WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2019 WAIRC 00826
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	WEDNESDAY, 11 SEPTEMBER 2019, FRIDAY, 25 OCTOBER 2019
DELIVERED	**:**	FRIDAY, 22 NOVEMBER 2019
FILE NO.	**:**	B 78 OF 2019
BETWEEN	**:**	BRADLEY COOPER Applicant AND OSM MARITIME GROUP Respondent

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CatchWords	**:**	Industrial Law (WA) - Claim for denied contractual benefits - Relevant term of Industrial Agreement incorporated into contract of employment - Contractual term not breached by respondent - Not unreasonable for respondent to reject application actually made - Application dismissed
Legislation	**:**	
Result	**:**	Application dismissed

Representation:

Counsel:

Applicant	**:**	Mr G Walsh (as agent)
Respondent	**:**	Mr S White (as agent)

Reasons for Decision

1 The applicant says that the following, an excerpt from clause 13.9 of the Svitzer Australia Pty Ltd and Australian Maritime Officers Union Offshore Oil and Gas Enterprise Agreement 2010, applies to him as a matter of contract:

> "[If] an employee who has been employed by the Employer for a period of at least twelve months applies in writing to go ashore to study and sit for an AMSA Master or Mate Certificate of Competency they shall, subject to approval of the application by the Employer (with consent not being unreasonably withheld) be entitled to the period of leave and to the rates of pay specified hereunder."

2 The applicant says that clause 13.9 is part of his contract of employment with the respondent, that he satisfies the pre-condition of having been employed by "the Employer" for more than twelve months and that he has applied in writing to go ashore to study and sit for an AMSA Chief Mate Certificate of Competency.

3 The applicant says that, in those circumstances, he is "entitled" to the period of leave, and to the rate of pay specified in the balance of the subclause, unless "the Employer" withholds its consent and does so reasonably.

4 The applicant says that the respondent has withheld its consent but has done so "unreasonably".

5 The respondent does not dispute that it has withheld its consent, but says it has done so reasonably.

6 I note, by way of an aside only at this time, that "the Employer" is defined by the Svitzer Australia Pty Ltd and Australian Maritime Officers Union Offshore Oil and Gas Enterprise Agreement 2010 to be "SVITZER Australia Pty Ltd" and that the applicant's current employer, and the entity to which he applied, is "OSM Australia Pty Ltd". That is, the applicant is not, and was not at the relevant time, employed by "the Employer" under the Svitzer Australia Pty Ltd and Australian Maritime Officers Union Offshore Oil and Gas Enterprise Agreement 2010.

7 However, the contract of employment between the applicant and OSM Australia Pty Ltd specifically provides that "your continued service with Svitzer will be taken to be service with OSM Australia" and no argument is made by the respondent that it is fatal to the claim that the applicant was not employed by "the Employer" referred to in the Svitzer Australia Pty Ltd and Australian Maritime Officers Union Offshore Oil and Gas Enterprise Agreement 2010, or that the applicant had not given twelve months service to "the Employer", at the time he made the relevant application.

8 The application under clause 13.9 was made on 29 October 2018.

9 In what became Exhibit 6 in these proceedings the applicant wrote to "Casey Munyard, OSM Australia" in terms which included the following:

> "I'd like to formally apply to OSM Australia for an opportunity to progress in my seafaring career and undertake my Chief Mate's Certificate at Fremantle Maritime TAFE for the intake of February 2019."

10 The rest of the document makes it clear it is an application under clause 13.9.

11 The application was not approved.

12 Exhibit 4 contains an email from Renae Hesford, the respondent's Crewing Manager, which said that "we are unable to approve your request for study leave to commence in the February 2019 intake."

13 The following was given by Ms Hesford by way of reasons:

> "I am sure you are aware that there is quite a bit of uncertainty going into next year with Siem Offshore having three of their vessels without work. Although we are working as hard as we can to secure work at the moment and there could be work in the pipeline still, nothing has been confirmed as yet. It has also been a difficult year for OSM this year and at this stage, we have not been able to rollover and allocate any addition funds for study leave next year."

14 So the relevant background is as follows:

(1) the applicant had been employed by the respondent for more than twelve months when he made his application;

(2) his application was in writing;

(3) the application was to go ashore and sit for an AMSA Mate Certificate of Competency; and

(4) the application was not approved.

15 The matters I need to consider and decide are:

(1) whether clause 13.9 is a contractual entitlement;

(2) if so, whether the entitlement was not allowed by the respondent; and

(3) if so, what remedy the applicant is entitled to.

Was the subclause a contractual entitlement?

16 The respondent's case on this point is set out at [10] to [18] of its written closing submissions as follows:

> 10. The contract of employment between the Applicant and the Respondent refers to the Applicant's conditions of employment being "set out" within the Svitzer Agreement in conjunction with relevant legislation
>
> 11. The Svitzer Agreement does not apply to or cover the Respondent.
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> 12. The contract of employment between the Applicant and the Respondent does not contain a clause relating to a study leave provision.
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> 13. The Respondent submits that the mere mention of an enterprise agreement in a contract of employment is not sufficient to consider that enterprise agreement to be contractually binding.
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> 14. In other words, as the Svitzer Agreement has been identified in the contract of employment as a point of reference for the conditions of employment, this does not mean that the conditions set out in the Svitzer Agreement govern the contractual obligations of the Respondent to the Applicant or vice versa.
>
> 15. The Respondent submits that for the Svitzer Agreement to have been considered as a contractual obligation on the parties, it needed to have been explicitly referred to and incorporated into the contract of employment (*Gramotnev v Queensland University of Technology* [2013] QSC 158).

16. As held in the Federal Court of Australia and the Western Australian Industrial Relations Commission (*Australian Workers' Union v BHP Iron-Ore Pty Ltd* [2001] FCA 3; *Fergusson v The Salvation Army (Western Australia) Property Trust as the Trustee for the Salvation Anny (WA) Social Work Trading as Salvos Stores* [2014] WAIRC 01042), the words "set out" do not explicitly incorporate the Svitzer Agreement into the contract of employment, rather they describe the instruments, being the Svitzer Agreement and other relevant legislative provisions, that are relevant to the Applicant's employment. Whilst the words "set out" used in the current matter are different to the words "as prescribed by" and "as per" referred to in the *Australian Workers Union v BHP Iron-Ore Pty Ltd* and *Fergusson v The Salvation Army* matters, the language used is highly comparable and, when read in conjunction with each other, results in the same outcome.

17. Even if the terms and conditions of an enterprise agreement were generally agreed by the parties to have been included in the contract, the question of whether a particular clause of the Svitzer Agreement is incorporated into the contract may not be answered in the affirmative. Given that the Svitzer Agreement contains non-contractual provisions between the employer and the employee, the Respondent submits that the provision that the Applicant's terms and conditions of employment are "set-out" in the Svitzer Agreement, when properly construed, does not have the effect of making all of the terms of the agreement contractually binding on the parties (*Gramotnev v Queensland University of Technology* [2015] QCA 127).

18. The Respondent submits that there is no contractual benefit of study leave owed to the Applicant as the Svitzer Agreement is not incorporated into the contract of employment and there is not a study leave provision present in the contract.

17 The contract of employment between the applicant and respondent relevantly says the following:

> "The terms and conditions of your employment are currently set out within the *Svitzer Australia Pty Ltd and Australian Maritime Officers Union Offshore Oil and Gas Enterprise Agreement 2010* (**Svitzer Agreement**) and applicable legislation, until a new OSM agreement which covers the scope of your position comes into operation, replacing the Svitzer Agreement."

18 The key passage is that the "terms and conditions of your employment are currently set out within the Svitzer Australia Pty Ltd and Australian Maritime Officers Union Offshore Oil and Gas Enterprise Agreement 2010."

19 The question is whether that language is the language of contractual incorporation.

20 This is a question that requires findings of fact to determine, from all of the found circumstances and context, what a reasonable person in the applicant's position would believe was intended by the relevant words in his contract of employment.

21 The reasonable person, of course, does not operate in a vacuum of knowledge.

22 He is presumed to be aware of relevant matters.

23 Other cases, and words used in other cases, are of limited relevance and assistance given that this is a fact-finding mission depending on all of the circumstances present in this case.

24 The circumstances here are such as to admit of only one conclusion.

25 That conclusion is that the Svitzer Australia Pty Ltd and Australian Maritime Officers Union Offshore Oil and Gas Enterprise Agreement 2010 was incorporated into the contract of employment between the applicant and the respondent.

26 I say this because, if the Svitzer Australia Pty Ltd and Australian Maritime Officers Union Offshore Oil and Gas Enterprise Agreement 2010 is not incorporated into the contract of employment, it does not otherwise apply to the applicant and the respondent and the employment relationship between them.

27 The agreement, on its terms, applies to "SVITZER Australia Pty Ltd" and its employees and not OSM Australia Pty Ltd and its employees.

28 The respondent was at pains at the hearing, and in its written submissions, to make the point that it is a completely separate entity from "SVITZER Australia Pty Ltd" and that there was no transfer of the business of "SVITZER Australia Pty Ltd" to it.

29 I do not understand how the respondent can then argue that the Svitzer Australia Pty Ltd and Australian Maritime Officers Union Offshore Oil and Gas Enterprise Agreement 2010 can apply to the applicant and it, and the employment relationship between them, without it being incorporated into the contract of employment between them. As I say, if it is not incorporated into the contract of employment, it would not otherwise apply to the parties at all.

30 Additionally, the language of "terms and conditions of your employment are currently set out within" is the language of contractual incorporation.

31 I note that the language also purports to incorporate "applicable legislation" in the contract of employment. There is no need for "applicable legislation" to be part of the contract. It applies in any event. This, however, merely points up the importance of interpreting the text in the light of all of the circumstances. Unlike the "applicable legislation" the Svitzer Australia Pty Ltd and Australian Maritime Officers Union Offshore Oil and Gas Enterprise Agreement 2010 would not apply other than if it was incorporated into the contract of employment. That is a crucial circumstance.

32 In my view, the passage quoted at [17] above says to the reasonable reader that if you want to know what the terms and conditions of your contract of employment are, it being clear that they are not all in the three page contract of employment document, you must go to the Svitzer Australia Pty Ltd and Australian Maritime Officers Union Offshore Oil and Gas Enterprise Agreement 2010.

33 In this case the language used in the contract of employment is the language of contractual incorporation. For the contract of employment to achieve its purpose of having the Svitzer Australia Pty Ltd and Australian Maritime Officers Union Offshore Oil and Gas Enterprise Agreement 2010 apply, it is necessary to treat the language, as it suggests we should, as language of incorporation. If I were to arrive at the alternative construction a key element of the contract of employment, the application of the Svitzer Australia Pty Ltd and Australian Maritime Officers Union Offshore Oil and Gas Enterprise Agreement 2010, would miscarry. The Svitzer Australia Pty Ltd and Australian Maritime Officers Union Offshore Oil and Gas Enterprise Agreement 2010 would not apply at all.

34 However, moving on to the submission made at [17] of the respondent's closing written submissions, what Jackson J said in *Dimitri Gramotnev v Queensland University of Technology* (2015) 251 IR 448 at [59] and [60] is undoubtedly correct. That is, even if the terms of an industrial agreement are the terms of a contract of employment this does not mean every provision of the industrial agreement is capable of operating, or ought be properly construed as operating, as a contractual promise.

35 I agree that in relation to most industrial agreements "a reasonable person in the position of the [parties to it], on reading the enterprise bargaining agreement, would be aware that not all of its provisions could operate as terms or conditions of the contract". (See [63] of *Dimitri Gramotnev v Queensland University of Technology* (2015) 251 IR 448.)

36 There can, however, in my view, be no argument that clause 13.9 is one of those clauses that is not a term or condition of the contract.

37 Clause 13.9 provides an employee with a clear entitlement. The approval of "the Employer" is required but that approval is qualified by the clear condition that is must not be unreasonably withheld.

38 The clause is one which is, to use the words of Jackson J at [60] of *Dimitri Gramotnev v Queensland University of Technology* [2015] QCA 127, "quite capable of operating as a contractual promise and obligation and apt to be construed as operating that way."

39 Here the respondent has promised the applicant, as part of the contract of employment by which he agreed to render it service, that it would grant him the entitlement provided for by clause 13.9, unless it had reasonable grounds to withhold its consent.

40 The only real question in this matter is whether the applicant has discharged the onus of proving, on the balance of probabilities, that the respondent's withholding of consent was unreasonable.

Was clause 13.9 breached?

41 I have already set out the reasons the respondent was given by Ms Hesford by email in November 2018.

42 Ms Hesford also gave evidence in these proceedings. Ms Hesford's evidence was that she was in favour of the applicant's application. Ms Hesford, in cross examination, said that the way in which permission was sought for the application to be approved was that a budget was sent to "Norway" for approval which included the cost of the applicant's training. In fact, the whole training budget was proposed to be dedicated to the applicant's training.

43 Ms Hesford said it "was put forward to Norway for consideration and approval for us to spend that this year and that was declined based on the financial situation of OSM Australia and no work" (ts 87).

44 I consider that Ms Hesford had an excellent understanding of the industry and of the financial performance of the respondent. I accept that her assertions that the request was knocked back due to financial considerations and a lack of confidence about a pick up in work to be informed ones.

45 Ms Hesford gave evidence, and I accept, that the respondent did suffer a significant loss in 2018 that would have it reasonably looking to save every dollar it could in 2019, and especially so given that I accept Ms Hesford's evidence that the market for the respondent's services in Australia was not robust as at late 2018 and was not predicted, on reasonable grounds, to be strong in 2019.

46 Although the amount of money needed to fund the applicant's training can be made to look small by comparison to other figures relating to the respondent, like its payroll, it was still a six-figure sum, and an entity looking to reasonably cut costs coming off a bad year, with no certainty of a pick-up in the next, was entitled to reasonably say "no" to a request for it to spend such a sum of money.

47 This is especially so where, as Ms Hesford said in unchallenged evidence, the respondent had no pressing need for the applicant to actually become a chief mate.

48 The applicant, nonetheless, says that there is an issue which, if taken into account, makes the respondent's withholding of its consent unreasonable.

49 The applicant gave evidence that in 2016 there was an agreement reached between him and his then employer, an employer which the current respondent, the applicant says, substituted in 2018, that, if he did certain things for his employer, it would fund paid study leave for a chief mate certificate.

50 The applicant gave evidence that when, in 2016, he was placed by his then employer as a second mate on a vessel, the Siem Topaz, he did duties for his employer additional to his second mate duties related to his employer's information technology, and that, in return, his employer, or at least one of its senior managers, promised "facilitation around, um putting me through and sponsoring my, um, chief mate certificate" (ts 30).

51 The applicant says that that senior manager came across to the employ of the respondent when it took over his former employer's local operations by way of substitution and it is not fair or reasonable for the respondent to renege on the deal.

52 I do not need to find whether there was such a deal or not, and I do not need to find whether, if there was such a deal, the respondent should be legally or morally bound by it given all of the circumstances.

53 I say this because, whether or not there was a deal, and whether or not the respondent would be legally or morally bound by it if there was such a deal, the fact is the applicant did not refer to the deal in his application under clause 13.9.

54 I do not see how it could possibly be unfair or unreasonable for the decision-maker to not take into account the claimed deal when no reference was made to it by the applicant in the application itself.

55 This might bring to a seemingly abrupt end a claim which has overcome several hurdles and which has been well-presented by the applicant's representative. It might also seem to the applicant to be an abrupt end given that I have no doubt that the applicant believes that he has a deal and that the respondent is being most unfair in not honouring it.

56 But I have to decide whether the failure to approve the application is unreasonable or not. In doing this, I have to have regard to the application itself and I have done that. Perhaps it is best if I set it out now in its entirety:

> "I'd like to extend my gratitude to OSM for having me on the team for nearly 10 years and providing me with a platform to grow and flourish as a multi-skilled seafarer that is not only bound to the constraints of the ocean life, but to that which have in the past been given opportunities to learn and adapt within the company in roles such as Crewing Manager and Operations, IT & Projects Advisor, where I was directly involved in the transition from Svitzer-OSM Australia. This experience brought about many positive challenges which not only helped me understand the importance of establishing a solid connection between shore and ship roles that aid in the ability of creating and maintaining a high level of service for OSM's respected clients.
>
> My ability to progress in my sea-going career into a Chief Mate position will directly help maintain the high quality of service that OSM can deliver to it's clients, where I'm able to

> utilise my shore-side experience coupled with my extensive seafaring experience to help build a safe, positive and harmonic environment on the vessel to which I'm engaged with.
>
> I'd like to formally apply to OSM Australia for an opportunity to progress in my seafaring career and undertake my Chief Mate's certificate at Fremantle Maritime Tafe for the intake of February 2019. I understand the costs involved as per the EBA and I also empathise with the company regarding the financial state of the industry, as during my time in the office the decline in the industry was strong and business was scarce. I believe that leading up to 2019 we are starting to see an uptrend in projects that are coming on line, and I believe that obtaining my next certificate in 2019 would greatly help OSM and it's clients in the lead up to a thriving Offshore Oil & Gas in the early stages of 2020.
>
> Having had obtained all my previous certificates at Fremantle Maritime Tafe, I do receive a discount in course fees, and Fremantle is also very close to my home so other than the 75% in wages, the intangible benefits that OSM gain from this investment considerably outweigh the costs of sponsoring me. As a long-standing employee with OSM Australia and position holder within Siem Offshore, I'm confident that with a combination of respect for OSM's policies, visions and high values with my extensive knowledge of Siem's operations and offshore systems, that I'll continue to be a valuable asset within the OSM team in helping to deliver a superior level of service to not only it's clients, but my superiors and fellow work colleagues.
>
> Bradley Cooper"

57 As can be seen, the application makes no reference to the "deal" as a matter to be taken into account in deciding whether to approve it or not.

58 The respondent was entitled to consider the application that was actually made, not some other application. The respondent was entitled to confine itself to the application that was actually made and was not obliged to conduct an investigation into wider circumstances than those referred to in the application.

59 The applicant has not discharged the onus upon him and his claim must fail.