

CONTRACTUAL BENEFIT CLAIM
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2020 WAIRC 00277

CORAM : COMMISSIONER T B WALKINGTON

HEARD : THURSDAY, 10 OCTOBER 2019

DELIVERED : FRIDAY, 15 MAY 2020

FILE NO. : B 114 OF 2019

BETWEEN : NIGEL JOHN BARR
Applicant

AND

THE SLATTER GROUP WA PTY LTD
Respondent

CatchWords : Benefit Under a Contract - Prescribed Amount - Interpretation of Legislation and Regulations

Legislation : *Industrial Relations Act 1979 (WA)*
Industrial Relations (General) Regulations 1997 (WA)

Result : Commission has jurisdiction to hear the substantive claim

Representation:

Counsel:

Applicant : Mr C Fordham (of counsel)
Respondent : Ms C Tsang (of counsel)

Solicitors:

Applicant : Slater & Gordon Lawyers
Respondent : Lavan Legal

Case(s) referred to in reasons:

Bhalsod v Perrie [2016] WASC 412

Brayson Motors Pty Ltd (In Liq) v Federal Commissioner of Taxation [1985] HCA 20; (1985) 156 CLR 651

Bull v The Attorney General (NSW) [1913] HCA 60; (1913) 17 CLR 370

Leahne Rowley v BHP Billiton Iron Ore [2013] WAIRC 00581; (2013) 94 WAIG 539

Matthews v Cool or Cosy Pty Ltd [2004] WASCA 114; (2004) 84 WAIG 2152

Stewart Michael Shields v WMC Resources Ltd [2004] WAIRC 10787; (2004) 84 WAIG 3378

Webster v McIntosh (1980) 32 ALR 603

William Hayward v Griffin Coal Mining Company Pty Ltd [2004] WAIRC 11512; (2004) 84 WAIG 1412

Reasons for Decision

- 1 Mr Nigel John Barr claims that he has been denied a benefit for payments of a bonus calculated with reference to the profit generated by individual projects under a contract of employment with The Slatter Group WA Pty Ltd (**Slatter Group**). Mr Barr calculates the total value of the bonus payments to be \$592,251.60. Mr Barr contends that he has received only \$15,000 of this amount. Mr Barr accepted the contract of employment in October 2013 and commenced employment on 4 November 2013 (**2013 Contract**).
- 2 Mr Barr's 2013 contract was terminated by agreement with the Slatter Group on 10 October 2017. Mr Barr and his employer agreed on a contract of employment with different terms which the applicant signed on 11 October 2017 (**2017 Contract**). This second contract did not include a term for a bonus payment.
- 3 On 6 February 2019, Mr Barr was notified by the Slatter Group that his employment was terminated as a result of redundancy. The Slatter Group declined Mr Barr's request for payment of the bonus payments he submits are due under the 2013 Contract. On 5 August 2019, Mr Barr applied to the Western Australian Industrial Relations Commission (**Commission**) pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA) (**IR Act**) seeking payment of the bonuses.
- 4 The Slatter Group objected to the Commission hearing and determining this matter on the basis that Mr Barr's salary exceeded the prescribed amount. The Slatter Group submitted that the relevant salary rate for the purposes of this matter is the salary paid at the time of Mr Barr's dismissal in February 2019 which was \$165,000. The Slatter Group refer to reg 5(2) of the *Industrial Relations (General) Regulations 1997* (WA) (**Regulations**) which sets out the method for calculating an employee's salary for the purposes of s 29AA(5) of the IR Act. The Slatter Group also argue that the 2017 Contract extinguished the term concerning the payment of bonuses in the 2013 Contract.
- 5 Mr Barr contends that the benefit he claims he is entitled to is provided in an earlier contract of employment. Mr Barr submits that it is the salary rate in the contract of employment which contains the benefit he claims, the 2013 Contract, that is the relevant salary rate. As this salary rate is under the prescribed amount, Mr Barr argues the Commission is able to hear and determine his claim. Mr Barr submits that the terms of the 2013 Contract were not extinguished by the 2017 Contract.

The Question to be Determined

- 6 The question I must answer is whether it is the salary rate in the first contract, the 2013 contract, or the salary rate at the time of Mr Barr's dismissal from employment as the salary rate that ought to be applied for the purposes of determining whether the salary received by Mr Barr exceeds the 'prescribed amount' as set out in s 29AA of the IR Act.

What are the Principles that Apply?

- 7 The jurisdiction to enquire into and deal with an industrial matter is conferred by s 23(1) of the IR Act to hear and determine a claim. Section 29(1)(b)(ii) of the IR Act provides standing to an employee to bring a claim: *Matthews v Cool or Cosy Pty Ltd* [2004] WASCA 114; (2004) 84 WAIG 2152.
- 8 Acting under the power conferred by s 23(1) and s 29(1)(b)(ii) of the IR Act, the Commission may hear and determine an industrial matter referred by an employee that is a claim of a benefit the employee claims to be entitled under his or her contract of employment.

- 9 Section 23(1) of the IR Act cannot be read in isolation, or only together with s 29(1)(b)(ii). Both of these provisions must be read with the restrictions set out in s 29AA(4) and s 29AA(5) of the IR Act. This approach applies the principle that the IR Act is to be read as a whole. Section 29AA(4) and s 29AA(5) of the IR Act are very specific provisions that operate to prohibit the Commission from determining a claim where the contract of employment of the employee who seeks to refer the claim pursuant to s 29(1)(b)(ii) of the IR Act provides for a salary that exceeds the prescribed amount.
- 10 The limitation provided for in s 29AA(4) and s 29AA(5) of the IR Act prevails to read down the general jurisdiction to enquire into and deal with an industrial matter conferred in s 23(1) of the IR Act when the matter referred is a claim that an employee has not been allowed a benefit to which he or she is entitled to under the contract of employment.
- 11 Section 29AA(4) and s 29AA(5) of the IR Act clearly provides a limitation on claims referred pursuant to s 29(1)(b)(ii) of the IR Act that can be determined by the Commission:
- (4) The Commission must not determine a claim that an employee has not been allowed by his or her employer a benefit to which the employee is entitled under a contract of employment if —
 - (a) an industrial instrument does not apply to the employment of the employee; and
 - (b) the employee’s contract of employment provides for a salary exceeding the prescribed amount.
 - (5) In this section —

industrial instrument means —

 - (a) an award; or
 - (b) an order of the Commission under this Act that is not an order prescribed by regulations made by the Governor for the purposes of this section; or
 - (c) an industrial agreement; or
 - (d) an employer-employee agreement;

prescribed amount means —

 - (a) \$90 000 per annum; or
 - (b) the salary specified, or worked out in a manner specified, in regulations made by the Governor for the purposes of this section.
- 12 The relevant regulation which provides for the ‘prescribed amount’ is found at reg 5 of the Regulations:
- 5. Prescribed amount — section 29AA**
- (1) For the purposes of paragraph (b) of the definition of “prescribed amount” in section 29AA(5) of the Act the specified salary is \$90 000, or that amount as affected by indexation in accordance with regulation 6.
 - (2) For the purposes of paragraph (b) of the definition of “prescribed amount” in section 29AA(5) of the Act, the salary provided for in an employee’s contract of employment is to be worked out as follows —
 - (a) for an employee who was continuously employed by an employer and was not on leave without full pay at any time during the period of 12 months immediately before the dismissal or claim — the greater of —

- (i) the salary that the employee actually received in that period; and
 - (ii) the salary that the employee was entitled to receive in that period;
- (b) for an employee who was continuously employed by an employer and was on leave without full pay at any time during the period of 12 months immediately before the dismissal or claim — the total of —
- (i) the actual salary received by the employee for the days during that period that the employee was not on leave without full pay; and
 - (ii) for the days that the employee was on leave without full pay an amount worked out using the formula —

remuneration mentioned in subparagraph (i)

$$\frac{\text{x days on leave without full pay}}{\text{days not on leave without full pay;}}$$

or

- (c) for an employee who was continuously employed by an employer for a period less than 12 months immediately before the dismissal or claim — the amount worked out using the formula —

$$\frac{\text{remuneration received x 365}}{\text{days employed.}}$$

- 13 In the interpretation of any statute or subsidiary legislation, regard is to be had to the ordinary and natural meaning of the words used within the relevant statute, in the context of the statute read as a whole. The Supreme Court of Western Australia summarised the principles of statutory interpretation in *Bhalsod v Perrie* [2016] WASC 412 [19]:

The applicable principles of statutory construction include the following. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The context and purpose of a provision are important to its proper construction because the primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The legal meaning of the relevant provision is to be decided by reference to the language of the instrument viewed as a whole. The purpose of the statute resides in its text and structure. The purpose of legislation must be derived from what the legislation says, and not from some a priori assumption about its purpose or any assumption about the desired or desirable reach or operation of the relevant provisions.

- 14 Where a legislative scheme is remedial or beneficial the presumption is towards the greater benefit to the individual and construed to give ‘the fullest relief which the fair meaning of the language will allow’: *Bull v The Attorney General (NSW)* [1913] HCA 60; (1913) 17 CLR 370, 384 (Isaccs J).
- 15 Delegated legislation, such as regulations, ought not be considered for the purposes of interpreting their principle legislation: *Webster v McIntosh* (1980) 32 ALR 603, 606. However, where the delegated legislation is an essential part of the legislative scheme then regulations may be considered to understand the scheme as established by the High Court of Australia in *Brayson Motors Pty Ltd (In Liq) v Federal Commissioner of Taxation* [1985] HCA 20; (1985) 156 CLR 651. Any conflict arising must be resolved in favour of the legislative provision.

Consideration

- 16 Mr Barr submits that the contract of employment that referred to s 29AA(4)(b) of the IR Act must be the same contract of employment that is referred to in s 29(1)(b)(ii) of the IR Act because those two subsections were clearly drafted to operate together. In s 29(1)(b)(ii) of the IR Act the terms ‘employee’, ‘employer’, ‘contract of employment’ are talking about the same employee, the same employer and the same contract of employment as that in s 29AA(4)(b) of the IR Act. In this matter the relevant contract is clearly the 2013 Contract which provides for a salary of \$150,000.
- 17 The Slatter Group submits that the regulations provide that the rate of salary is what Mr Barr received in the 12 months prior to his dismissal. Mr Barr was effectively dismissed in February 2019 when his position was made redundant. The Slatter Group submits that reg 5 of the Regulations refers to the salary the employee received or was entitled to receive during the 12 months immediately before his dismissal. The Slatter Group submit that Mr Barr’s salary at the time of his dismissal exceeds the prescribed amount.
- 18 The Slatter Group submit the decision of *Stewart Michael Shields v WMC Resources Ltd* [2004] WAIRC 10787; (2004) 84 WAIG 3378 (*Shields*) is instructive in this matter in that the Commission found that for the purposes of determining whether an employee’s salary exceeded the prescribed amount, the salary the employee received or was entitled to receive in the last 12 months of their employment should be applied. In *Shields* the issue to be decided was set out as ‘whether or not Mr Shields’ contract of employment provides for a salary exceeding the prescribed amount’ [13] and how the prescribed amount is to be calculated [15]. In this matter the respondent contended that the prescribed amount is to be calculated by reference to reg 5(2) of the Regulations. The Commission rejected this contention and found that reg 5(2) of the Regulations goes to the calculation of the salary provided for in the employee’s contract of employment and not to the calculation of prescribed amount (which is to be found in reg 5(1) of the Regulations). Mr Shields’ claim was that he was unfairly dismissed. In *Shields* the Commissioner, having found that reg 5 of the Regulations did not apply to the circumstances of the matter before him, found that at the material time the applicant’s salary was that which was ‘laid down’ or ‘specified’ in the applicant’s contract of employment. *Shields* did not consider the question of different contracts and which salary under the different contracts is to be referenced for the purposes of s 29AA(4)(b) of the IR Act.
- 19 The Slatter Group also refer to the decision of Kenner C in *William Hayward v Griffin Coal Mining Company Pty Ltd* [2004] WAIRC 11512; (2004) 84 WAIG 1412 (*Hayward*). In that case the issue to be determined was whether the applicant’s contract of employment, at the material time, provided for a salary exceeding the prescribed amount [2]. Mr Hayward brought a claim for unfair dismissal. At [26] the Commission sets out that the ordinary and natural meaning of s 29AA(3) of the IR Act appears to concern itself with the two issues. The first issue is what salary does an applicant’s contract of employment ‘provide for’. Secondly, having determined this issue, the next question is whether the salary exceeds the ‘prescribed amount’. Further the Commission finds that reg 5(2) of the Regulations provides a method to calculate the ‘salary provided for in an employee’s contract of employment’ which is that referred to in s 29AA(3)(b) of the IR Act and concerns unfair dismissal. The Slatter Group contend that this case is authority for the interpretation to be applied in the matter now before the Commission because the same wording of s 29AA(3)(b) of the IR Act is found in s 29AA(4)(b) of the IR Act which concerns claims for benefits under a contract of employment.

- 20 **Hayward** concerned a claim for unfair dismissal and the Commission found that the material time was that of the date of the employee's dismissal and the terms of the employment contract at that time. I do not agree with the Slatter Group's contentions that this decision is authority and that it is only the salary at the time of an employee's dismissal that is relevant for the purposes of a claim for a benefit under a contract of employment. In **Hayward** the relevant salary that was provided under the contract of employment that was the subject of the claims for the unfair dismissal claim and a benefit under the contract of employment. In the matter now before the Commission the benefit claim is under the 2013 Contract
- 21 Following the reasoning in **Hayward**, the application of reg 5(2) of the Regulations cannot be the 'period of 12 months immediately before the dismissal' because there was no dismissal during the operation of the 2013 Contract which came to an end by mutual agreement. Regulation 5 provides the method of working out the salary of an employee 'the period of 12 months immediately before the dismissal or claim'. I read the 'claim' as referring to the claim that an employee has not been allowed by his employer a benefit to which the employee is entitled under a contract of employment referred to in s 29AA(4)(b) of the IR Act. That is, in this matter, the claim for a benefit under the 2013 Contract and it is the salary rate provided for in this contract which is relevant.
- 22 In further support of their contentions the Slatter Group point to **Leahne Rowley v BHP Billiton Iron Ore** [2013] WAIRC 00581; (2013) 94 WAIG 539 (**Rowley**), in particular [8] 'The question to be answered at this stage of the proceedings is *whether, at the time of termination of her employment and the commencement of this claim, Ms Rowley's "salary", for the purposes of ss 29AA(4) and (5) exceeded the statutory cap*'. **Rowley** concerned the meaning of the term 'salary' and the inclusion of the value of other benefits paid to an employee in the calculation of an employee's salary. Ms Rowley had one contract of employment and her claim concerned this contract of employment at the time of her dismissal. **Rowley** is not concerned with the application of s 29AA of the IR Act to circumstances similar to that of Mr Barr's claim.
- 23 I read s 29AA(4)(b) of the IR Act to mean it is the employee's salary under the contract under which the benefit is claimed that is relevant. The starting point must be the statute and not the regulation. That is, if reg 5 of the Regulations is applied in the manner in which the Slatter Group contend, it would be inconsistent with the plain meaning of the language of the statute. The statute must prevail.
- 24 In this case then, the salary rate is that provided for or received under the 2013 Contract and is under the prescribed amount set at the time of the termination of that contract or at the time the claim was made.
- 25 The Slatter Group further submit that the 2017 Contract replaced the 2013 Contract and extinguished any entitlements or benefits under the earlier contract. This is not a matter relevant to determining the issue whether the claim is barred as a result of s 29AA(4)(b) of the IR Act. This is a contention that the benefit claimed by Mr Barr is one that he is not entitled to.

Conclusion

- 26 On the basis of the reasons set out herein, Mr Barr's salary was less than the prescribed amount and the Commission has jurisdiction to hear the substantive claim. A declaration will be made to this effect.