of employment between the company and directors.
- 36 Commissioner McKinnon stated that in order to find that the directors were employees of Auto Loans Group Pty Ltd, he would need to be satisfied that a contract of employment existed between them (oral or written). '[C]ontracts of employment are contracts for personal service, as opposed to contracts that ... [permit] unlimited delegation or a contract which does not actually compel performance of work': *Jeremy Taylor* [52].
- 37 'A dispute about whether a contract of employment exists is resolved by reference to the true character of the relationship between the alleged parties': *Jeremy Taylor* [53].
- 38 In *ACE Insurance Limited v Trifunovski* [2013] FCAFC 37 [102] - [103], Buchanan J, after reviewing a number of cases, drew some conclusions highlighting a number of features of what may tend against concluding whether an employment relationship exists and identifying certain indicia of employment, most notably a right of control such as allocation of work or how work should be done.

### Evidence

- 39 In part, the most reliable evidence with respect to the employment status of five of the Disputed People is contained in the time sheets for each of the five casual employees.
- 40 I understand that the five casual employees comprising the Disputed People worked in the maintenance division of MCL. According to Mr Cuthbert, October 2019 to January 2020 was a busy time and he engaged casual employees to support other full time and part time employees in the maintenance division (maintaining client gardens). Mr Cuthbert stated that MCL did not rely upon any particular casual employee to perform work and several people were contacted depending on their availability.
- 41 Mr Cuthbert agreed that there was a monthly maintenance template and that this was broken down into clients, however, Mr Cuthbert said that he was not involved in scheduling the work which was done by Mr Neil Waterhouse (Mr Waterhouse), Ms Jennifer Smith (Ms Smith), and

Ms McCormack. Mr Cuthbert also agreed that MCL had regular clients and jobs which were carried out on a weekly, fortnightly, and monthly basis and that each job was ordinarily carried out by two employees. Mr Cuthbert did not know if there were 20 shifts to be filled each week but he did not dispute that this might be the case and he did not dispute that 14 shifts were filled by part time and full time employees with casual employees filling the remaining six to eight shifts.

- 42 Mr Cuthbert clarified that the monthly maintenance template and scheduling referred to by Ms McCormack was a schedule of jobs and not a schedule of employees. Further, the gaps in the scheduling referred to by Ms McCormack occurred during the busy times of the year and this was when casual employees were used to fill those gaps. However, Mr Cuthbert stated that MCL was not reliant on the casual employees to carry out its contractual obligations and, if necessary, MCL would use one instead of two employees to undertake the work.
- 43 Mr Cuthbert stated that a casual employee would be contacted the week before and if they were available to work, they would be engaged to work and, if not, he would move on to the next person.

#### *Mr Rutherford*

- 44 Mr Rutherford worked 42 days between 1 October 2019 and 22 January 2020. He worked between 5.5 and 36.25 hours per week. Other than on seven occasions, he commenced work around 7.00 am and finished between 1.00 pm and 4.15 pm.<sup>8</sup>
- 45 The time sheets for Mr Rutherford demonstrate that on each of his working days he would attend the 'yard' at the beginning and end of each day, which I infer was MCL's business premises and that he did so to pick up tools or to join other employees to go to various jobs. His main working days were Monday to Wednesday, and he attended a variety of private and commercial properties. He also attended other locations to obtain supplies such as mulch or to attend the rubbish tip.<sup>9</sup>
- 46 Mr Rutherford was paid an hourly rate for the hours worked.
- 47 According to Mr Cuthbert, Mr Rutherford did not work on 28 January 2020 and he was not always available to work on days requested because he had other commitments.<sup>10</sup> Mr Rutherford ceased working for MCL.
- 48 According to the table of hours worked, Mr Rutherford worked:<sup>11</sup>
- Sixteen days in October 2019;
  - Eleven days in November 2019;
  - Ten days in December 2019; and
  - Five days in January 2020.

#### *Mr Gatt-Loading*

- 49 Mr Gatt-Loading worked 14 days between mid-October 2019 and 29 January 2020. He worked between 7.5 and 16 hours per week. He commenced work around 7.00 am and finished between 1.00 pm and 4.00 pm.<sup>12</sup>
- 50 Similar to Mr Rutherford, the time sheets for Mr Gatt-Loading demonstrate that on each of his working days he would attend the 'yard' at the beginning and end of each day, which I again infer was MCL's business premises and that he did so to pick up tools or to join other employees

to go to various jobs. His main working day was Friday, and he attended a variety of private and commercial properties.<sup>13</sup>

51 Mr Gatt-Loading was paid an hourly rate for the hours worked.

52 According to Mr Cuthbert, Mr Gatt-Loading did not work on 28 January 2020 and he was rarely available to work on days requested because he had other commitments.<sup>14</sup> Mr Gatt-Loading ceased working for MCL.

53 According to the table of hours worked, Mr Gatt-Loading worked:<sup>15</sup>

- Three days in October 2019;
- Four days in November 2019;
- Five days in December 2019; and
- Two days in January 2020.

#### *Ms Stroot*

54 Mr Cuthbert corrected his evidence as it related to Ms Stroot, namely he said that the table at [19] of his witness statement provided that Ms Stroot was a '*regular and systematic*' casual employee and was included in the count on 28 January 2020. This was an error, and he clarified that Ms Stroot was not a '*regular and systematic*' casual employee and she was not included in the count on 28 January 2020.<sup>16</sup>

55 Ms Stroot worked 15 days between 3 October 2019 and 29 January 2020. She worked between 8 and 17 hours per week. Save for one occasion, she commenced work around 7.00 am and finished between 2.30 pm and 4.30 pm.<sup>17</sup>

56 Similar to Mr Rutherford and Mr Gatt-Loading, the time sheets for Ms Stroot demonstrate that on each of her working days she would attend the 'yard' at the beginning and end of each day, which I again infer was MCL's business premises and that she did so to pick up tools or to join other employees to go to various jobs. Her main working days were Monday, Thursday and Friday, and she attended a variety of private and commercial properties and other locations.<sup>18</sup>

57 Ms Stroot was paid an hourly rate for hours worked.

58 According to Mr Cuthbert, Ms Stroot worked on 28 January 2020 and her work hours were ad hoc.<sup>19</sup> Ms Stroot resigned in February 2020 after being advised that there was no further work.

59 According to the table of hours worked, Ms Stroot worked:<sup>20</sup>

- Six days in October 2019;
- Four days in November 2019;
- Two days in December 2019; and
- Three days in January 2020.

#### *Ms Hughes*

60 Ms Hughes worked 11 days between 10 October 2019 and 22 January 2020. She worked between 6.25 and 8.75 hours per week and only worked on Mondays. Save for one day she commenced work at 7.00 am and finished between 3.15 pm and 4.15 pm.<sup>21</sup>

61 Similar to the other casual employees, the time sheets for Ms Hughes demonstrate that on each of her working days she would attend the 'yard' at the beginning and end of each day, and she



attended a variety of private and commercial properties and other locations during the course of the day.<sup>22</sup>

62 Ms Hughes was paid an hourly rate for hours worked.

63 According to Mr Cuthbert, Ms Hughes did not work on 28 January 2020 and she was not always available due to other commitments.<sup>23</sup> Ms Hughes resigned on or around 21 February 2020.

64 According to the table of hours worked, Ms Hughes worked:<sup>24</sup>

- Three days in October 2019;
- Three days in November 2019;
- Three days in December 2019; and
- Two days in January 2020.

#### *Mr Martino*

65 Mr Martino worked 41 days between January 2019 and January 2020.<sup>25</sup> He worked:

- Fifteen days in February 2019;
- Eleven days in March 2019;
- Six days in September 2019;
- Six days in October 2019; and
- Three days in November 2019.

66 The timesheets for Mr Martino suggest that he worked on specified jobs, such as at Grandis Primary School, consistent with the blocks of work hours undertaken. He worked at varying times.<sup>26</sup>

67 According to Mr Cuthbert, Mr Martino did not work on 28 January 2020 and his employment was occasional and he worked sporadically throughout the year depending on his availability where he ran his own business.<sup>27</sup>

#### Determination

68 For the following reasons, I am not satisfied on the balance of probabilities that Mr Rutherford, Mr Gatt-Loading, Ms Stroot, Ms Hughes, and Mr Martino's causal employment by MCL was '*regular and systematic*':

- I accept Mr Cuthbert's evidence that he used the five casual employees to supplement the work carried out by full time and part time employees during a busy period. This is consistent with the number of days worked over the purported busy period of time;
- I further accept Mr Cuthbert's evidence that the five casual employees were contacted the week prior for their availability and if they were not available, another person was contacted. If no one was available, the same maintenance work was carried out by one person being a full time or part time employee;
- the available work for each of the five casual employees, particularly Mr Gatt-Loading, Ms Stroot, Ms Hughes, and Mr Martino, was infrequent and variable and, in my view, not subject to any pattern of regularity. At best it reflects a short-term busy period in

October and November 2019 with a significant drop in available work in December 2019 and January 2020;

- to the extent that Mr Rutherford was offered and presumably accepted work more frequently, again this was over a short period of time and decreased significantly in December 2019 and January 2020;
- it is difficult to conclude that any of the five casual employees could have had a reasonable expectation of ongoing future work where they were employed for between zero and five days in January 2020 and at least two casuals resigned in February 2020;
- the work was not offered and accepted sufficiently often, particularly in December 2019 and January 2020, such that it could be characterised other than as occasional and infrequent in respect of each of the five casual employees; and
- while it is not determinative, but I also note that none of the five casual employees appeared to rely upon being offered work by MCL, where Mr Cuthbert referred to their other commitments. This is also consistent with the infrequent work offered and accepted.

69 I also refer to Mr Cuthbert's evidence regarding his acceptance of the employment status of two other casual employees, Mr Sabastian Cannella (Mr Cannella) and Mr Paul Nudd (Mr Nudd), as '*regular and systematic*'.

70 From Mr Cuthbert's perspective, the significant difference between Mr Cannella and Mr Nudd and the five other casual employees was that Mr Cannella and Mr Nudd worked daily for over 12 months in the construction area, and between October 2019 and January 2020 Mr Cannella and Mr Nudd worked consistently more than 30 hours per week over four to five days per week.<sup>28</sup> In my view, this also corroborates Mr Cuthbert's evidence that the other five casual employees were used to 'top up' the maintenance work on an as needs basis when they were available to do so.

#### *Mr Cuthbert*

71 According to Mr Cuthbert, he is not an employee of MCL. Mr Cuthbert stated that he attended the business premises most days, but he was not involved in the day to day running of the business and he engaged five people to run the business, including:<sup>29</sup>

- Construction manager and estimator – Mr Jamie Brooks;
- Maintenance supervisor – Mr Waterhouse;
- Senior horticulturalist – Ms Smith;
- Leading hand – Mr Chris Ford; and
- Office administrator and bookkeeper – Ms McCormack.

72 Mr Cuthbert stated that he did not get paid a salary or wage and did not draw a director's fee. Further, while he had previously received dividends, he had not received a dividend from the business for some years. Mr Cuthbert referred to the statutory declaration of Mr Graeme Arthur Sheard (Mr Sheard), Chartered Accountant, declared on 16 October 2020 in support of his evidence in this regard.

73 I note Mr Sheard did not give viva voce evidence or was subject to cross-examination on the contents of his statutory declaration. It is a matter for the IMC as to what weight ought to be

given to the contents of Mr Stead's statutory declaration. In my view, it supports Mr Cuthbert's oral evidence, which was subject to cross-examination, that he did not draw a wage, dividend or a director's fee, but that the fortnightly payment made in to Mr Cuthbert's and Mrs Cuthbert's joint account was from a loan between Mr Cuthbert and MCL.<sup>30</sup>

- 74 I also note Ms McCormack's oral evidence that while she did MCL's accounts and bookkeeping, she had no knowledge of the statements of accounts or the accountancy for the business. However, I note that Ms McCormack says that between \$2,350 and \$2,850 was paid into a joint bank account for Mr Cuthbert and Mrs Cuthbert.
- 75 Mr Cuthbert also stated that there was no employment agreement between him and MCL, he was not covered by MCL's workers' compensation policy and did not accrue any leave entitlements.
- 76 Further, while Mr Cuthbert agreed that he attended the office each day, he said he had no set days or hours of work and his role was to take sales enquiries, chat to clients, advertising, give quotations and he attended the weekly construction meetings. Ms McCormack also stated that other employees reported to Mr Cuthbert and he prepared and signed commercial contracts.
- 77 Ms McCormack agreed that when Mr Cuthbert and Mrs Cuthbert were away on leave, she and other employees continued to run the business without their input.
- 78 Ms McCormack said that Mr Cuthbert had the use of the company credit and charge cards and the use of employees to maintain his personal gardens.

#### *Mrs Cuthbert*

- 79 According to Mr Cuthbert, Mrs Cuthbert is not an employee of MCL, but provides voluntary support to him and the business because she and Mr Cuthbert set up the business and Mrs Cuthbert was originally responsible for the administration before Ms McCormack was employed.<sup>31</sup>
- 80 As stated above, Mrs Cuthbert is a shareholder of MCL and owns 49% shares on trust for the family trust, The Malixia Trust.
- 81 Mr Cuthbert agreed that Ms McCormack was supervised by Mrs Cuthbert, but he said that this was because Mrs Cuthbert had set up the business with him and understood the administration side of the business.
- 82 Ms McCormack said that Mrs Cuthbert attended the office daily usually between 8.30 am or 9.00 am to 2.30 pm or 3.00 pm, depending on the children's school commitments.
- 83 Mr Cuthbert said that Mrs Cuthbert did not have an employment agreement with MCL, was not on the payroll and did not receive wages or a salary, could come and go from the business as she saw fit where she did not have set hours of work, did not accrue any leave entitlements and was not covered by MCL's workers' compensation policy. Ms McCormack did not disagree with this.<sup>32</sup>
- 84 Similarly, Ms McCormack said that Mrs Cuthbert had the use of the company credit and charge cards and the use of employees to maintain her personal gardens. Further, Ms McCormack says Mrs Cuthbert pays creditors and makes certain financial decisions for MCL. Ms McCormack believes Mrs Cuthbert is a 'shadow director'.

Determination

- 85 For the following reasons, I am not satisfied, on the balance of probabilities, that the evidence demonstrates that there was a contract of employment between Mr Cuthbert and Mrs Cuthbert and MCL, and I am not satisfied that they were employees of MCL:
- notwithstanding Mr Cuthbert and Mrs Cuthbert may have attended the business each day, they were under no obligation to do so and could come and go as they pleased;
  - to the extent that they continued to be involved in the business, I am not satisfied that they necessarily formed an integral part of the business on a day to day basis, where MCL employed other staff in dedicated day to day roles;
  - Mr Cuthbert and Mrs Cuthbert had no defined roles and responsibilities and the evidence is consistent with them maintaining oversight over the business rather than running the day to day aspects of the business;
  - they received no entitlements usually associated with a contract of employment, including wages, annual leave and other such entitlements, and they were not covered by MCL's workers' compensation policy; and
  - while an amount of money was paid into Mr Cuthbert and Mrs Cuthbert's joint account on a regular basis, I accept that it was in the form of a loan rather than wages or salary.

Outcome

- 86 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 [the FWA] or a fair work instrument; and*
  - (b) *the employer has contravened a civil remedy provision by failing to pay the amount'.*
- 87 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.
- 88 I note further that Ms McCormack elected the small claim 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.*
- 89 In order for Ms McCormack's claim to be successful, she is required to demonstrate that MCL is required to pay her an amount, relevantly, under s 119(1)(a) of the FWA and that the failure to pay that amount constitutes a civil remedy provision.

- 90 As stated at the outset, MCL denied any requirement to pay an amount under s 119(1)(a) of the FWA because it said it was a '*small business employer*' where at the time of Ms McCormack's termination of employment it employed less than 15 employees.
- 91 Having regard to the determinations made with respect to the employment status of the five casual employees (forming the Disputed People) and to Mr Cuthbert and Mrs Cuthbert, I am satisfied on the balance of probabilities that MCL was a '*small business employer*'. At the time of Ms McCormack's termination of employment on 28 January 2020, I find on the balance of probabilities that MCL employed 12 employees.
- 92 The five casual employees, being Mr Rutherford, Mr Gatt-Loading, Ms Stroot, Ms Hughes, and Mr Martino, were not employed by MCL on a '*regular and systematic*' basis. Mr Cuthbert and Mrs Cuthbert were not employed by the MCL as there was no contract of employment between them and MCL.
- 93 Accordingly, I accept and I find that the Disputed People ought not to have been included in the count for the purposes of s 23(2) of the FWA.
- 94 Therefore, MCL was excluded from paying Ms McCormack a redundancy pay under s 121(1) of the FWA.

**Result**

- 95 Ms McCormack's claim is dismissed.

**D. SCADDAN  
INDUSTRIAL MAGISTRATE**

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<sup>1</sup> Exhibit 3 – Witness Statement of Martin Cuthbert dated 4 November 2020 at [5] and [6]. I note that this evidence was not contested by Ms McCormack and there was no rebuttal evidence before the IMC regarding the family trust and whether it employed other people.

<sup>2</sup> Exhibit 3 [7] - [12], annexure MC-1.

<sup>3</sup> Exhibit 1 – Witness Statement of Erin McCormack dated 28 October 2020 at [8].

<sup>4</sup> Exhibit 3 [13]; Exhibit 1 [7].

<sup>5</sup> Exhibit 1 [13] – employees 1 - 12; Exhibit 3 at [19] – employees 1 - 12. The employees include full time, part time and casual employees.

<sup>6</sup> Neil Waterhouse and Jamie Wilkes.

<sup>7</sup> Also referred to in *Jeremy Taylor*.

<sup>8</sup> Exhibit 4 – Annexure MC 4 – Timesheets and pay slips; Exhibit 2 – table prepared by Ms McCormack.

<sup>9</sup> Exhibit 4 – Annexure MC 4.

<sup>10</sup> Exhibit 3 [23e].

<sup>11</sup> Exhibit 4 – Annexure MC 6 – summary of hours worked for casual employees.

<sup>12</sup> Exhibit 4 – Annexure MC1 – time sheets and pay slips and Exhibit 2.

<sup>13</sup> Exhibit 4 – Annexure MC1.

<sup>14</sup> Exhibit 3 [23e].

<sup>15</sup> Exhibit 4 – Annexure MC6.

<sup>16</sup> Consistent with [23e] of Exhibit 3 and MCL’s Response to the Originating Claim.

<sup>17</sup> Exhibit 4 – Annexure MC5 – timesheets and pay slips and Exhibit 2.

<sup>18</sup> Exhibit 4 – Annexure MC5.

<sup>19</sup> Exhibit 3 [23e].

<sup>20</sup> Exhibit 4 – Annexure MC6.

<sup>21</sup> Exhibit 4 – Annexure MC2 – timesheets and pay slips and Exhibit 2.

<sup>22</sup> Exhibit 4 – Annexure MC2.

<sup>23</sup> Exhibit 3 [23e].

<sup>24</sup> Exhibit 4 – Annexure MC6.

<sup>25</sup> Exhibit 4 – Annexure MC6; Exhibit 3 [23e].

<sup>26</sup> Exhibit 4 – Annexure MC3 – timesheets.

<sup>27</sup> Exhibit 3 [23e].

<sup>28</sup> Exhibit 3 [23e].

<sup>29</sup> Exhibit 3 [24].

<sup>30</sup> Exhibit 5 – Statutory Declaration of Graeme Arthur Sheard declared 16 October 2020; Exhibit 3 [24d], [24e]; also see Exhibit 3 – Annexure MC3 – balance sheet liability list for MCL.

<sup>31</sup> Exhibit 3 [25h].

<sup>32</sup> Exhibit 3 [25h].

## Schedule I: Jurisdiction, Practice And Procedure Of The Western Australian Industrial Magistrates Court 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: FWA s 44(1).
- [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].*