

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION : 2020 WAIRC 00276

CORAM : INDUSTRIAL MAGISTRATE D. SCADDAN

HEARD : TUESDAY, 7 APRIL 2020

DELIVERED : FRIDAY, 15 MAY 2020

FILE NO. : M 122 OF 2019

BETWEEN : HENRY C AVELING

CLAIMANT

AND

TRADE HOZZ P/L AS TRUSTEE FOR FRANCIS FAMILY
TRUST TRADING AS SOLOMONS FLOORING CANNINGTON

RESPONDENT

CatchWords : INDUSTRIAL LAW – Small Claim under the *Fair Work Act 2009* (Cth) – Claim for unpaid wages alleged to be owed under an oral contract of employment – Whether the Claimant was employed by the Respondent – Whether the Claimant is an ‘*employee*’ for the purposes of the *Fair Work Act 2009* (Cth) – Turns on its own facts

Legislation : *Fair Work Act 2009* (Cth)
Corporation Act 2001 (Cth)
Industrial Relations Act 1979 (WA)

Case(s) referred to in reasons : *Nield v Matheson* [2014] FCAFC 74
Dietrich v Dare (1980) 30 ALR 407
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 : Claim is dismissed

Representation:

Claimant : Self-represented
Respondent : Mr A. Francis on behalf of the Respondent (as a director)

REASONS FOR DECISION

- 1 The Claimant, Mr Henry C. Aveling (Mr Aveling), alleges he was employed by the Respondent, Trade Houzz Pty Ltd as Trustee for Francis Family Trust trading as Solomon Flooring, Cannington, from 5 June 2018 to 22 September 2018 pursuant to an oral agreement with Mr Anthony Francis (Mr Francis), an owner of the business.
- 2 Mr Aveling claims \$13,350 in alleged unpaid wages and \$1,268.50 in superannuation where he says the Respondent contravened an unspecified section of the *Fair Work Act 2009* (Cth) (FWA). Mr Aveling elected the Small Claims procedure under s 548 of the FWA. Mr Aveling says he had an oral agreement with Mr Francis to assist in getting started in a new business where Mr Francis had no experience in operating a flooring shop or knowledge in how to sell flooring to customers. Mr Aveling makes no other reference to any employment instrument, such as a modern award or an enterprise agreement.
- 3 Mr Aveling claims he assisted Mr Francis to get the business up and running, and passed on his knowledge to make the business a success. He says that his claim for unpaid wages is justified as he was essentially doing the work of a salesperson and store manager for an extended period of time and was relied upon to manage the shop and produce sales.
- 4 The Respondent denies the claim. The Respondent says Mr Aveling was never employed by the Respondent, and was given a total of \$5,500 by Mr Francis personally as a goodwill gesture for introducing a customer and for providing advice on how to improve the business.
- 5 Schedule I of these reasons for decision outline the jurisdiction, practice and procedure of the Industrial Magistrates Court of Western Australia (IMC).

Background

- 6 The Respondent is an Australian proprietary company limited by shares registered pursuant to the *Corporations Act 2001* (Cth) and operates a flooring business known as Solomon Flooring, Cannington. Accordingly, the Respondent is a constitution corporation within the meaning of that term in s 12 of the FWA, which *may* mean it is a ‘*national system employer*’ within the meaning of that term in s 14(1)(a) of the FWA.
- 7 Whether Mr Aveling was employed by the Respondent is a fact in dispute and the determination of that fact will also determine whether Mr Aveling is a ‘*national system employee*’ within the meaning of s 13 of the FWA.
- 8 The Respondent purchased the business in October 2017. Mr Aveling had previous experience in the flooring business having operated other Solomon Flooring stores and there was some arrangement for Mr Aveling to assist Mr Francis in improving the business in some unspecified way.
- 9 The primary issue for determination is whether Mr Aveling is an ‘*employee*’ for the purposes of the FWA. This requires consideration of whether there was a contract of employment between Mr Aveling and the Respondent.

Is Mr Aveling An ‘Employee’ For The Purposes Of The FWA?

- 10 Mr Aveling’s claim makes no reference to a modern award or an enterprise agreement relevant to his alleged employment by the Respondent. Mr Aveling says that he is entitled to be paid his wages pursuant to an alleged oral contract of employment between him and Mr Francis. Accordingly, any claimed entitlement is, arguably, limited where the National Employment

Standards (NES) do not include or relate to the payment or non-payment of wages: s 61(2) of the FWA.

- 11 It is not for the IMC to run a party's claim, however, for the purposes of resolving the claim, pt 2 - 9 of the FWA refers to other terms and conditions of employment, including s 323(1)(a) of the FWA, which states '*an employer must pay an employee amounts payable to the employee in relation to the performance of work in full*'.
- 12 If, for the purposes of resolving the claim, it is accepted that a claim for unpaid wages owed under a contract of employment gives rise to an entitlement under s 323(1) of the FWA, Mr Aveling would need to prove on the balance of probabilities that he was a '*national system employee*' and the Respondent was a '*national system employer*': s 322 and s 323(1) of the FWA.
- 13 A '*national system employee*' is an individual so far as he or she is employed, or usually employed, as described in the definition of **national system employer** in section 14, by a national system employer, except on a vocational placement': s 13 of the FWA.
- 14 Relevant to the Respondent, a '*national system employer*' is: (a) a constitutional corporation, so far as it employs, or usually employs, an individual': s 14(1) of the FWA.
- 15 Leaving aside whether the Respondent employs or usually employs an individual, Mr Aveling is required, at the very least, to prove on the balance of probabilities that he was employed or usually employed by the Respondent.
- 16 If Mr Aveling cannot prove that threshold requirement, he has no other applicable entitlement, having regard to the basis of his claim, under the FWA.

Was Mr Aveling employed by the Respondent?

- 17 This threshold question is determined by resolving whether there was an oral contract of employment between Mr Aveling and the Respondent. If there was no *agreement* between Mr Aveling and Mr Francis for Mr Aveling to undertake work for the Respondent, then Mr Aveling cannot have been employed by the Respondent.

Evidence

- 18 Mr Aveling states that he was engaged by the Respondent as an employee from 5 June 2018 to 22 September 2018 via a verbal agreement with Mr Francis where the Respondent agreed to pay him \$25 per hour.¹ There are no documents or other material corroborating Mr Aveling's evidence of when this alleged verbal agreement was entered into or any other terms of the alleged verbal agreement.
- 19 However, Mr Aveling states that a text message sent by Mr Francis on 24 September 2018 supports his evidence that he *was* employed by the Respondent.² The content of the text message is as follows:

Hi Henry. Nicholas & myself have decided to handle the business on our own. You do not need to come to the shop from tomorrow onwards. We want the reduce running cost to keep the business afloat. Anthony.

- 20 I note Mr Aveling's response to this text message was '[t]hats great news n wish you good luck n all the best.Thank you for everything'.³
- 21 From Mr Aveling's perspective the significance of the text message from Mr Francis is that it indicates the Respondent did not want to keep paying for his services as a cost cutting exercise, which is consistent with him being in paid employment.⁴

- 22 Mr Aveling also states that he had keys to the store and a business card in his name, which stated his position within the business,⁵ and he attached to his witness statement a number of quotes or orders he says he completed while employed by the Respondent.⁶
- 23 Mr Aveling states he followed the direction of his employer as to when to open the store and when to attend for work. He says that he was expected to take sales orders and to attend to customers' orders, including measures and quotes. He was provided with sample books and used a desk at the Respondent's premises to complete the tasks he was required to do.⁷
- 24 Mr Aveling claims he worked 534 hours and refers to a 'Time Sheet' he says accounts for time worked and the amount he claims.⁸ I note this document is dated 15 May 2019. Mr Aveling said that he worked Monday to Friday from 9.00 am to 3.00 pm and Saturday from 9.00 am to 2.00 pm.
- 25 Mr Aveling thereafter admitted that he was given \$5,500 by Mr Francis as a gesture of goodwill to be paid before 31 May 2018. However, \$3,000 was paid at the end of June 2018 and \$2,500 was paid at the end of September 2018. Mr Aveling admitted that he held onto the money from a customer as he was waiting to see what the Respondent would do. Mr Aveling denies taking orders or plans from the Respondent's office and says that he may be mistaken about the store opening until 2.00 pm on Saturdays.
- 26 Mr Aveling admitted looking at Facebook while at the store and admitting going out to buy lotto tickets, but says he did this on his lunch break. He also admitted that the 'Time Sheet'⁹ was given as part of the Court proceedings and not provided to the Respondent.
- 27 Mr Aveling relies upon witness evidence of Mr Mark Francis van der Lee (Mr van der Lee), previously a sales representative for Proline Floors Pty Ltd, who states that his *understanding* was that Mr Aveling was a sales representative employed by the Respondent. He further states that he attended the store approximately once per month and saw Mr Aveling serving customers and dealing with enquiries.¹⁰ Mr van der Lee maintained that he attended the store more than once and met Mr Francis more than once.
- 28 Mr van der Lee's evidence was limited to observations he says he made of Mr Aveling at the store, rather than professing any knowledge of the terms of any oral agreement between Mr Aveling and Mr Francis. Accordingly, in that sense, Mr van der Lee's evidence is of limited weight.
- 29 Mr Aveling also relies upon witness evidence of Ms Marianne Aveling (Ms Aveling), his wife, who states that her husband worked as a full-time salesperson for the Respondent and that she dropped off lunches at the store.¹¹ She also alleges that she worked at the store in June 2018 and was not paid.¹²
- 30 Leaving aside the Respondent's denial that Ms Aveling was employed by the Respondent, Ms Aveling's evidence is of limited weight where she says she worked in the store for one month and then dropped off lunches, thus making no observation of what her husband did, if anything, and she clearly had no independent knowledge of any purported oral agreement between Mr Aveling and Mr Francis.
- 31 Mr Francis denied ever agreeing, either in writing or verbally, to employ Mr Aveling. Further, he denied ever discussing or agreeing upon wages, scope of work, duties or reporting times with Mr Aveling. Mr Francis expressed surprise at Mr Aveling describing himself as a Senior Sales Consultant, which Mr Francis says he never discussed or agreed with Mr Aveling.¹³

- 32 Mr Francis states that Mr Aveling commenced the claim against the Respondent after the Respondent recovered monies from Mr Aveling, which Mr Aveling had deposited into a bank account for 'Henry Flooring'. This money was paid by a customer for services provided by the Respondent and erroneously withheld by Mr Aveling.¹⁴ The gravamen of Mr Francis' evidence is that Mr Aveling deposited into a bank account operated by him money owed to the Respondent.
- 33 Mr Francis states this money was recovered on 4 June 2019 by a debt collector and the claim was commenced on 8 July 2019.¹⁵
- 34 In reference to the content of the text message dated 24 September 2018, Mr Francis says that he was trying to be polite, but he wanted to prevent Mr Aveling from attending the store and talking to customers.¹⁶
- 35 Mr Francis states that the Respondent only provided business cards to family members, including himself, Ms Jessica Han, Mr Francis' daughter, Mr Nicholas Francis (Mr N. Francis), Mr Francis' son, Mr Marcus Francis (Mr M. Francis), Mr Francis' son, and the previous owners of the business, Mr Andrew Mcleod and Ms Heather Mcleod (Ms Mcleod). Mr Francis says that Ms Mcleod was the only other employee employed by the Respondent and her employment ceased on 31 May 2018.¹⁷
- 36 Mr Francis states he gave a total of \$5,500 in cash to Mr Aveling as a goodwill gesture from his personal funds. This was for introducing a customer to the business and advising on how to improve the business.¹⁸ The payment of \$5,500 was in two payments.
- 37 To the extent that Mr Aveling says that his wife, Ms Aveling, was at the store, Mr Francis says that he was helping Ms Aveling prepare price tags for her art exhibition. Mr Francis also states that it was convenient for Ms Aveling to have Mr Aveling at the store and not at home.¹⁹
- 38 Mr Francis referred to a number of attachments in his witness statement, including text messages between himself and Mr Aveling dated 4 October 2018 demonstrating the issue with respect to the recovery of monies owed to the Respondent and a letter from the Respondent's accountant confirming Ms Mcleod as the Respondent's employee.²⁰
- 39 The Respondent also relied upon evidence of Ms Han Cui Yee (Ms Yee), Mr Francis' wife and co-owner of the Respondent, Mr M. Francis and Mr N. Francis.
- 40 Similar to Ms Aveling's evidence, Ms Yee's evidence was of limited weight given she had limited involvement in the business, albeit she says she had a conversation with Mr Aveling where Mr Aveling said that he would help the family as they were new to the flooring business.²¹
- 41 The relevance of Mr M. Francis's evidence was limited to him seeing Mr Francis give Mr Aveling money and Mr Aveling crying and thanking Mr Francis.²²
- 42 Mr N. Francis' evidence was also limited, save that Mr N. Francis said he did some work with Mr Aveling and to his knowledge Mr Aveling attended the store to show the family the 'flooring trade'. Further, when Mr Aveling was in the store, Mr N. Francis only saw him using his mobile telephone to access Facebook or going out to buy lotto tickets and to attend to other personal tasks.²³ Mr N. Francis denied Mr Aveling worked as a salesperson or did any other work in the store. While he accepted Mr Aveling helped him to learn the flooring trade, Mr N. Francis denied that Mr Aveling helped or mentored him further or helped him with customers. Mr N. Francis said that he designed the business card and did not approve the business card for Mr Aveling.

Determination

- 43 A contract of employment requires no particular form, and unless required by legislation, a contract of employment need not be in writing.
- 44 In an employment context, it may be formed by a verbal offer of work and by the other party agreeing to and performing the work. In the absence of written evidence as to the agreement a Court may imply the agreement by the parties' conduct.
- 45 However, a contract of employment must comply with certain requirements with respect to its formation, like any other contract. Irrespective that the purported contract was an oral agreement, to be enforceable as a contract the oral agreement must comply with the usual elements required for the formation of a contract. Those formal requirements are:
- an intention to create contractual relations;
 - an offer and acceptance of that offer of an agreement (that is, an agreement); and
 - consideration.
- 46 An intention to create legal relations is assessed on an objective basis, based on all of the circumstances.²⁴ While the intention to create legal relations is often assumed if the other elements of the contract are present, it is a separate formal element. In the context of arrangements involving the performance of work, the absence of an intention to create legal relations has prevented the existence of any binding and enforceable contract. By way of example, this may include where the work was performed on a voluntary basis, for a family business or as work experience, even where some form of payment is made.²⁵
- 47 An agreement is usually evidenced by an offer being made and acceptance of the offer by the person to whom the offer is made where the acceptance is communicated to the offeror. The fundamental question is to determine whether the parties have in fact reached an agreement. It will ultimately be a question of objectively assessing the words and conduct of the parties in order to determine if an agreement has been reached.
- 48 For the following reasons, I am not satisfied that Mr Aveling has proven on the balance of probabilities that there was any contract of employment between he and Mr Francis for Mr Aveling to perform work for the Respondent:
- Mr Aveling's evidence lacked specificity with respect to what, and when it, was agreed with Mr Francis beyond Mr Aveling saying he was to be paid \$25 per hour and that he says he worked from 9.00 am to 3.00 pm Monday to Friday and from 9.00 am to 2.00 pm on Saturday (bearing in mind that he agreed he may be mistaken about the store opening hours on Saturday). Beyond that there was no evidence about the nature of the employment, what work was to be carried out, the role he was employed for, or any other usual employment entitlements such as annual leave and sick leave;
 - the goodwill payment was for assistance provided by Mr Aveling prior to 31 May 2018, albeit that it was paid later, consistent with Mr Francis' evidence of the purpose of the goodwill payment;
 - the 'Time Sheet' tendered by Mr Aveling was not provided to the Respondent prior to the Court proceedings and the hours recorded on the 'Time Sheet' are inconsistent with Mr Aveling's evidence of the purported hours he allegedly worked. By way of example, Mr Aveling says he worked 23 hours the week of 30 July 2018 to 4 August 2018, save that he did not work Monday. On his oral evidence he apparently worked

six hours per day each weekday and five hours on a Saturday, which would be 29 hours worked. The 'Time Sheet' also records Superannuation, but nowhere in the claim, his witness statement or in oral evidence does Mr Aveling mention that the payment of Superannuation was a term of the agreement discussed with Mr Francis. The 'Time Sheet' records 35 hours per week for most weeks, but Mr Aveling accepts that he may be mistaken about the number of hours the store was open on Saturdays. This strongly indicates that the 'Time Sheet' was reconstructed prior to the claim being lodged for the purposes of making the claim and I have significant doubt about whether it reflects actual time worked (if he did work) at the business;

- notwithstanding the content of the text message from Mr Francis dated 24 September 2018, the response from Mr Aveling is instructive. Mr Aveling does not raise an issue with respect to wages or being terminated from his purported employment, and does not raise any issue until after the Respondent recovers monies relating to a former customer; and
- to the extent that Mr Aveling provided assistance in the store, this had the hallmarks of an ad hoc arrangement suitable to Mr Aveling, rather than to the Respondent. However, there came a time that Mr Francis no longer wanted Mr Aveling attending the store and informed him as much.

49 These factors demonstrate not only a lack of credibility in respect of Mr Aveling's evidence and his claim, but, in my view, they also objectively show that there was not an intention to create legal relations between Mr Aveling and the Respondent involving the performance of work. That is, I accept Mr Francis' evidence that there was never a discussion with Mr Aveling concerning work to be performed by Mr Aveling and on what terms that work would be carried out. In that sense I find that there was no agreement between Mr Aveling and Mr Francis or Mr Aveling and the Respondent for Mr Aveling to perform work for \$25 per hour, let alone what that work might or did entail.

50 Mr Francis' closing submissions accurately reflect the situation; that is, this was an unfortunate situation involving a friendship that had soured where Mr Aveling initially provided some assistance to a fledgling business, which was rewarded by the payment of \$5,500. There was never any intention for Mr Aveling to go beyond that initial assistance, albeit it may have suited him to attend the store for personal reasons.

Outcome

51 I am not satisfied that Mr Aveling has proven on the balance of probabilities that a contract of employment existed between him and the Respondent. Therefore, I am not satisfied that Mr Aveling has proven on the balance of probabilities that he was employed by the Respondent.

52 Accordingly, where I am not satisfied that the Respondent employed Mr Aveling, Mr Aveling is not a 'national system employee' pursuant to s 13 of the FWA. Where I find that Mr Aveling is not a 'national system employee', no entitlement arises under s 323 of the FWA (if any entitlement existed).

53 Further, Mr Aveling's claim does not identify any or any other entitlement under the FWA applicable to him and the Respondent.

54 Section 545(3) of the FWA enables an eligible State court (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 this Act or a fair work instrument; and*
- (b) *the employer has contravened a civil remedy provision by failing to pay the amount*'.

55 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.

56 Where I am not satisfied Mr Aveling is an employee employed by the Respondent and there is no obligation to pay an amount referable to the, the IMC does not have jurisdiction to make an order for payment of alleged unpaid wages.

57 Therefore, Mr Aveling's claim fails for two reasons:

- (1) he has failed to prove he was employed by the Respondent and is not a '*national system employee*'; and
- (2) the IMC cannot make an order under s 545(3) where the Respondent has no obligation under the FWA to pay the amount sought by Mr Aveling.

58 I note further that Mr Aveling elected the Small Claim procedure. However, in my view, the relative informality of the Small Claim procedure does not assist Mr Aveling where the amount referred to in s 548(1)(a) and s 548(1A) of the FWA refers to '*an amount ... 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.

59 For the reasons already given, the amount claimed by Mr Aveling is not an amount required to be paid by an employer to an employee under the FWA.

60 Further, '*safety net contractual entitlement*' means '*an entitlement under a contract between an employee and an employer that relates to any of the subject matters described in*' (relevantly) s 61(2) of the FWA (that is, the NES): s 12 of the FWA.

61 The minimum standards listed in s 61(2) of the FWA, forming the NES, do not include or relate to the alleged non-payment of wages and, therefore, the payment or non-payment of wages under a contract of employment is not a '*safety net contractual entitlement*' (for the purposes of s 548(1A)(ii) and s 548(1A)(iii) of the FWA).

62 Accordingly, notwithstanding Mr Aveling elected the Small Claim procedure, the amount he claims is also not an amount within s 548(1A) of the FWA.

Result

63 For the reasons given above, Mr Aveling's claim is dismissed.

**INDUSTRIAL MAGISTRATE
D. SCADDAN**

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- ¹ Exhibit 1 - Witness Statement of Henry Aveling dated 28 February 2020 [3].
- ² Exhibit 2.
- ³ Exhibit 2.
- ⁴ Exhibit 1 [4a].
- ⁵ Exhibit 1[4b].
- ⁶ Exhibit 3.
- ⁷ Exhibit 1 [4e] - [4i].
- ⁸ Exhibit 4.
- ⁹ Exhibit 4.
- ¹⁰ Exhibit 5 - Witness Statement of Mark Francis van der Lee dated 28 February 2020 [4] - [6].
- ¹¹ Exhibit 6 - Witness Statement of Marianne Aveling date 28 February 2020 [7] and [8].
- ¹² Exhibit 6 [4].
- ¹³ Exhibit 7 - Witness Statement of Anthony Francis dated 27 March 2020, 3.2.
- ¹⁴ Exhibit 7, 1.0.
- ¹⁵ Exhibit 7, 1.0.
- ¹⁶ Exhibit 7, 1.0.
- ¹⁷ Exhibit 7, 4.0 and 4.1.
- ¹⁸ Exhibit 7, 5.0.
- ¹⁹ Exhibit 7, 6.0.
- ²⁰ Exhibit 7 at attachment 5 - 7 and 8.
- ²¹ Exhibit 9 - Witness Statement of Han Cui Yee dated 27 March 2020.
- ²² Exhibit 10 - Witness Statement of Marcus Francis dated 27 March 2020.
- ²³ Exhibit 11 - Witness Statement of Nicholas Francis dated 27 March 2020.
- ²⁴ *Nield v Matheson* [2014] FCAFC 74 [42].
- ²⁵ *Dietrich v Dare* (1980) 30 ALR 407.

Schedule I: Jurisdiction, Practice And Procedure Of The Industrial Magistrates Court (WA) 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 Industrial Magistrates Court (WA) (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 National Employment Standards: FWA, s 44(1); and contravening other terms and conditions of employment: FWA, s 323(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 National Employment Standard 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.

Contravention

- [6] 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).
- [7] The civil penalty provisions identified in s 539 of the FWA include:
- The National Employment Standards set out in pt 2 - 2 of the FWA: FWA, s 61(2) and s 539.
 - Other terms and conditions of employment set out in pt 2 - 9 of the FWA: FWA, s 323(1) and s 539.
 - An '*employer*' has the statutory obligations noted above if the employer is 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 and s 14. The obligation is to 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.
- [8] 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).

- [9] 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

- [10] 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.

- [11] 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].