WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2020 WAIRC 00835
CORAM	**:**	INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD	**:**	THURSDAY, 27 AUGUST 2020
DELIVERED	**:**	THURSDAY, 1 OCTOBER 2020
FILE NO.	**:**	M 127 OF 2019
BETWEEN	**:**	RICHARD FRANK MOORE **CLAIMANT** AND ROYALSTAR PTY LTD T/A TORRE ELECTRICS (ABN:24009451763) **RESPONDENT**

CatchWords	**:**	INDUSTRIAL LAW – Requirement to pay an amount in lieu of notice of termination under *Fair Work Act 2009* (Cth) – Whether the claimant's employment was terminated by the employer – Whether the claimant resigned – Requirement to pay an amount in full under the *Minimum Conditions of Employment Act 1993* (WA) – Whether the claimant was an 'employee' of the respondent or an 'independent contractor'
Legislation	**:**	*Fair Work Act 2009* (Cth) *Minimum Conditions of Employment Act 1993* (WA) *Corporations Act 2001* (Cth) *Industrial Relations Act 1979* (WA) *Long Service Leave Act 1958* (WA) *Magistrates Court (Civil Proceedings) Act 2004* (WA)
Case(s) referred to in reasons:	**:**	***Botica v Top Cut Holdings Pty Ltd*** [2020] WAIRC 00061 ***United Construction Pty Ltd v Birighitti*** [2002] 82 WAIG 2409 ***United Construction Pty Ltd v Birighitti*** [2003] WASCA 24 ***David Kershaw v Sunvalley Australia Pty Ltd*** [2007] WAIRComm 520 ***Stevens v Brodribb Sawmilling Co Pty Ltd*** (1986) 160 CLR 16 ***ACE Insurance Ltd v Trifunovski*** (2011) 200 FCR 532 ***McShane v Image Bollards Pty Ltd*** [2011] FMCA 215 ***Mildren v Gabbusch*** [2014] SAIRC 15

Sammut v AVM Holdings Pty Ltd [No 2] [2012] WASC 27
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 R. Torre on behalf of the Respondent (as a director)

REASONS FOR DECISION

1 The Claimant, Mr Richard Frank Moore, was employed as a full-time general manager of Torre Electrics by the Respondent, Royalstar Pty Ltd t/as Torre Electrics, from 2 July 1990 to 21 December 2018.

2 The Claimant alleges the Respondent failed to pay him:

a. an amount of $8,233.77 being the equivalent of five weeks in lieu of notice and associated superannuation in contravention of s 117 of the *Fair Work Act 2009* (Cth) (FWA); and

b. wages of $630 for work undertaken as a casual employee from January 2019 to May 2019 in contravention of the *Minimum Conditions of Employment Act 1993* (WA) (MCE).

3 The Claimant elected the small claims procedure under s 548 of the FWA.

4 Schedule I of these reasons for decision outline the jurisdiction, practice and procedure of the Industrial Magistrates Court of Western Australia (IMC).

Background

5 The Respondent is an Australian proprietary company limited by shares registered pursuant to the *Corporations Act 2001* (Cth) and operated an electrical contracting business, Torre Electrics. The Respondent is a '***constitutional corporation***' within the meaning of that term in s 12 of the FWA and is a '***national system employer***' within the meaning of that term in s 14(1)(a) of the FWA. The Claimant is an individual who was employed by the Respondent and is a '***national system employee***' within the meaning of that term in s 13 of the FWA.

6 The Claimant is an electrician by trade.

7 The Respondent intended to cease operating Torre Electrics sometime in early 2019. The Claimant was attending to the sale of the Respondent's assets relating to Torre Electrics and arranging for trading activities to either close or be handed over to another electrical contractor. It appears one of the last items to be finalised to dissolve the business was the expiration of a commercial lease on 1 March 2019 for a building occupied by the Respondent.

8 The Claimant's final day of work with the Respondent was 21 December 2018, although he carried out nine jobs associated with electrical warranty work on behalf of the Respondent from January 2019 to May 2019 (the Warranty Work).

9 Upon the cessation of the Claimant's employment on 21 December 2018, he was paid $51,879.48 (gross) in entitlements, including ordinary wages, untaken paid annual leave, accrued long service leave and associated superannuation.

10 The Claimant's claim and the dispute between the parties involves two principal issues:

A. Whether the Claimant resigned from, or the Respondent terminated, the Claimant's employment on 21 December 2018?

B. Whether the Claimant was a casual employee of, or an independent contractor to, the Respondent for the Warranty Work undertaken from January 2019 to May 2019?

11 The Claimant says the Respondent terminated his employment and he was not provided with the requisite statutory notice period prior to his termination or payment in lieu of notice upon his termination. The Respondent says the Claimant resigned from his employment and he was paid all of his entitlements.

12 The Claimant further says that pursuant to an oral agreement with Mr Ross Torre (Mr Torre), director of the Respondent, he was employed as a casual employee of the Respondent to undertake the Warranty Work at a rate of $70 per job and he did nine jobs for which he is owed $630.

13 The Respondent does not dispute the rate stated by the Claimant or that the Claimant did the work or that the Claimant is owed $630 for undertaking the work. The Respondent's dispute is that the Claimant was not employed as a casual employee, but was an independent contractor, and when the Claimant presents a proper invoice for payment, he will be paid.

Was The Claimant's Employment Terminated Or Did He Resign?

14 The critical time period relevant to the parties' factual dispute about the cessation of the Claimant's employment is from 19 December 2018 to 21 December 2018.

15 The chronology is as follows:

- On 12 June 2017, the Claimant made enquiries with Mr Torre about the 'paying out' of accrued leave entitlements.[1] Nothing came of this enquiry.
- On 14 December 2018, Mr Torre requested the Claimant to give two employees one week's notice of termination with their end date being 21 December 2018.
- On 19 December 2018, Mr Torre requested a meeting with the Claimant and the two men met at a café at about 2.00 pm. A range of topics were discussed, including:
  - the financial state of Torre Electrics;
  - issues regarding closing the business;
  - the Claimant's entitlements and how they were to be paid; and
  - the Claimant undertaking the Warranty Work in the future.
- On 21 December 2018 at 5.44 am, the Claimant sent an email to Mr Torre stating:[2]

  Further to our discussion on Wednesday afternoon about you requesting to pay my entitlements out fortnightly.

  I have had discussions with my accountant and Lyne and find that it is best to have my entitlements paid out in full as a lump sum, not just for me but also best for you, as you would

have to pay superannuation contributions on that format which may have an effect on your future cash flow.

As you stated there is no work going forward as of Friday 21/12/2018, so have thought that Friday could be my last day of employment, can you please clarify my employment situation going forward.

- On 21 December 2018, the Claimant's employment ceased.
- On 21 December 2018, the Respondent authorised the transfer of $38,991.48 to the Claimant in accordance with a final payslip.[3]
- On 31 December 2018, the Claimant sent an email to 'Sandra', one of the Respondent's employees. The relevant content of the email states:[4]

  (*2) I have also noticed that I have not been paid my 5 week's pay in lieu of notice that was not given.*

- On 3 January 2019, 'Sandra' sent an email to the Claimant in response to the Claimant's email dated 31 December 2018. The relevant content of the email states:[5]

  The 5 weeks pay in lieu of notice, I was advised by Ross that he had spoken to you and Stacey and had told you the last day of work was going to be the 21/12, if you have any discrepancy regarding this best you speak to Ross direct to clarify it.

- On 6 January 2019, the Claimant sent an email to 'Sandra' in response to her email dated 3 January 2019. The relevant content of the email states:[6]

  As for the notice given, below (marked with the brackets) is an extract of an email from me to Ross on Friday, 21 December, 2018 5:44 AM, which Ross forwarded to you, which confirms no notice was given for termination of employment.

  [The contents of the email dated 21 December 2018 was inserted into the email]

  Next thing I know, was when you informed me on Friday 21/12/2018 that you had organised my payout and issued a pay slip. Employment finished. Hence 5 weeks pay in lieu of notice is owed as no notice was given.

<u>Discussions on 19 December 2018</u>

16 According to the Claimant, Mr Torre wanted to pay the Claimant's entitlement by instalments, which he could not accept without discussing the proposal with his wife. He and Mr Torre also discussed the other employees' termination and Mr Torre referred to there being no work going forward. The Claimant said they discussed the Claimant doing maintenance work for 'Schneider' and he and Mr Torre agreed he would be a causal employee ('*if and when Torre Electrics was scaled fully back of employee's*' [sic]) and paid a set rate of $70 per job.

17 The Claimant agreed he understood there was some future work to be undertaken for 'Schneider' and finishing off existing work and '*bits and pieces*' to wind down the business. The Claimant also understood that the business had to be out of the leased premises before the lease ended. The Claimant agreed there had been discussions about closing the business, but he was not aware of a definite date. The Claimant denied there was a conversation about him finishing up and wanting to do things amicably. He agreed that Mr Torre did not want to undertake the Warranty Work but did so to help out the Claimant.

18 According to Mr Torre, the meeting on 19 December 2018 was to discuss the final issues regarding the closure of the business and the Claimant said he wanted to think about a proposal to pay his entitlements in instalments, which was the Respondent's preference. Mr Torre also

said that the second part of the conversation was to do with ceasing employment and how the Claimant's employment was to end. Mr Torre said the Claimant asked about future work where the Respondent had a small amount of warranty work for one client. They agreed the Claimant would charge $70 per job, but Mr Torre said the work was to be undertaken on a sub-contractor basis where the Claimant had an Australian Business Number (ABN). The work was completed and months later he received an email from the Claimant wanting payment, but the Claimant never produced an invoice for payment.

Events on 21 December 2018

19 According to the Claimant, Mr Torre arrived at the office between 11.00 am and 12.00 pm and started to answer his questions in the email the Claimant had sent earlier in the morning, '*telling* [the Claimant] *that today … 21st December 2018 was* [the Claimant's] *last day*' of work and that he was to finish with the two other employees.[7] The Claimant said he did not return to work after 21 December 2018.

20 In respect of the contents of the email dated 21 December 2018, the Claimant said that he wanted to know his status going forward, as he did not know the situation and he was not sure what was going on. He did not believe that he was anticipating that 21 December 2018 was his last day of employment.

21 Mr Torre received the Claimant's email dated 21 December 2018 in which the Claimant said he wanted his entitlements in a lump sum and, in his view, saying *today was Claimant's last day*. Mr Torre said he agreed to everything the Claimant wanted and he was happy for the Claimant to leave on 21 December 2018 if the Claimant wanted to go. Mr Torre denied putting the *acid test* on the Claimant to leave, although he acknowledged that one day the Claimant's employment would end with the closing of the business.

Resolving the evidence

22 It is clear that the Claimant and Mr Torre had different recollections or perceptions of events surrounding the cessation of the Claimant's employment. I am not able to resolve the differences by rejecting their evidence as incredible or necessarily untruthful where in many respects their evidence is consistent with each other.

23 However, there are a number of difficulties with respect to the content of the Claimant's email dated 21 December 2018 when compared to the content of the conversation between the Claimant and Mr Torre on 19 December 2018:

- notwithstanding discussions on 19 December 2018 included the specific termination of other employees, even on the Claimant's evidence, at its highest, there was a general discussion about the Claimant's employment ceasing in the future consistent with the closing of the business;
- however, the Claimant professed to be unaware of when the business would close, although he acknowledged that there was some work to be finished off and *bits and pieces* to complete to wind down the business and there was no definitive date for closure;
- further, nothing in the Claimant's evidence arising from the conversation on 19 December 2018 indicated that the Claimant: was asked to nominate a date to end his employment; or informed of when in fact the business was closing upon which it was implied his employment would cease from that date, notwithstanding Mr Torre had said there was no work from 21 December 2018;

- the real gravamen of the Claimant's concern arising from discussions on 19 December 2018 was the payment of outstanding entitlements and he wanted some time to think about the Respondent's proposal to pay the entitlements by instalments, noting that this issue was also raised some 18 months earlier;
- between the end of the meeting on 19 December 2018 until the Claimant sent the email on 21 December 2018, nothing changed. That is, the Respondent did not press a response to the proposal about paying entitlements put forward by Mr Torre, nor did the Respondent press any other issue discussed at the meeting;
- it was the Claimant's email dated 21 December 2018 that bought things to a head. In that email the Claimant said he wanted his entitlements in a lump sum (rather than by instalments) that he '*thought that Friday could be my last day of employment*'; and
- after receiving this email, according to the Claimant, Mr Torre said 21 December 2018 was his last day and the Claimant was given a final pay slip and paid his entitlements.

24 The Claimant's explanation that he was not anticipating his employment ending on 21 December 2018 is inconsistent with the contents of his email where he nominates an end date of 21 December 2018. I do not accept that this email was merely a query about an unknown future work situation.

25 While the Claimant did query his future employment situation, this also needs to be seen in the context of the Claimant's other query on 19 December 2018 regarding carrying out the Warranty Work (the circumstances of which are disputed).

26 Section 117 of the FWA refers to the giving of notice of termination of an employee's employment and generally applies where an employer is the moving party and ends the employee's employment.

27 In the Claimant's case, where the Claimant bears the onus of proving his claim and the facts giving rise to his claim, I am unable to discount that, consistent with Mr Torre's evidence, following the general discussions on 19 December 2018, which included the Claimant's employment ending at some point coinciding with the eventual closing of the business, Mr Torre agreed to the Claimant's suggested last day of employment being 21 December 2018.

28 Nothing in the evidence suggests the Respondent or Mr Torre proposed or suggested this day as the end of the Claimant's employment and, in fact, the first time this date was raised was when it was proposed by the Claimant in his email dated 21 December 2018.

29 To the extent 21 December 2018 was a relevant date, it was relevant because two other employees had received notices of termination to cease employment on that date and because at the meeting on 19 December 2018, Mr Torre had said there was '*no work* [for the business] *going forward*'.

30 However, the Claimant agreed there was still some work to do in relation to closing the business and the actual date or timing of the closure was not known albeit that it was likely to be around the same time as the cessation of a commercial lease for the Respondent's office.

31 I am satisfied that, on the evidence, it is equally open to conclude an alternative rational explanation exists; that being, Mr Torre acquiesced to the Claimant's proposal to finish on 21 December 2018 and paid out his entitlements as requested.

32 While I am satisfied of an alternative explanation on the evidence, I am not satisfied the Claimant has proven to the requisite standard the Respondent terminated his employment.

33 Therefore, if I am not satisfied the Respondent terminated the Claimant's employment, I am not satisfied an obligation under s 117(1) of the FWA applies to the Claimant's employment.

Was The Claimant A Casual Employee Or An Independent Contractor?

34 The discussions between the Claimant and Mr Torre on 19 December 2018 are also relevant to the issue of whether the work undertaken by the Claimant between January 2019 and May 2019 was as a casual employee of the Respondent or an independent contractor to the Respondent.

35 The nature of these discussions was, in my view, very general and the agreed facts concerning this work include:

- the Claimant wanted to do the Warranty Work for the Respondent in 2019 and offered to do discrete jobs at $70 per job;
- the Warranty Work involved replacing faulty equipment under warranty associated with a minor contract remaining with the Respondent's business;
- the Respondent was reluctant to have the Claimant carry out this work, but said the work could be done by the Claimant as a subcontractor and the Claimant was to supply an ABN;
- the Claimant disputed the work could be done on a subcontracting basis because it would not comply with certain regulatory requirements for electrical work;
- the Claimant undertook nine jobs between January 2019 and May 2019 and 'invoiced' the Respondent for $630; and
- the Respondent declined to pay the amount 'invoiced' until the Claimant provided a tax invoice with an ABN.

36 On 20 May 2019, the Claimant sent an email to 'Sandra' and Mr Torre requesting payment of $630 for work performed.[8] I note the attachments does no more than list item numbers with an amount of $70 next to each item number.

37 Between 22 May 2019 and 27 May 2019, there was a series of emails between the Claimant and Mr Torre disputing how the Claimant would invoice the Respondent for the Warranty Work and reference to the conversation on 19 December 2018 about the Claimant's status as a casual employee or subcontractor.[9] Suffice to say the Claimant and Mr Torre had a different view on how the work was to be paid and the Claimant's status.

38 This issue was not resolved at the time the work was done.

39 The Claimant refers to the MCE as the basis for his claim for wages as a casual employee.

40 Therefore, *if* the MCE has any application to the claim, the Claimant must first prove to the requisite standard that he is an '***employee***' as defined in s 3 of the MCE, noting the Respondent denies the Claimant was an employee at the time the Warranty Work was undertaken.

41 '[E]***mployee***' in s 3 of the MCE means '*a person who is an employee within meaning of*' the *Industrial Relations Act 1979* (WA) (IR Act).

42 Section 7 of the IR Act defines '***employee***' to, relevantly, mean '*(a) any person employed by an employer to do work for hire or reward including an apprentice; or (b) any person whose usual status is that of an employee*'.

43 In ***Botica v Top Cut Holdings Pty Ltd*** [2020] WAIRC 00061 (***Top Cut***), Industrial Magistrate Flynn (as he was then) comprehensively reviewed the meaning of '***employee***' as it related to the FWA, but also as it related to s 4(1)(a) and s 4(1)(b) of the *Long Service Leave Act 1958* (WA) (LSL Act).

44 The relevant definition of '***employee***' in s 3 of the MCE (by virtue of s 7 of the IR Act) is the same as that in s 4(1)(a) and s 4(1)(b) of the LSL Act.

45 As Industrial Magistrate Flynn noted in ***Top Cut***, at [55], the meaning of '***employee***' in s 4(1)(a) and s 4(1)(b) of the LSL Act has been construed by appellate authority in Western Australia consistent with the meaning of '***employee***' in the FWA adopted by authorities in other jurisdictions.

46 In summary, the totality of the relationship between the parties must be examined to determine whether the person who is engaged is an employee or an independent contractor.[10] The principles applied in respect of the meaning of '***employee***' in s 4(1)(a) and s 4(1)(b) of the LSL Act are also applicable to the meaning of '***employee***' in s 3 of the MCE.

47 I adopt Industrial Magistrate Flynn's summary and adaptation, at [38] in ***Top Cut***, identifying a number of potentially significant and relevant factors in assessing the totality of the relationship between a person who engages another to do work and the person who is engaged to do the work.[11] I also note the different methodologies referred to at [39] in ***Top Cut***.

48 Similar to that in ***Top Cut***, there are factors suggesting an 'employee/employer' relationship between the Claimant and the Respondent and factors suggesting the Claimant was 'independently contracted' to the Respondent to carry out the Warranty Work.

49 The factors suggesting an 'employee/employer' relationship include:

- the Claimant attended the Respondent's office for each job to complete the necessary computer or paperwork;
- the Respondent nominated the Warranty Work to be undertaken, if and when it was required to be done; and
- on the Claimant's evidence, he was required to operate under the Respondent's electrical licence and electrical contractor's licence to complete the Warranty Work.

50 The factors suggesting an 'independent contractor' relationship include:

- the Warranty Work involved discrete and limited tasks where the Respondent had otherwise divested its electrical business to another organisation. In that sense, there was limited representation of the Respondent by the Claimant;
- the Claimant presented the Respondent with an 'invoice' at the completion of nine jobs rather than was paid for work undertaken on each occasion;
- the work was invoiced at a job rate of $70 per job and not an hourly rate;
- the Warranty Work was infrequent with nine jobs completed over some five months;
- there was no suggestion that the Claimant was directed to do the work or supervised in carrying out the work. The Claimant was free to determine the manner in which he completed the Warranty Work; and
- the Respondent otherwise had no control, nor did it assume control, over the Claimant's time. The Respondent did not have the Claimant's exclusive services and it appears the

Claimant did not, and was not required to, regularly attend the workplace. The Claimant was free to look for other work.

51 Whether the Claimant used the Respondent's tools or wore the Respondent's uniforms (if there was any) is unknown, although having regard to other circumstances, I do not consider this determinative of the Claimant's status as an employee or as an independent contractor.

52 Further, the parties placed significant emphasis on whether the Claimant could complete the Warranty Work without the Respondent's electrical licence and electrical contracting licence. The Claimant was adamant that he could not, and this was indicative of him being an employee, whereas the Respondent said the Claimant could complete the work using the Respondent's licences, and this is no different to the position adopted by other subcontractors.

53 While I have noted this factor as an indicator of the Claimant's 'employee/employer' relationship, again, this is not determinative where I also cannot disregard the Respondent's engagement of other subcontractors using its electrical licence and electrical contracting licence (and I am not required to resolve the legitimacy in doing so).

54 Finally, the Claimant's ABN was cancelled on 23 May 2019.[12] The existence of the ABN during the Warrant Work merely demonstrates the Claimant *could have* issued a tax invoice for the Warranty Work, not necessarily that he was operating a business. However, in part, it supports Mr Torre's evidence of the Respondent's preference for the work to be contracted to the Claimant.

55 When assessing the totality of the relationship between the Claimant and the Respondent, the Claimant's ability or inability to carry out the Warranty Work using the Respondent's electrical licence and electrical contracting licence and the nomination of the Warranty Work by the Respondent is less significant than the combined effect of the Warranty Work being infrequent, discrete and involving limited tasks charged on a per job basis where the Respondent otherwise had no, or did not assume, control over the Claimant's exclusive services.

56 Therefore, I conclude the Claimant supplied his services to the Respondent on an ad hoc basis on a per job rate of $70 per job to do the Warranty Work, rather than serving the Respondent in whatever remained of its business.

57 I am not satisfied the Claimant was an '***employee***' of the Respondent for the purposes of the MCE.

Outcome

Claimant's claim for payment in lieu of notice of termination

58 Section 545(3) of the FWA enables an eligible State court (of which 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'.

59 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.

60 I note further that the Claimant elected the small claims procedure. Thus, the amount referred to in s 548(1)(a) and s 548(1A)(a) of the FWA refers to '*an amount that 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.

61 Having regard to the findings made I am not satisfied the Claimant has proven to the requisite standard the Respondent was required to pay an amount in lieu of notice of termination under s 117(2) of the FWA.

The Claimant's claim for payment of the Warranty Work

62 The Claimant did not identify what provision of the MCE he relied upon for the purposes of his claim for the payment of $630 for the Warranty Work, nor did he identify the enforcement provisions relevant to the IMC.

63 The IMC has limited jurisdiction under the MCE and IR Act: s 7 of the MCE and s 81A of the IR Act. The IMC has no jurisdiction to consider a broader common law contractual claim or a claim for denial of contractual benefits.

64 If I assume the Claimant relies on s 17C(1) of the MCE to seek payment in full and he seeks to enforce the payment of the amount of $630 pursuant to s 7(c) of the MCE, when read with s 83 of the IR Act, the IMC can only order payment where a contravention or failure is proved under s 83(4) of the IR Act: s 83A(1) of the IR Act.

65 This is predicated on the Claimant being an employee of the Respondent (bearing in mind the condition being implied into a contract of employment).

66 Having regard to the findings made, I am not satisfied the Claimant has proven to the requisite standard he was an employee of the Respondent and thus no condition for payment in full can be implied into any contract of employment for the purposes of the MCE. Therefore, there is no basis for the IMC to make an order for payment under s 83A of the IR Act.

Result

67 The Claimant's claim is dismissed.

D. SCADDAN
INDUSTRIAL MAGISTRATE

[1] Exhibit 1 - witness statement of the Claimant dated 26 April 2020 [4] and the email chain dated 12 June 2017 at RM-2.
[2] Exhibit 1 [5] and email dated 21 December 2018 at RM-3.
[3] Exhibit 1 at RM-21.
[4] Exhibit 1 [7] and email dated 31 December 2018 at RM-4.
[5] Exhibit 1 - email dated 3 January 2019 at RM-5.
[6] Exhibit 1 - email dated 6 January 2019 at RM-4.
[7] Exhibit 1 [6].
[8] Exhibit 1 - RM-8.
[9] Exhibit 1 - RM-9, RM-10, RM-11, RM-12, RM-13.
[10] ***United Construction Pty Ltd v Birighitti*** [2002] 82 WAIG 2409; ***United Construction Pty Ltd v Birighitti*** [2003] WASCA 24; ***David Kershaw v Sunvalley Australia Pty Ltd*** [2007] WAIRComm 520; ***Stevens v Brodribb Sawmilling Co Pty Ltd*** (1986) 160 CLR 16, 28 - 29; ***ACE Insurance Ltd v Trifunovski*** [2011] FCA 1204; (2011) 200 FCR 532 [29].
[11] *In **Abdalla v Viewdaze Pty Ltd** (2003) 53 ATR 30, the Full Bench of the Western Australian Industrial Relations Commission identified a number of factors of potential significance when assessing the totality of the relationship between a Business and a Worker. I have adapted the list and added to it from other cases. The list is not exhaustive. Features of a relationship in a particular case which do not appear below may be relevant.*

a. Does a Worker perform work for anyone other than a Business (or have a genuine and practical entitlement to do so)? Does the Worker operate from premises other than that of a Business? Does a Worker advertise his or her services to the world at large? The right of a Business to the exclusive services of a Worker is characteristic of an employment relationship. On the other hand, if a Worker also works for others (or has the genuine and practical entitlement to do so) then this suggests an independent contract.

b. Does a Worker have the right to delegate or subcontract work? Does a Worker have an obligation to regularly attend the workplace? If a Worker is entitled to delegate work to others (without reference to a Business) then this is an indicator that a Worker is an independent contractor. An employment contract is personal in nature; it is a contract for the supply of the services of the worker personally.

c. To what extent do the arrangements for remuneration and leave of a Worker resemble an employment relationship?[11] Employees tend to be paid a periodic wage or salary and the rate is often set in advance by the Employer. Employees tend to be afforded paid leave for holidays and when unable to work because of illness. Independent contractors tend to be paid by reference to completion of tasks and there may be genuine negotiations about remuneration. Independent contractors tend not to be paid when on holidays or when unable to work because of illness. Employers tend to meet certain expenses associated with each employee including insurance and the cost of a uniform. Independent contractors often pay these expenses themselves. Compared to independent contractors, employers are rarely entitled to make deductions from payments to Workers on account of poor work performance.

d. Does a Business present a Worker to the world at large as an emanation of the business?[11] Typically, this will arise because a Worker is required to wear the uniform of the Business. Alternatively, if a Worker generates personal goodwill with customers of the Business and is able to leverage this goodwill into an asset that is saleable, a Worker may be an independent contractor.

e. Does a Worker have a special skill that is typically required by a Business for a discrete task or for a discrete time period? Such persons tend to be engaged as independent contractors rather than as employees.

f. Does a Worker spend a significant portion of his or her remuneration on business expenses, suggesting an independent contractor?

g. Does a Business have the right to suspend or dismiss a Worker in a manner consistent with typical dealings between an employer and an employee, suggesting an employment relationship?

[12] Exhibit 5.

Schedule I: Jurisdiction, Practice And Procedure Of The Industrial Magistrates Court (WA) Under The *Fair Work Act 2009* (Cth) and *The Industrial Relations Act 1979* (WA)

Jurisdiction under the *Fair Work Act 2009* (Cth)

[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 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***'); IR Act s 81, 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 a term of the NES: FWA s 44(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, s 47. A NES 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, s 47.

Small Claims Procedure

[6] The FWA provides that in 'small claims proceedings, the court is not bound by any rules of evidence and procedure and may act in an informal manner and without regard to legal forms and technicalities': FWA s 548(3). In ***McShane v Image Bollards Pty Ltd*** [2011] FMCA 215 [7], Judge Lucev explained this provision as follows:

> *Although the Court is not bound by the rules of evidence, and may act informally, and without regard to legal forms and technicalities in small claims proceedings in the Fair Work Division, this does not relieve an applicant from the necessity to prove their claim. The Court can only act on evidence having a rational probative force.*

Contravention

[7] 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).

[8] The civil penalty provisions identified in s 539 of the FWA includes:

- The Core provisions (including s 44(1)) set out in pt 2 - 1 of the FWA: FWA s 61(2), s 539.

[9] 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).

[10] 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.

Jurisdiction under *Industrial Relations Act 1979* (WA)

[11] Section 83 and s 83A of the IR Act confer jurisdiction on the IMC to make orders for the enforcement of a provision of an industrial agreement where a person has contravened or failed to comply with the agreement. If the contravention or failure to comply is proved, the IMC may issue a caution or impose a penalty and make any other order necessary for the purpose of preventing any further contravention. The IMC must order the payment of any unpaid entitlements due under an industrial agreement.

[12] The powers, practice and procedure of the IMC are the same as a case under the *Magistrates Court (Civil Proceedings) Act 2004* (WA). The onus of proving a claim is on the claimant and standard of proof required to discharge the onus is proof 'on the balance of probabilities'. The IMC is not bound by the rules of evidence and may inform itself on any matter and in any manner it sees fit. In ***Sammut v AVM Holdings Pty Ltd [No 2]*** [2012] WASC 27 [40] - [47], Commissioner Sleight examined a similarly worded provision regulating cases in the State Administrative Tribunal of Western Australia, noting:

> [T]*he rules of evidence are* [not] *to be ignored… After all, they represent the attempt made, through many generations, to evolve a method of enquiry best calculated to prevent error and elicit truth…*
>
> *The more flexible procedure provided for does not justify decisions made without a basis in evidence having probative force.*

Burden and standard of proof

[13] In an application under the FWA and under the IR Act, 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.*

[14] 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].