

**CONTRACTUAL BENEFIT CLAIM  
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

**CITATION** : 2019 WAIRC 00805

**CORAM** : COMMISSIONER D J MATTHEWS

**HEARD** : THURSDAY, 3 OCTOBER 2019

**DELIVERED** : TUESDAY, 12 NOVEMBER 2019

**FILE NO.** : B 104 OF 2019

**BETWEEN** : MANON GANDIOLLE  
Applicant

AND

M4 MARKETING  
Respondent

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**CatchWords** : Industrial law (WA) – Contractual benefit claim – Claimed entitlement to salary and annual leave – Applicant discharges evidential onus in relation to part of the claim only – Claim for denied contractual benefit upheld in part – Order issued – Name of respondent amended

**Legislation** : *Western Australian Industrial Relations Act 1979*

**Result** : Claim upheld in part

**Representation:**

Applicant : In person  
Respondent : In person

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*Reasons for Decision*

- 1 Ms Gandiolle was employed by an entity which traded as M4 Marketing until 17 April 2019. On that date she received an email from a Mr Richard Trainer, the person she understood to be in charge, ending her employment.
- 2 At the hearing of the matter before me, Ms Gandiolle's case was that she was not paid after 2 April 2019.
- 3 It emerged that, in relation to the time up until 15 April 2019, Ms Gandiolle's claim was that she worked and was not paid. For the days 15 to 17 April 2019 Ms Gandiolle says she was entitled to sick leave payments.
- 4 Mr Trainer's case was that Ms Gandiolle had a payslip covering up to 10 April 2019 and was paid until that time in accordance with the payslip. Mr Trainer did not address the matter of payment for 11 and 12 April 2019. In relation to 15 to 17 April 2019 Mr Trainer said that Ms Gandiolle was not really sick and that the medical certificate she provided to him was not credible.
- 5 At ts 17, there was the following exchange between me and Mr Trainer about the first aspect of Ms Gandiolle's case, that is the aspect about payment up to and including 12 April 2019:
- MATTHEWS C:** All right. Do you dispute that Ms Gandiolle wasn't paid from 2 April on? That is her case, that she wasn't paid after 2 April. Do you have anything to say to her about that?
- TRAINER, MR:** No. In fact, the date she was paid, weekly in advance, so the date I would have her paid up to was in fact, the 11<sup>th</sup>.
- MATTHEWS C:** So what Mr Trainer is saying is that you were paid in advance and when did you make the last payment to her?
- TRAINER, MR:** Look, I haven't got that in front of me and I'd have to basically, go back through and get that from my partner. So it's a date – a date I don't have, I should have it but I don't have it.
- 6 There was a payslip which covered up until 10 April 2019.
- 7 Ms Gandiolle said that despite there being a payslip, she did not receive wages for the week 3 April 2019 to 10 April 2019.
- 8 There was this exchange between Ms Gandiolle and Mr Trainer when Ms Gandiolle was cross-examining Mr Trainer:
- GANDIOLLE, MS:** Mr Trainer, so you said I received a payslip that should have been from 10 March to 10 April. I am not contesting that payslip, however, do you have proof of payment that payments were made, according to that payslip? --- I would presume from the payslip being provided and you hadn't come back, in that email to Emma, to say you haven't received the payment. You've basically, said thank you for the payslip, however, the date's incorrect and you put the date. But you certainly haven't mentioned that in that email and you – and I believe you would have if you hadn't been paid. You stated there you haven't received your payment. You haven't said that in this email. (Indistinct).
- 9 In relation to 11 and 12 April 2019, as I say, Mr Trainer did not give any evidence as to whether Ms Gandiolle was paid or not.
- 10 In relation to the period 15 to 17 April 2019, Mr Trainer asserted the following, at ts 30:

I believe the doctor's certificate was a furphy. She in fact, just didn't want to come to work and work out her notice period and she – she hadn't come in and completed her obligations and worked out her notice period. So she wasn't then, entitled to her leave.

- 11 Both parties attended by telephone by their own choice. Ms Gandiolle was in Scotland. Mr Trainer was in Sydney.
- 12 For the period 3 to 10 April 2019, Ms Gandiolle has not convinced me to the required standard that she was not paid for that work. She gave evidence she was not paid. Mr Trainer says she was paid. I am simply unable to make, on what I have, any finding of fact with the requisite level of comfort.
- 13 I do not find myself persuaded on the evidence I have, basically Ms Gandiolle's word, that on the balance of probabilities she was not paid. I have to take into account that Mr Richard Trainer gave evidence that she was paid.
- 14 Ms Gandiolle asked Mr Trainer, in the passage reproduced above, if he could prove that he paid her. That is, of course, not the way things work. The onus remains at all times on Ms Gandiolle to prove, on the balance of probabilities, that she was not paid. It was not for Mr Trainer to prove that she was. Ms Gandiolle failed to discharge the onus upon her.
- 15 If the parties had been in attendance there might have been something about their demeanour, or presentation, that would have allowed me to prefer the evidence of one over the other and decide I was satisfied to the requisite standard that something happened or did not happen.
- 16 If Ms Gandiolle had produced some documentary evidence, say some bank records showing that a normal weekly payment had not occurred, that may have had an impact.
- 17 All I had was Ms Gandiolle on the telephone saying she was never paid and Mr Trainer saying she was. There was no good basis upon which I could possibly determine what did or did not happen.
- 18 I have no such doubt in relation to 11 and 12 April 2019 because Ms Gandiolle says she was not paid for those dates and Mr Trainer did not dispute it.
- 19 In relation to 15 to 17 April 2019, Ms Gandiolle is only entitled to be paid if she had an entitlement to paid sick leave for this period.
- 20 Ms Gandiolle has not proven to me to the requisite standard that she had such an entitlement. Ms Gandiolle was not able to establish on the balance of probabilities what her entitlement was nor how much of it she had used (or not used) as at 15 April 2019.
- 21 I reject Mr Trainer's assertion that the medical certificate was a 'furphy' but in the end whether it was or not I have been unable to determine Ms Gandiolle's sick leave entitlement.
- 22 I find that Ms Gandiolle is owed for two days' pay (11 and 12 April 2019) at a rate of \$19.30 per hour. I calculate the amount owed to be \$308.80.
- 23 It is necessary for me to decide who should pay this amount, that is, who was the correct employer. Ms Gandiolle brought the action against "M4 Marketing" which was just a trading name and not an entity capable of being sued. Mr Richard Trainer explained that he is the trustee of the unit trust named "M4 Unit Trust" which traded as M4 Marketing (see ts 2 and 3).
- 24 Accordingly, it is appropriate that Mr Richard Trainer as trustee for the M4 Unit Trust be named as the employer, and as the respondent, and I make that order.