

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2020 WAIRC 00148

CORAM : COMMISSIONER T B WALKINGTON

HEARD : FRIDAY, 2 AUGUST 2019

DELIVERED : TUESDAY, 3 MARCH 2020

FILE NO. : B 24 OF 2019

BETWEEN : KIERAN KNIGHT
Applicant

AND

FINAL TRIM OPERATORS PTY LTD
Respondent

CatchWords : Denied benefit under contract of employment – Dismissed on grounds that no real question to be tried – Breach of contract – Unfair dismissal

Legislation : *Industrial Relations Act 1979 (WA)*

Result : Application dismissed

Representation:

Applicant : In person

Respondent : Mr C M Beetham (of counsel) and with him Ms L Chen (of counsel)

Case(s) referred to in reasons:

Aboriginal Legal Service of Western Australia (Inc) v Mark James Lawrence (No 2) [2008] WASCA 254; (2008) 89 WAIG 243

Automatic Fire Sprinklers Propriety Limited v Watson (1946) 72 CLR 435

Byrne v Australian Airlines Limited (1995) 185 CLR 410

Hotcopper Australia Ltd v David Saab [2001] WAIRC 03827; (2001) 81 WAIG 2704

Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited (2007) 233 CLR 115; (2007) 241 ALR 88

Sandra Tye v Care Services Administration Pty Ltd [2017] WAIRC 00689; (2017) 97 WAIG 1319

Talbot & Olivier (A Firm) v Glenys June Witcombe [2006] WASCA 87; (2006) 32 WAR 179

Reasons for Decision

- 1 Mr Kieran Knight commenced this application as a claim for payment of \$5,000 made pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA) (**IR Act**) for a benefit under a contract of employment that his former employer had denied him. Mr Knight's former employer, Final Trim Operators Pty Ltd/FT Workforce (**Final Trim Operators Pty Ltd**) refute Mr Knight's claim and seek that the application be dismissed because Mr Knight has not identified a benefit under a contract of employment that has been denied.

Background

- 2 Mr Knight was first employed by Final Trim Operators Pty Ltd from 28 November 2016 on full time hours for an annual salary of \$65,000 (**2016 Contract**). Subsequently Mr Knight entered a second contract for the period from 16 November 2018 to 16 January 2019 on part time hours for an annual salary of \$75,000 (**2018 Contract**). On 7 January 2019 Mr Knight notified Final Trim Operators Pty Ltd in writing his agreement to work full time hours from 14 January 2019 (**2019 Contract**).

- 3 On 13 February 2019 the General Manager notified the payroll officer by email that Mr Knight's annual salary was to be reduced by \$5,000 effective from that day:

Pls note effective todayKeiran's salary is 70k plus super.....Note this will take effect for next week's pay run.

Mr Knight was courtesy copied into the email.

- 4 Mr Knight emailed the General Manager the following morning advising that his written contract stipulates an annual salary of \$75,000 and that he had not been consulted about the reduction of salary prior to the decision being made, that he did not agree with the reduction, and that he considers the action of Final Trim Operators Pty Ltd to be in breach of the contract between them. Mr Knight stated in the email:

Please consider this my written 2 weeks' notice effective immediately.

- 5 He further advised that he would utilise his accrued leave until the end of his notice period.
- 6 The General Manager, responded by email advising him that she understood, thanking Mr Knight for his work over the years, and requesting a letter of resignation with his signature.
- 7 Mr Knight responded by email:

Technically I am not resigning – The current contract is considered null and void between myself and the company.

This is a breach of contract which is different to resigning my position.

The company has breached the contract by not complying with our agreed terms as stipulated in the contract.

- 8 The General Manager emailed Mr Knight:

So you will finish up with us then? I still need a letter and pls confirm the date.

- 9 Mr Knight responded by reiterating that he was currently employed under contract and the circumstances surrounding his leaving are as a result of a breach of contract by Final Trim Operators Pty Ltd and not a voluntary resignation. Mr Knight repeated that he was not resigning and that the company had intentionally or unintentionally made a serious breach of the agreed contract and that he was choosing to terminate the contract due to the breach.

10 Subsequently Mr Knight emailed the General Manager on 14 February 2019 with an attachment of a letter with his signature dated 14 February 2019. The letter stated:

Please find attached my signature confirming the termination of the Employment Contract between myself and Final Trim Operators Pty Ltd/FT Workforce (Common name FTWorkforce/Final Trim Operators) effective immediately. This is due to breach of conditions as stipulated and agreed upon in the contract.

11 On 18 February 2019 Mr Knight lodged an application pursuant to s 29(1)(b)(ii) of the IR Act alleging Final Trim Operators Pty Ltd had breached the contract of employment by reducing his salary from \$75,000 to \$70,000 without consultation, seeking payment of \$5,000.

12 On 5 June 2019 Mr Knight filed and served further and better particulars of his claim, being for:

- \$2500 dollars penalty for breaching a (sic) agreed employment contract under WA law
- \$2500 dollars for lost wages/pay drop per annum.

13 At the hearing on 2 August 2019 Mr Knight submitted a different claim for \$68,750 being for the payment of the benefit of the salary that he says he would have been entitled to under a contract 'entered into by affirmation'. Mr Knight says that the contract of employment he was engaged under at the time he terminated his employment on the grounds that Final Trim Operators Pty Ltd had breached their contract, would have been for a fixed term and for a period of 12 months or longer based on his previous work history with Final Trim Operators Pty Ltd.

14 Mr Knight says that he relies on a contract of employment that he says came into existence by the conduct of Final Trim Operators Pty Ltd continuing to employ him past the date of the expiry of the 2018 Contract, rescinding the 2018 Contract and reverting to the 2016 Contract terms.

15 Mr Knight says he had an ongoing contract that entitled him to the benefit of a salary, at the rate of the 2018 Contract, for a minimum of 12 months as he would have continued employment for a period of up to 24 months had Final Trim Operators Pty Ltd not unilaterally reduced his salary. Mr Knight contends that these were the terms of a contract at the time the employment relationship ended because Final Trim Operators Pty Ltd affirmed this to be the case by their conduct. Final Trim Operators Pty Ltd, he says, failed to take action to issue a further contract and acted as if the 2018 Contract continued.

16 Final Trim Operators Pty Ltd refutes that Mr Knight has been denied a contractual benefit and contends that Final Trim Operators Pty Ltd accepted Mr Knight's decision to terminate the contract of employment and paid Mr Knight's notice and entitlements in accordance with the rates of the 2018 Contract.

17 Final Trim Operators Pty Ltd says Mr Knight has failed to identify the benefit under the contract of employment he claims he has been denied, despite ample opportunity to do so, and seeks that the application be dismissed pursuant to s 27(1)(a)(iv) of the IR Act.

Question to be Determined

18 The first question to be answered is whether the application ought be dismissed because there is no real question of fact or law to be tried?

19 If the answer to the first question is no, the second question to be answered is whether the applicant was denied a benefit under this employment contract?

Principles

20 Section 29(1)(b)(ii) of the IR Act provides that:

- (1) An industrial matter may be referred to the Commission —
 - (a) in any case, by —
 - (i) an employer with a sufficient interest in the industrial matter; or
 - (ii) an organisation in which persons to whom the industrial matter relates are eligible to be enrolled as members or an association that represents such an organisation; or
 - (iii) the Minister;
 and
 - (b) in the case of a claim by an employee —
 - (i) that he has been harshly, oppressively or unfairly dismissed from his employment; or
 - (ii) that he has not been allowed by his employer a benefit, not being a benefit under an award or order, to which he is entitled under his contract of employment,
 by the employee.

...

21 The principles that apply to denied contractual benefit claims are set out in *Hotcopper Australia Ltd v David Saab* [2001] WAIRC 03827; (2001) 81 WAIG 2704 [34]. It is necessary for the applicant to establish this relates to an ‘industrial matter’; that he is an employee; that he is employed under a contract of service; that the benefit claimed is an entitlement under his contract of service; that the benefit does not arise under an award or order of the Western Australian Industrial Relations Commission (**Commission**); and that the benefit must have been denied by Final Trim Operators Pty Ltd .

22 Section 27(1)(a) of the IR Act provides that:

- (1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —
 - (a) at any stage of the proceedings dismiss the matter or any part thereof or refrain from further hearing or determining the matter or part if it is satisfied —
 - (i) that the matter or part thereof is trivial; or
 - (ii) that further proceedings are not necessary or desirable in the public interest; or
 - (iii) that the person who referred the matter to the Commission does not have a sufficient interest in the matter; or
 - (iv) that for any other reason the matter or part should be dismissed or the hearing thereof discontinued, as the case may be;

...

23 In *Sandra Tye v Care Services Administration Pty Ltd* [2017] WAIRC 00689; (2017) 97 WAIG 1319 [30], the Full Bench of this Commission affirmed the principles to be

applied when determining applications made under s 27(1)(v) of the IR Act to dismiss a matter on grounds that it cannot possibly succeed or there is no real question of fact or law to be tried as those set out by Steytler J in *Talbot & Olivier (A Firm) v Glenys June Witcombe* [2006] WASCA 87; (2006) WAR 179 [22]:

... it is only in cases in which it can be seen from the outset that, however the facts be found, there is no basis for the legal conclusion contended for by the plaintiff that the pleading should be struck out. ...

- 24 In the same matter, the Full Bench held that where the Commission is satisfied, after hearing from the parties, that the preconditions of s 27(1)(a) of the IR Act are met, the Commission is authorised to exercise the discretion conferred to dismiss the claim [40].
- 25 The doctrine of repudiation involves a circumstance where a party to a contract evinces an unwillingness or inability to render substantial performance of the contract or a breach of a term of a contract occurs: *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited* (2007) 233 CLR 115; (2007) 241 ALR 88 [44] – [49]. Repudiation by one party gives the party not in breach, known as the innocent party, the option to affirm the contract or to accept the repudiation and regard the contract as at an end. This step, by an innocent party, known as the election, is required for employment contracts as with other species of contracts: *Automatic Fire Sprinklers Propriety Limited v Watson* (1946) 72 CLR 435; *Byrne v Australian Airlines Limited* (1995) 185 CLR 410.

Consideration

- 26 There is no issue that Mr Knight was an employee and the subject matter of his claim is an industrial matter for the purposes of s 7 of the IR Act.
- 27 Mr Knight's employment terminated as a result of Mr Knight electing to treat the contract as ended as a result of his view that Final Trim Operators Pty Ltd conduct was in breach of their contract.
- 28 Mr Knight's assertion that the 2019 Contract continued for a further twelve months is not supported by any evidence. Mr Knight says the contract 'would have' continued, however he has not submitted any evidence that shows the contract would continue. Mr Knight's contention that the 2019 Contract between the parties was a reversion to the terms of the 2016 Contract is not sustainable given his claim is for the higher rate of salary under the 2018 Contract.
- 29 Even if it could be found that the 2019 Contract was a continuation of the 2018 Contract with the variation to full time hours, the 2018 Contract provided a clause for either party to terminate the contract with notice:
- 16.2 Notice of termination during the Term
- Subject to clause 1.7(b), during the Term, either you or the Company may terminate your employment by giving notice in accordance with the National Employment Standards. Notice of termination must be writing. If the Company gives notice, it may elect to make payment in lieu of all or part of your notice period.
- 30 Mr Knight does not dispute that he received payment of four weeks' notice and accrued leave entitlements at the rates set by the terms under the 2018 Contract. That is the salary rate of \$75,000 and not the reduced rate of \$70,000.

- 31 As in *Hotcopper Australia Ltd v David Saab* it is necessary for Mr Knight to establish the benefit claimed is an entitlement under his contract of employment. Mr Knight has not established that neither his initial claim for \$5,000 nor his revised claim for \$68,750 are entitlements under a contract of employment.
- 32 As in *Sandra Tye v Care Services Administration Pty Ltd*, there is no basis under the IR Act for the contentions of Mr Knight and having heard from both parties I find that the provisions of s 27(1)(a) of the IR Act are met.
- 33 Mr Knight contends that Final Trim Operators Pty Ltd repudiated the contract of employment by its decision to reduce his annual salary by \$5,000 without his agreement. Mr Knight elected to accept the repudiation and regard his employment as ended, similar to *Koompaahtoo Local Aboriginal Land Council v Sanpine Pty Ltd*. It may also constitute a dismissal at law. In addition, Mr Knight contends Final Trim Operators Pty Ltd intended that the reduction of his salary would force him to terminate his employment. Mr Knight has not demonstrated that his claim in this respect is founded on a benefit under his contract of employment. Mr Knight's claim concerns the fairness or otherwise of the termination, it does not concern a benefit of an employment contract and the failure to provide that benefit. This Commission is precluded from considering and determining the fairness of the termination as Final Trim Operators Pty Ltd is a national system employer: *Aboriginal Legal Service of Western Australia (Inc) v Mark James Lawrence (No 2)* [2008] WASCA 254; (2008) 89 WAIG 243.

Conclusion

- 34 In the circumstances, the application will be dismissed pursuant to s 27(1)(iv) of the IR Act on the basis that I am satisfied there is no real question of fact or law to be determined.