

## WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

**CITATION** : 2020 WAIRC 00275

**CORAM** : INDUSTRIAL MAGISTRATE D. SCADDAN

**HEARD** : WEDNESDAY, 20 NOVEMBER 2019, THURSDAY, 21 NOVEMBER 2019, WEDNESDAY, 15 JANUARY 2020, WEDNESDAY, 8 APRIL 2020

**DELIVERED** : FRIDAY, 15 MAY 2020

**FILE NO.** : M 130 OF 2018

**BETWEEN** : GAVIN SMITH

CLAIMANT

AND

SILKWOOD HOLDINGS (WA) PTY LTD AS TRUSTEE FOR  
THE DIABLO DISCRETIONARY TRUST T/A DOUGLAS JONES  
FINANCIAL SERVICES

RESPONDENT

**CatchWords** : INDUSTRIAL LAW – Modern award coverage – Financial services – Application of *Clerks – Private Sector Award 2010* (Cth) – Alleged contravention of terms of a modern award on award pay – Payment of untaken paid annual leave upon termination of employment – Contravention of National Employment Standards and *Fair Work Act 2009* (Cth) – Payment of long service leave under *Long Service Leave Act 1958* (WA)

**Legislation** : *Fair Work Act 2009* (Cth)  
*Long Service Leave Act 1958* (WA)  
*Corporation Act 2001* (Cth)  
*Fair Work Regulations 2019* (Cth)  
*Long Service Leave Act 1955* (NSW)

**Instrument** : *Clerks – Private Sector Award 2010* (Cth)

**Case(s) referred to in reasons** : *Transport Workers Union of Australia v Coles Supermarkets Australia Pty Ltd* [2014] FCAFC 148  
*City of Wanneroo v Australian Municipal, Administrative, Clerical Services Union* (2006) 153 IR 426  
*Kucks v CSR Ltd* (1996) 66 IR 182

*Ancor Ltd v CFMEU* [2005] HCA 10  
*Ghimire v Karriview Management Pty Ltd (No 2)* [2019] FCA 1627  
*Cigna Insurance Asia Pacific Ltd v Packer* [2000] WASCA 415  
*Dean v Weir Minerals Australia Ltd* [2018] FCCA 108  
*Matus v Australia Wide Computer Resources Pty Ltd (No 2)* [2015] FCCA 2055  
*Australasian Meat Industry Employees Union v Australian Meat Holdings Pty Ltd* (1999) 93 IR 308  
*Concut Pty Ltd v Worrell* [2000] HCA 64  
*North v Television Corporation Ltd* (1976) ALR 599  
*Wall v Westcott* (1982) 1 IR 252  
*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 proven in part

**Representation:**

Claimant : Mr P. Mullally (industrial agent)  
Respondent : Mr D. Jones (Director) on behalf of the Respondent

**REASONS FOR DECISION**

**Introduction**

- 1 Gavin Smith (Mr Smith) was employed by Silkwood Holdings (WA) Pty Ltd as the trustee for the Diablo Discretionary Trust t/as Douglas Jones Financial Services (the Company) from 7 February 2008 to 8 December 2017.
- 2 The role Mr Smith was employed to do is a fact in dispute and forms one of the central issues for determination. Mr Smith says that he was employed as a Portfolio Manager and Client Liaison Officer carrying out administration and clerical duties consistent with a level 5 employee under the *Clerks – Private Sector Award 2010* (Cth) (the Award), which he says was applicable to his employment by the Company.
- 3 Mr Smith claims a sum of \$49,243.33<sup>1</sup> from the Company, alleged to be:
  - \$4,487.74 for a shortfall of award wages from 1 July 2015 to 8 December 2017 under the provisions of the Award;
  - \$36,791.72 for the non-payment of annual leave not taken during the course of employment pursuant to s 90(2) of the *Fair Work Act 2009* (Cth) (FWA); and
  - \$7,964.33 for the non-payment of accrued long service leave under the *Long Service Leave Act 1958* (WA) (LSL Act).
- 4 Mr Smith claims the Company contravened the FWA and the Award in failing to pay him the entitlements referred to above and failing to comply with certain other requirements, relating to the provision of pay slips, of the FWA. Arising from this, Mr Smith also claims a pecuniary penalty for contraventions of the FWA and pre-judgment interest.

- 5 The Company disputes the claim. First, the Company denies the Award (or any award) applied where Mr Smith was employed as a graduate accountant and a para-planner and was ‘award free’.
- 6 Secondly, the Company claims that Mr Smith was paid all entitlements owed under the relevant employment contracts, including annual leave.
- 7 Thirdly, the Company claims Mr Smith is not owed long service leave where his employment was terminated for ‘serious misconduct’.
- 8 In Schedule I of this decision I have set out the law relevant to the jurisdiction, practice and procedure of the Industrial Magistrates Court of Western Australia (IMC) in determining this case. Relevant to matters identified under the heading, ‘Jurisdiction’ in Schedule I of this decision, I am satisfied: the Company is a corporation to which paragraph 51(XX) of the *Constitution* applies and it is a ‘*national system employer*’; and Mr Smith was an individual who was employed by the Company and is a ‘*national system employee*’.
- 9 There are potentially seven issues for determination:
- a. Whether Mr Smith and the Company are covered by the Award (or no award)?
  - b. If Mr Smith and the Company are covered by the Award, what was the appropriate classification of Mr Smith’s role under the Award?
  - c. If Mr Smith and the Company are covered by the Award, what are Mr Smith’s entitlements under the Award?
  - d. Is Mr Smith entitled to the payment of untaken accrued annual leave?
  - e. What, if any, contraventions of the FWA have occurred?
  - f. Whether Mr Smith is entitled to long service leave payment under the LSL Act?
  - g. Orders and the payment of a pecuniary penalty (if any).

### **First Issue – Is The Award Applicable To Mr Smith’s Employment By The Company?**

#### The Award Coverage

- 10 A modern award made by the Fair Work Commission does not impose an obligation or give an entitlement unless the award *applies* to the employer and the employee: s 46 of the FWA. An award *applies* to the employer and the employee if the award *covers* each of them: s 47 of the FWA. An award *covers* an employer and an employee if the award is expressed to cover each of them: s 48(1) of the FWA. It follows that the starting point to determine award coverage are the words of the award itself. More specifically, it is ‘*the objective meaning of the words used [in the relevant award] bearing in mind the context in which they appear and the purpose they are intended to serve*’: *Transport Workers Union of Australia v Coles Supermarkets Australia Pty Ltd* [2014] FCAFC 148 [22].
- 11 The interpretation of an award begins with consideration of the natural and ordinary meaning of the words used.<sup>2</sup> An award is to be interpreted in light of its industrial context and purpose, and must not be interpreted in a vacuum divorced from industrial realities.<sup>3</sup> An award must make sense according to the basic conventions of English language.<sup>4</sup> Narrow and pedantic approaches to the interpretation of an award are misplaced.<sup>5</sup>
- 12 Clause 4.1 of the Award provides that ‘[t]his award covers employers in the private sector throughout Australia with respect to their employees engaged wholly or principally in clerical

work, including administrative duties of a clerical nature, and to those employees. However, the award does not cover:

- (a) an employer bound by a modern award that contains clerical classifications; or
- (b) an employee excluded from award coverage by the Act’.

13 Clauses 4.2 and cl 4.3 of the Award provides that the Award does not cover:

- employees who are covered by a modern enterprise award or an enterprise instrument or employers in relation to those employees; and
- employees who are covered by a State reference public sector modern award or a State reference public sector transitional award, or employers in relation to those employees.

14 Clause 4.6 of the Award details several industry awards where the Award does not cover the employer. None of these awards are relevant to this claim.

15 Clause 4.7 of the Award provides that ‘[w]here an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work’.

16 Clause 3.1 of the Award defines ‘**clerical work**’ to include ‘*recording, typing, calculating, invoicing, billing, charging, checking, receiving and answering calls, cash handling, operating a telephone switchboard and attending a reception desk*’.

17 Similarly, cl 3.1 of the Award defines ‘**employee**’ to mean ‘*national systems employee*’ under the FWA and ‘**employer**’ to mean ‘*national systems employer*’ under the FWA.

Is the Company an employer in the private sector?

*Evidence*

18 ‘Private Sector’ is not defined in the Award or the FWA. The dictionary meaning of ‘**private sector**’ includes ‘*businesses or industries not owned or controlled by the government*’.<sup>6</sup>

19 Mr Smith and Mr Lyall Jones (Mr Jones), Director of the Company, agree on two things:

- (1) Mr Jones is a Director of a proprietary limited company, which owns and operates a business providing financial services (according to Mr Smith) or accounting and tax agent services (according to Mr Jones) to clients for commercial gain; and
- (2) the Company employed Mr Smith.

20 Regardless of how the service to clients is characterised, for the purposes of determining whether the Company is an employer in the private sector it is safe to say that the Company is not owned by the government and, beyond any statutory requirements, such as those under the *Corporations Act 2001* (Cth), it is not controlled by the government. Further, the Company operates a business and the business provides a service to clients in return for money.

21 Therefore, I am satisfied to the requisite standard that the Company operates its business in the private sector and is an employer in the private sector.

Was Mr Smith engaged wholly or principally in clerical work, including administrative duties of a clerical nature?

22 To answer this question, it first needs to be determined what, in fact, Mr Smith’s role was when he was employed by the Company.

*Evidence*

- 23 Mr Smith has a Bachelor of Business with majors in finance and accounting. He has an accreditation as an ASX Accredited Listed Products Adviser and has attained various other qualifications relevant to financial planning.<sup>7</sup>
- 24 According to Mr Smith, save for the first two weeks of his employment when he was employed as an Accountant, he was employed as a Portfolio Manager and Client Liaison Officer. Mr Smith refers to the Company's website which he says continues to refer to his position as Portfolio Administrator and Client Liaison Manager after his employment was terminated.<sup>8</sup>
- 25 On 7 February 2008, Mr Smith was offered employment as an Accountant.<sup>9</sup>
- 26 On 27 August 2009, Mr Smith was offered employment as an Accountant.<sup>10</sup>
- 27 On 1 March 2010, Mr Smith was offered employment as an Accountant.<sup>11</sup>
- 28 On 20 October 2016, Mr Smith was offered employment as an office administrator.<sup>12</sup>
- 29 Mr Smith's income tax returns for 2008, 2009 and 2012 refers to his main salary and wage occupation as 'Financial adviser'.<sup>13</sup>
- 30 On 8 December 2017, following the termination of his employment, Mr Smith was provided with a reference from Mr Jones stating that his duties included '*financial planning, statement of advice compilation and accounting*'. Further to this, Mr Smith was described as the '*client liaison manager and implements the approved recommended strategies to client's investment portfolios and superannuation fund accounts*'.<sup>14</sup>
- 31 Mr Smith says that from July 2013 he worked from home so that Mr Jones could rent out the business premises located in the Perth CBD. Prior to this, Mr Smith worked at the Company's office located at 12 St George's Terrace, Perth (Perth Office). Consistent with this, Mr Smith referred to an email from Mr Jones.<sup>15</sup> Mr Smith says that following this email, all of the business records and the Company's office equipment was re-located to his home address in Harrisdale until it was collected on 5 April 2018.<sup>16</sup> Thereafter, he says he regularly met Mr Jones at the Perth Office.
- 32 A list of items collected by Mr Jones on 5 April 2018 shows that it includes two keys to a mail box, various stationary, client records and other financial documents and various computer items and other office equipment.<sup>17</sup>
- 33 Mr Smith says that his duties and tasks included:<sup>18</sup>
- a) *Answering client phone calls and liaising with them*
  - b) *Answering phone calls from investment, superannuation and insurance companies*
  - c) *Diary bookings and management of the financial adviser's events and meetings*
  - d) *Regular mail collection from all mail boxes, including the PO Box at St George's Terrace and sorting of the documentation*
  - e) *Electronic and manual generation of portfolio reports for clients on a quarterly basis*
  - f) *Facilitation of the required tasks within the computer software programs*
  - g) *Sending and receiving emails to clients as well as investment, superannuation and insurance companies*
  - h) *Filing of client records and documentation in alphabetical order*

- i) *Completion of application forms for clients*
- j) *Photocopying and scanning of documents*
- k) *Records management of bills*
- l) *Stationary ordering*
- m) *Word processing of client letters*
- n) *Accompanying the financial adviser to client meetings and making notes in client files.*

34 In his oral evidence, Mr Smith clarified that he also facilitated investment portfolios for clients according to statements of advice, which included the preparation of financial documents for clients, reporting for clients on a quarterly basis, preparing compliance documents for clients and maintaining files for each client. Further, he also made applications for insurance cover and superannuation for clients, liaised with investment companies and stock brokers for maintaining client portfolios.

35 Mr Smith said that, in effect, his home became the Company's office and he had all of the client files at his home and met with clients' neighbouring offices at the Perth Office and at his home. Mr Smith also said Mr Jones would come to his home and he would communicate with Mr Jones by telephone, email and in person.

36 Further, he said that all client communication was diverted to his mobile telephone.

37 In cross-examination, Mr Smith acknowledged that he carried out many other tasks that were not referred to in paragraph 7 of his witness statement (Exhibit 1), including:

- the preparation of taxation returns;
- discussions with clients in person and on the telephone;
- actioning clients' instructions;
- liaising with stock brokers for share transactions and insurance companies for applications;
- preparation of statements of advice; and
- analysing clients' financial situation where the statement of advice was prepared for clients' needs and financial situation and advice specific to clients and getting clients to approve the advice.

38 Mr Smith described the task and duties in paragraph 7 as a summary and said that he performed many other roles. Mr Smith acknowledged that he applied for one of two positions at the Company, including an accounting position and a financial planning position. His goal was to put into practice the skills he had from his degree and to assist clients having completed a double major. He said he adopted a confidential and positive approach to client needs and used accounting functions and transactions, including financial reporting for clients.

39 Mr Smith trained and supervised three people, who, as I understand it, assisted Accountants employed by the Company in clerical and administrative duties. He said that his duties did not change from those carried out at the Perth Office to those carried out at his home. That is, his duties remained the same after July 2013 when, in effect, the business relocated to his home.

40 Mr Smith said that the Company sold its accounting business in 2011 and retained its financial planning business, although Mr Smith denied being a financial adviser (contrary to the income

taxation records), saying that the word ‘financial’ was there to reflect the industry that he worked in. Up to 2011, and prior to the sale of the accounting business, the Company employed a receptionist at the Perth Office. As I understood it, there may have been some sharing of services after the sale of the business with another business who occupied the same location.

- 41 Mr Smith acknowledged that his employment contract contained a bonus component for new clients who engaged with the Company.
- 42 Mr Smith acknowledged that the Company is a small business, and, as I understood it, from 2013 he and Mr Jones were the sole employees.
- 43 Mr Smith said his main role at the Company was Portfolio Manager and Client Liaison Officer, requiring him to keep in constant contact with clients to keep them informed and answer their questions, manage their investments for superannuation and other investments (which required a certain level of qualification including financial planning). His degree enabled him to prepare reports for clients regarding their investments.
- 44 Mr Smith agreed that he was involved in para-planning, which involved the preparation of statements of advice for clients and involved analytical skills, which he accepted was more involved than clerical skills and was an in-depth process. He also accepted that clerical duties formed part of the duties for financial planning, but said his main duties were clerical and administration.
- 45 Mr Smith accepted that he undertook courses for his professional employment, including working towards his Certified Practising Accountant. He accepted the Company provided no other services other than accounting and professional services.
- 46 Mr Smith prepared the statements of advice which were signed off by Mr Jones as the licensed financial adviser. Mr Smith accepted that he wrote his own reference,<sup>19</sup> anticipating future employment and Mr Jones signed the document. Mr Smith agreed it was a fair description of his employment, but he said these roles were clerical roles.
- 47 Mr Smith relied on witness evidence from Ms Nancy Vos, Ms Michelle D’Roza, Ms Leslie Ross, Mr Wayne Hand and his mother, Ms Avril Smith. The relevance of their evidence was limited, and I place significantly less weight on their evidence. The purpose of their evidence was to corroborate Mr Smith’s opinion of his role, however, it was apparent that each of the witnesses had limited knowledge of Mr Smith’s role, or did not work with Mr Smith, or relied upon what he had told them his opinion of his role was.
- 48 Mr Jones said Mr Smith was employed as a graduate accountant and then worked as an internal para-planner with ancillary administrative duties. Mr Jones said Mr Smith was a junior member of the team working under his direction and performed several of the necessary tasks in developing a financial plan for a client, including:<sup>20</sup>
  - a. preparing and gathering of clients’ financial reports and records;
  - b. reviewing the clients’ financial records and create or model different possible financial scenarios and make recommendations on which financial plan should be followed;
  - c. preparing a statement of advice or review of financial advice;
  - d. assisting Mr Jones in presenting the information to clients by producing charts, graphs and histograms;
  - e. answering clients’ questions and follow up with clients and any other staff to ensure that the financial plan was followed and make changes to any plan; and

f. where necessary, meeting with clients.

- 49 Mr Jones said most 'firms' require a para-planner to have an associate degree with industry experience or a bachelor's degree with some relevant certification.
- 50 Mr Jones said that he employed other staff members to attend to administrative duties.<sup>21</sup>
- 51 Mr Jones also referred to Mr Smith's employment contracts and income taxation documents, which he says corroborates his characterisation of Mr Smith's role.
- 52 In respect of the employment contract signed by Mr Smith in October 2016 where Mr Smith is described as an 'office administrator', Mr Jones says that from 2011 onwards the business comprised of him and Mr Smith, and Mr Smith's contract was altered to take into account a bonus entitlement for him to bring new business. Mr Jones says that Mr Smith's role altered as a result. Further, in relation to the Company's website, Mr Jones says Mr Smith determined his role for the website, which was a marketing tool and was established in August 2017.<sup>22</sup>
- 53 In cross-examination, Mr Jones confirmed that he is a qualified accountant and financial adviser. He holds the licence to carry out financial advising as an authorised licensee. He said the Company provides financial advice services to clients.
- 54 Mr Jones acknowledged that Mr Smith obtained an order in the Western Australian Industrial Relations Commission with respect to the payment of a contractual entitlement related to bonus payments. In that regard, Mr Jones says that this demonstrates that the Company never had an intention to remunerate Mr Smith for clerical duties (by the bonus) and to remunerate him for 'higher duties'.
- 55 Mr Jones denied Mr Smith was an 'office administrator' as described in the contract of employment dated 20 October 2016. While Mr Jones agreed that Mr Smith did carry out the tasks identified in Mr Smith's witness statement,<sup>23</sup> he said that he carried out additional duties to those tasks, including the preparation of statements of advice. Mr Jones would then review the advice prepared by Mr Smith and sign off on the advice because he has the licence.
- 56 Relevant to the issue of whether the Award applies to Mr Smith, Mr Jones relied on the witness evidence of Mr Shane Pye (Mr Pye) and Mr Simon Lau (Mr Lau). Similar to the evidence relied upon by Mr Smith, the relevance of their evidence was limited. The purpose of their evidence was to corroborate Mr Jones' opinion of Mr Smith's role, however, it was apparent that Mr Pye had limited knowledge of Mr Smith's role, or did not work with Mr Smith, or relied upon what he was told about Mr Smith's role. Initially, Mr Lau had some oversight of Mr Smith's employment during the early years of their employment by the Company, although this ceased in around 2010 when the accounting and taxation component of the Company was sold. Thereafter Mr Lau's involvement and knowledge of Mr Smith's employment was limited to infrequent observations. However, his observations and knowledge of Mr Smith's role at the Company from approximately 2008 to 2010 is consistent with the role of a trainee accountant.

#### Determination

- 57 In my view, Mr Smith and Mr Jones tailored their evidence to suit their respective positions on various issues.
- 58 In particular, if regard was had only to the duties and tasks listed in paragraph 7 of Mr Smith's witness statement,<sup>24</sup> and if the Award applied, Mr Smith's duties and tasks would be characteristic of a level 1 classification under the Award. This is inconsistent with the claim made by Mr Smith. Thereafter, Mr Smith clarified in his oral evidence his duties by expanding



the duties to incorporate more sophisticated duties of a financial nature. Cross-examination elicited further expansion of his duties, such that it was apparent that Mr Smith was performing his role in a predominantly independent manner with little supervision in a financial planning and/or financial advice business operated by two people, he and Mr Jones. Furthermore, it was also apparent that his duties went well beyond that originally outlined by him.

- 59 By way of example, Mr Smith did not merely receive and answer telephone calls from clients or financial organisations. It is apparent that where he communicated with clients and financial organisations by telephone, he did so for the purpose of advising clients in financial matters, obtaining their instructions and preparing financial documents in accordance with their instructions.
- 60 While Mr Jones was responsible for authorising and signing off on any work undertaken as the licensee for the business operated by the Company, it is apparent that Mr Smith was the person undertaking the majority of the client work.
- 61 Most relevantly, this is consistent with the Company's employment reference authored by Mr Smith and signed by Mr Jones, where Mr Smith characterised his duties significantly different to the bland clerical work he referred to in paragraph 7 of this witness statement. It is reasonable to infer that he did so because he wanted to secure future employment beyond that of an actual clerical worker, consistent with his qualifications and stated aspirations.
- 62 This is not to say that I found Mr Jones' evidence persuasive on all issues, but in regard to his evidence concerning Mr Smith's duties and role, his evidence was consistent with expansion of duties referred to by Mr Smith in his oral evidence, both in evidence-in-chief and cross-examination and consistent with other evidence, such as the reference written by Mr Smith and signed by Mr Jones.
- 63 Therefore, I find the *function* of Mr Smith's role as Portfolio Manager and Client Liaison Officer was to support the licensee in providing financial advice to, and management of, the Company's clients.
- 64 The *tasks* performed by Mr Smith as Portfolio Manager and Client Liaison Officer in discharging this function were:
- a. taking instructions from clients and obtaining financial documents and other records to assess clients' financial needs;
  - b. preparing financial reports and advice and analysing client financial needs in the context of the information obtained;
  - c. ongoing managing and reviewing of clients' financial position;
  - d. liaising with other staff and third parties as required; and
  - e. clerical and administrative duties as required.
- 65 For my purposes - identifying the relevant award (if any) and, if necessary, the appropriate classification - it is sufficient to make the findings below on the tasks of a Portfolio Manager and Client Liaison Officer in the position of Mr Smith during the relevant period. A Portfolio Manager and Client Liaison Officer:
- a. communicated with clients and financial organisations so as to give financial advice and prepare financial documents in accordance with that advice and the clients' instructions;

- b. applied knowledge and skill in order to prepare statements of advice, financial reports and undertake an analysis of clients' financial requirements;
- c. carried out other financial duties from time to time, including preparation of taxation returns, maintaining client files, investments and portfolios and client compliance;
- d. carried out other duties, including clerical duties, in order to complete the tasks referred to in a, b and c; and
- e. completed other administrative duties where required.

66 The time involved by a Portfolio Manager and Client Liaison Officer in the respective tasks outlined above is difficult to quantify with accuracy, but, having regard to the evidence, I am satisfied that tasks a, b, and c comprised most of Mr Smith's work time and was the principal work that he was engaged to perform and did perform. That he also carried out work of a clerical nature is hardly surprising given the business was a two man operation, but I am not satisfied that Mr Smith was engaged in wholly, or even principally, '**clerical work**' (as defined) where it is apparent that his principal role was much more than this.

67 Mr Smith carried out the functions and tasks (i.e. his work) at an office in the Perth Office from 2008 to July 2013 and thereafter carried out the same functions and tasks at his home address in Harrisdale until the termination of his employment in December 2017.

68 Therefore, while his contracts of employment refer to him as an accountant and in December 2016 as an officer administrator, his duties and tasks, and therefore his role, did not, in fact, change over the course of his employment. It is the functions and tasks undertaken, rather than nomenclature, that is important.

69 Mr Smith was employed by the Company and undertook work tasks and functions as an employee of the Company. His role as a Portfolio Manager and Client Liaison Officer did not wholly or principally require him to be engaged in '**clerical work**', as that term is defined by the Award.

70 Where I am not satisfied to the requisite standard that the role engaged in by Mr Smith was wholly or principally clerical work, I am not satisfied the Award covered the Company's employment of Mr Smith.

71 Where I am not satisfied the Award covered Mr Smith's employment by the Company, it is unnecessary to consider his classification under the Award or what entitlements may have applied (as sought by him in the claim). That is, the second and third issues for determination do not require consideration in light of the conclusion reached regarding the application of the Award.

#### **Fourth Issue – Is Mr Smith Entitled To Alleged Untaken Accrued Annual Leave?**

##### Evidence

72 Mr Smith says that he never took annual leave during the entire time of his employment by the Company,<sup>25</sup> evidence he maintained in cross examination. Further, Mr Smith says that Mr Jones informed him that he [Mr Jones] would pay out his entitlements upon the termination of Mr Smith's employment upon Mr Smith writing to him to ask him to do so.<sup>26</sup> Therefore, pursuant to s 90(2) of the FWA, Mr Smith claims the payment of untaken paid annual leave he says was owing at the time of the termination of his employment.

73 One of the facts in dispute in respect of this issue is whether the Company implemented a Christmas shut down during the period of Mr Smith's employment.

- 74 At the outset, I note the Company did not maintain or provide any employment records<sup>27</sup> for Mr Smith, save for PAYG payment summaries and profit and loss statements for the Company, including pay slips required to be provided pursuant to s 536(1) of the FWA.
- 75 Further, the Company did not have any process of reconciling annual leave taken or accrued and did not make or keep any record relevant to annual leave.<sup>28</sup>
- 76 Therefore, when Mr Jones says that Mr Smith was paid all of his contractual and annual leave entitlements, but cannot and did not produce any employment records on behalf of the Company, particularly those records required by the FWA to be provided and maintained by an employer,<sup>29</sup> his evidence is not supported by any corroborating documents.<sup>30</sup>
- 77 Section 557C(1) of the FWA provides that, relevantly, if *‘in proceedings relating to a contravention by an employer of a civil remedy provision referred to in subsection (3) ... [a claimant] makes an allegation in relation to a matter’ and the employer was required (by specified provisions) to keep a record in relation to the matter and ‘the employer failed to comply with the requirement’* (and there is no reasonable excuse as to why there has not been compliance), the employer *‘has the burden of disproving the allegation’*.<sup>31</sup> A civil remedy provision includes s 44(1), which involves a contravention of a NES.<sup>32</sup>
- 78 Section 557C of the FWA positively requires a defaulting employer to disprove such an allegation and there is more than an evidentiary burden on the employer as it relates to the absence of records.<sup>33</sup>
- 79 The potential effect of s 557C of the FWA for a defaulting employer is that a claim will be upheld, notwithstanding there may be issues of credibility with respect to the employee’s account.<sup>34</sup>
- 80 Mr Jones’ evidence, consistent with Mr Smith’s and Mr Lau’s evidence, is that the Company did not provide pay slips, including leave reconciliation records, to Mr Smith. Mr Jones’ explanation for not doing so was, in essence, that the Company’s employees were aware of what they were paid and what they were owed, and the PAYG records were sufficient. He says that he is now aware of the requirement to provide, keep and maintain employment records under the FWA.
- 81 Mr Smith alleges that he did not take any annual leave during the course of his employment and was, in essence, required to be available for clients all year round. Mr Jones says that the Company enforced a Christmas shut down period each year and that employees, including Mr Smith, took annual leave during the Christmas shut down period. Mr Jones relies on evidence from Mr Lau<sup>35</sup>, Mr Pye<sup>36</sup>, Mr Mathew Clune<sup>37</sup> (Mr Clune) and Ms Irene Jones<sup>38</sup> (Ms I. Jones) corroborating the observance of a Christmas shutdown period.
- 82 However, their evidence is of limited weight where none of the witnesses were able to specify the exact dates of any Christmas shut down,<sup>39</sup> nor did they work with Mr Jones or Mr Smith for any length of time and they often made assumptions about Mr Smith taking annual leave during this period.<sup>40</sup> Further, while Ms I. Jones and Mr Lau<sup>41</sup> also refer to the Mr Smith taking time off to attend funerals, they do not specify when this was or profess any knowledge of any arrangements that may have been made between Mr Smith and Mr Jones to attend a funeral.<sup>42</sup>
- 83 In addition, the letters from the Company to clients<sup>43</sup> purportedly informing clients of an office closure in various years does not inform the IMC of what, if any, arrangements were made with respect to the taking of annual leave during a purported Christmas shutdown period. Further, Mr Smith did not commence employment with the Company until February 2008, therefore, the letter<sup>44</sup> regarding a Christmas shutdown in 2007 / 2008 is irrelevant.

- 84 Mr Smith's evidence that he took no annual leave while working for the Company might seem somewhat extraordinary, something referred to by Mr Jones in his evidence, but simply put there is little, if any, evidence before the IMC that enables a positive rejection of his evidence that he worked during the Christmas and New Year periods over the course of his employment.
- 85 For a substantial period of time Mr Smith worked from home where the Company's registered office was Mr Smith's home address. Whatever might have been the arrangement with respect to the Company's telephone service, Mr Smith appears to have been expected to be available by mobile telephone to answer client queries. Any arrangements between Mr Smith and Mr Jones were ad hoc and Mr Smith was expected to work independently with little supervision by Mr Jones.
- 86 The Company's evidence that Mr Smith took all of his annual leave and was paid all of his annual leave entitlements during his employment, principally because of an enforced annual Christmas shutdown period, is based on assumptions and purported casual observations made by people who had no real knowledge of Mr Smith's working arrangements. Similarly, Mr Jones' evidence on this issue lacked cogency and while he purports to give the dates of the alleged annual shutdown period, there is no employment records which otherwise verify that annual leave was, in fact, taken by Mr Smith.

#### Determination

- 87 Where the Company failed to keep the requisite annual leave and other employment records, I am not satisfied the Company has proven on the balance of probabilities that Mr Smith did not work during any Christmas shutdown period, or, even, that there was a Christmas shutdown period applicable to Mr Smith and to his employment. Further, I am not satisfied the Company has proven on the balance of probabilities that Mr Smith took other ad hoc annual leave while employed by the Company.
- 88 Additionally, having regard to all of the evidence there is nothing to suggest that Mr Smith's allegation concerning the failure to pay untaken annual leave was not bona fide.
- 89 Therefore, notwithstanding some surprise might be expressed about Mr Smith's assertion that he did not take any annual leave while employed by the Company, Mr Smith's claim as it relates to the failure by the Company to pay him untaken accrued annual leave must succeed.
- 90 Mr Smith claims 197 days of untaken accrued annual leave from 7 February 2008 to 8 December 2017.<sup>45</sup> Nothing controverts this number of days of untaken annual leave and I accept this number. However, Mr Smith calculates the amount owing to him based on the Award rates. I did not accept that the Award applied to Mr Smith's employment.
- 91 I calculate the amount applied for untaken accrued annual leave, based on Mr Smith's contracts of employment, as follows:
- 7 February 2008 to 26 August 2009 at \$38,000 per year based on 7.5 hours of work per day<sup>46</sup> or \$146 per day;
  - 27 August 2009 to 28 February 2010 at \$45,000 per year based on 7.5 hours of work per day<sup>47</sup> or \$173 per day;
  - 1 March 2010 to 19 October 2016 at \$45,000 per year based on 7.5 hours of work per day<sup>48</sup> or \$173 per day; and
  - 20 October 2016 to 7 December 2017 at \$45,000 per year based on 7.5 hours of work per day<sup>49</sup> or \$173 per day.

92 Accordingly, using the above figures the amounts owed are as follows:

| <b>Year</b>   | <b>Days</b> | <b>Amount per day</b> | <b>Total</b>    |
|---------------|-------------|-----------------------|-----------------|
| 2008          | 18          | \$146                 | \$2,628         |
| 2009          | 20          | \$146<br>(13 days)    | \$1,898         |
|               |             | \$173 (7 days)        | \$1,211         |
| 2010          | 20          | \$173                 | \$3,460         |
| 2011          | 20          | \$173                 | \$3,460         |
| 2012          | 20          | \$173                 | \$3,460         |
| 2013          | 20          | \$173                 | \$3,460         |
| 2014          | 20          | \$173                 | \$3,460         |
| 2015          | 20          | \$173                 | \$3,460         |
| 2016          | 20          | \$173                 | \$3,460         |
| 2017          | 19          | \$173                 | \$3,287         |
| <b>Total:</b> |             |                       | <b>\$33,244</b> |

93 Therefore, the total amount of untaken accrued annual leave owed to Mr Smith is \$33,244.

#### *Limitation Period*

94 One final issue was raised by Mr Jones during the hearing relevant to limitation, where the Company referred to Mr Smith being time barred from making a claim relevant to annual leave when, in part, his claim related to alleged untaken annual leave from dates outside of a six year limitation period.

95 Section 544 of the FWA provides:

*A person may apply for an order under this Division in relation to a contravention of one of the following only if the application is made within 6 years after the day on which the contravention occurred:*

- (a) a civil remedy provision;*
- (b) a safety net contractual entitlement;*
- (c) an entitlement arising under subsection 542(1).*

96 The Division referred to in s 544 of the FWA is div 2 in ch 4, pt 4.1, which contains the power of courts to make orders.

97 The IMC has limited powers to make orders under the FWA. Relevant to Mr Smith's claim, the orders the IMC can make are contained in s 545(3) of the FWA. That is:

*[the IMC] may order an employer to pay an amount to ... an employee ... 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.*

- 98 Further to that, the IMC must not make an order under s 545(3) of the FWA ‘*in relation to an underpayment that relates to a period that is more than 6 years before the proceedings concerned commenced*’ (emphasis added): s 545(5) of the FWA.
- 99 Mr Smith’s claim alleges the failure to pay untaken paid annual leave upon termination of employment: s 90(2) of the FWA (a civil remedy provision pursuant to s 44(1) of the FWA).
- 100 ‘*A cause of action accrues when all the facts have occurred which ... [the claimant] must prove in order to succeed*’: ***Cigna Insurance Asia Pacific Ltd v Packer*** [2000] WASCA 415 [31] (Malcolm CJ) (other references omitted).
- 101 The principle issue for determining when a cause of action arises is identifying the date on which any cause of action accrued with respect to the alleged failure to pay untaken paid annual leave.
- 102 In Mr Smith’s case this was at the time his employment was terminated and the Company failed to pay any untaken paid annual leave that was owing to Mr Smith at this time. Therefore, the cause of action started to accrue at the date of termination of employment, or 8 December 2017, notwithstanding that untaken paid annual leave had accrued prior to 8 December 2011.
- 103 The alleged contravention by the Company occurred when it failed to pay untaken paid annual leave upon termination of employment. In this sense the failure does not relate to any underpayment but the non-payment of untaken paid annual leave. The whole of any amount owed was due at the time of termination of employment, again, notwithstanding that the annual leave had accrued over a longer period than six years prior to the commencement of the claim.
- 104 A similar issue arose in ***Dean v Weir Minerals Australia Ltd*** [2018] FCCA 108 (***Weir Minerals***) where Jarret J referring to *obiter* reasons in ***Matus v Australia Wide Computer Resources Pty Ltd (No 2)*** [2015] FCCA 2055 (***Matus***), also concluded that s 545(5) of the FWA does not include non-payment of an entitlement. Notably, ***Matus*** concerned a claim for unpaid annual leave entitlements that became due upon the termination of an employee’s employment pursuant to s 90(2) of the FWA.
- 105 Accordingly, in my view, consistent with the decisions in ***Weir Minerals*** and ***Matus***, the limitation period in s 544 and s 545(5) of the FWA do not apply in respect of Mr Smith’s claim for untaken accrued annual leave not paid following the termination of his employment.

#### **Fifth Issue – Has There Been Any Contraventions Of The FWA?**

- 106 Section 44(1) of the FWA provides that ‘[a]n employer must not contravene a provision of the National Employment Standards [NES]’.
- 107 Section 61(1) of the FWA provides that pt 2 - 2 ‘sets minimum standards that apply to the employment of employees which cannot be displaced’. Section 61(2) of the FWA lists the minimum standards, which includes at s 61(2)(d) ‘annual leave (Division 6)’.
- 108 Section 90(2) of the FWA is included in div 6 and requires the employer to pay to the employee untaken paid annual leave upon termination. The failure by the Company to pay Mr Smith the untaken paid annual leave amount of \$33,244 upon the termination of Mr Smith’s employment contravenes a provision of the NES.
- 109 Accordingly, the Company has contravened s 44(1) of the FWA and any contravention of s 44 of the FWA is a contravention of a civil remedy provision, pursuant to s 539 of the FWA (Item 1).
- 110 Section 535(1) of the FWA requires an employer to ‘make, and keep for 7 years, employee records of the kind prescribed’ by the *Fair Work Regulations 2009* (FWR). The employee

records required to be made and kept for 7 years include records related to pay (or pay slips) pursuant to reg 3.33(1) of the FWR. The failure by the Company to make, and keep for 7 years, pay slips for Mr Smith's employment contravenes s 535(1) of the FWA. Further, the Company failed to provide pay slips to Mr Smith during the course of his employment contrary to s 536(1) of the FWA.

- 111 Accordingly, the Company has contravened s 535(1) of the FWA and any contravention of s 535(1) of the FWA is a contravention of a civil remedy provision, pursuant to s 539 of the FWA (Item 29). Further, the Company has contravened s 536(1) of the FWA and any contravention of s 536(1) of the FWA is a contravention of a civil remedy provision, pursuant to s 539 of the FWA (Item 29).

### **Sixth Issue – Is Mr Smith Entitled To A Pro-Rata Long Service Leave Payment?**

- 112 Relevantly, s 8(3) of the LSL Act provides:<sup>50</sup>

*Where an employee has completed at least 7 years of such continuous employment since the commencement thereof, but less than 10 years, and the employment is terminated —*

*(a) by his death; or*

*(b) for any reason other than serious misconduct,*

*the amount of leave to which the employee is entitled shall be a proportionate amount on the basis of 8 2/3 weeks for 10 years of such continuous employment.*

- 113 Mr Jones says he terminated Mr Smith's employment on 16 November 2017 and that he did so because Mr Smith failed to attend an alternative office to undertake work and this amounted to a refusal to carry out a lawful and reasonable direction by his employer.<sup>51</sup> The Company says that such conduct amounts to 'serious misconduct' such that it is not required to pay Mr Smith pro-rata long service leave entitlements pursuant to s 8(3)(b) of the LSL Act.

#### **What does 'serious misconduct' mean?**

- 114 'Serious misconduct' is not defined in the LSL Act. In *Australasian Meat Industry Employees Union v Australian Meat Holdings Pty Ltd* (1999) 93 IR 308, Dowsett J considered authorities discussing the meaning of 'serious' and 'misconduct', although it should be noted that this was in the context of the meaning of 'serious or wilful misconduct' in the relevant award.

- 115 Distillation of His Honour's reasons appear to do no more than say that whether misconduct can be considered 'serious' is a question of fact in the context of the employment relationship, albeit that he noted the meaning of the words were in the context of entitlement to pro-rata long service leave payments. His Honour noted that '*an employee's alleged misconduct could be such as to justify his or her dismissal whilst not being serious or wilful misconduct for the purposes of the provision relating to loss of long-service leave benefits*' [87].

- 116 In *Concut Pty Ltd v Worrell* [2000] HCA 64 (*Concut*) Kirby J, at [51], sets out a number of points as it relates to summary dismissal for misconduct (noting that the employee/employer relationship was not governed by any statute, regulation or industrial award):

*The ordinary relationship of employer and employee at common law is one importing implied duties of loyalty, honesty, confidentiality and mutual trust.*

...

*It is ... only in exceptional circumstances that an ordinary employer is entitled at common law to dismiss an employee summarily. Whatever the position may be in relation to isolated acts of negligence, incompetence or unsuitability, it cannot be disputed (statute or express contractual*

*provision aside) that acts of dishonesty or similar conduct destructive of the mutual trust between the employer and employee, once discovered, ordinarily fall within the class of conduct which, without more, authorises summary dismissal. Exceptions to this general position may exist for trivial breaches of the express or implied terms of the contract of employment. Other exceptions may arise where the breaches are ancient in time and where they may have been waived in the past, although known to the employer. Some breaches may be judged irrelevant to the duties of the particular employee and an ongoing relationship with the employer. (footnotes omitted)*

117 Relevantly, the majority in **Concut** at [17] stated:

*The issues which must be determined are to be understood in the context of the law respecting employment relationships. It would be unusual for this to be purely contractual. Statute may impose obligations to observe industrial awards and agreements, and in some instances the relevant terms of the employment relationship may be found in the industrial award which binds the parties at the relevant time. Further, as Mason J pointed out in **Hospital Products Ltd v United States Surgical Corporation**, the relationship between employee and employer is one of the accepted fiduciary relationships; their critical feature is that the fiduciary undertakes or agrees to act for or on behalf of, or in the interests of, another person in the exercise of a power or discretion that will affect the interests of that other person in a legal or practical sense. (footnotes omitted)*

118 Further, at [25] in **Concut** (citations omitted):

*In **Pearce v Foster**, Lord Esher MR stated it to be a ‘rule of law’ that ‘where a person has entered into the position of servant, if he does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him’. In **Blyth Chemicals Ltd v Bushnell**, in the course of considering the position of the respondent, who was the manager of the appellant’s business, Starke and Evatt JJ said:*

*‘As manager for the appellant, the respondent was in a confidential position. And it is clear that he might be dismissed without notice or compensation if he acted in a manner incompatible with the due and faithful performance of his duty, or inconsistent with the confidential relation between himself and the appellant’.*

*In the same case, Dixon and McTiernan JJ said:*

*‘Conduct which in respect of important matters is incompatible with the fulfilment of an employee’s duty, or involves an opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal’. (footnotes omitted)*

119 In **North v Television Corporation Ltd** (1976) ALR 599 (**North**) Smithers and Evatt JJ stated (in the context of summary dismissal without notice):

*It is of assistance to consider the expression ‘misconduct’ by reference to subject matter to which it is related and the context in which it appears. The subject matter is the termination by one party against the will of another of a continuing contract of employment on the ground of breach of one of the terms of the contract. And the context is such as to indicate that certain breaches of a non-serious nature, some of which would be within the connotation of misconduct, are not regarded as grounds for termination. In such a situation it is reasonable to interpret the expression ‘misconduct’ as referring to conduct so seriously in breach of the contract that by standards of fairness and justice the employer should not be bound to continue the employment.*

120 Furthermore, arguably, the burden of proving the relevant misconduct is on the respondent: **North** at 599. The standard of proof being on the balance of probabilities.



- 121 In *Wall v Westcott* (1982) 1 IR 252 (Industrial Relations Commission of New South Wales, 12 March 1982), Watson J considered the meaning of ‘serious and wilful misconduct’ in the context of the *Long Service Leave Act 1955* (NSW) stating, at 256, (omitting citations):

*Misconduct justifying termination of employment includes misconduct outside the particular employment which is incompatible with the continuance of the employment relationship. The misconduct must be at least such as would justify termination, to be relevant under s 4(2)(a)(iii) of the Long Service Leave Act, but with a further element, comprehended by the terms ‘serious and wilful’. The category of misconduct thus intended is a particular type of misconduct which, in terms of gravity, must be capable of being described as serious beyond circumstances which would simply justify termination. Secondly, it must be subjectively considered in view of the requirement that it be ‘wilful’.*

- 122 ‘Serious misconduct’ in s 8 of the LSL Act does not include the word ‘wilful’. Further, s 8 of the LSL Act does not refer to an employee’s termination in the context of summary dismissal. Therefore, in my view, for an employee to have engaged in ‘serious misconduct’ for the purposes of the LSL Act, the employer need not have summarily dismissed the employee so as to highlight the gravity of the misconduct. Otherwise a careful and prudent employer will be prejudiced by a sense of fair play before deciding to terminate an employee.
- 123 For the purposes of the LSL Act, the misconduct must be of sufficient gravity such as to justify termination of the employment relationship in the context of beneficial legislation. That is, the misconduct must be of a type that justifies not only termination, but is of a gravity capable of denying the employee an entitlement to a statutory benefit where they have worked for an employer for a lengthy period of time.
- 124 Having regard to this framework, did Mr Smith’s purported conduct amount to ‘serious misconduct’ in the context of s 8 of the LSL Act?

#### Evidence of ‘serious misconduct’

- 125 Mr Smith says Mr Jones have him a termination letter on 17 November 2017 and has not paid him his alleged long service leave entitlement.<sup>52</sup>
- 126 In his oral evidence, Mr Smith clarified that he had continuous employment with the Company and Mr Jones never informed him that his employment was terminated for ‘serious misconduct’.
- 127 In summary, Mr Jones says Mr Smith breached ‘prevailing regulations’ by failing or refusing to attend the Ashstead Street residence at Morley (Morley Address) when requested to do so and this was a direct failure or refusal to comply with a lawful and reasonable instruction by the employer about where to work. Mr Jones described this as representing a serious and imminent risk to the profit and the Company’s revenue where he says the Company could not maintain sufficient control and supervision over its employee, Mr Smith, and client information.<sup>53</sup>
- 128 In cross-examination, Mr Jones said that leading up to Mr Smith’s dismissal Mr Smith was not doing his job properly and he needed to monitor Mr Smith. Further, Mr Smith did not work from the Morley Address when he was told to, preferring to work from his home address in Harrisdale.
- 129 Mr Jones said that in his mind this amounted to ‘serious misconduct’ where he considered there was a risk to the profitability of the business and for ‘litigation reasons’.
- 130 Mr Jones clarified that Mr Smith attended the Morley Address for two days around 16 November 2017 and then refused to re-attend. Mr Jones confirmed that Mr Smith continued to be employed by the Company until mid-December 2017. Mr Jones said he secured the Company’s records before Mr Smith was dismissed, although he left the client files at

Mr Smith's home address in Harrisdale until April 2018. In the meantime, Mr Jones said that he used electronic client files rather than the hard copy files in Mr Smith's possession.

- 131 Mr Jones said that his goal was to decrease the risk to clients and the hard copy files were not a priority and he considered that he had mitigated any risk even though the hard copy files remained with Mr Smith.
- 132 Mr Jones agreed that the letter of termination provided to Mr Smith did not refer to the reason for termination being 'serious misconduct' because he did not want to exacerbate Mr Smith's position or to make matters worse for him. His goal was not to not assist Mr Smith in getting a new job. Mr Jones accepted that the contents of the letter of termination and reference he signed was inconsistent with an allegation of 'serious misconduct', but he did not want to hinder Mr Smith in gaining future employment.
- 133 Mr Jones also agreed that the Employment Separation Certificate<sup>54</sup> referred to the '[s]hortage of work' as the reason for termination, rather than stating '[m]isconduct as an employee'. Mr Jones maintained that the dominant reason for the termination of Mr Smith's employment was 'serious misconduct', but it was not the sole reason and he was being truthful when he identified in the Employment Separation Certificate that there was a '[s]hortage of work'.
- 134 Mr Jones did not recall having a conversation with Mr Smith where he informed Mr Smith of any 'serious misconduct'.
- 135 Relevant to the issue of long service leave entitlement, Mr Jones also relied on evidence of Ms I. Jones, his former wife, and Mrs Norma Jones (Mrs N. Jones), his mother. With respect to Ms I. Jones and Mrs N. Jones, their evidence was of limited utility beyond informing the IMC that Mr Jones worked from home and that Mr Smith attended the Morley Address on 14 November 2017 and 15 November 2017. Mrs N. Jones saw Mr Smith working at the Morley Address on 14 November 2017 and for part of the following day and then he left.

#### Determination on issue of 'serious misconduct'

136 In determining this question, the following is relevant:

- on 16 November 2017, Mr Jones gave Mr Smith a letter of termination informing him that his final date of employment was 8 December 2017. The reason for termination provided in the letter was '*restructure issue and funding pressures*'. Further, in the same letter, Mr Jones advised Mr Smith that if he required a reference to be forwarded that he was to advise any prospective employer of Mr Jones' contact details '*whereupon I will be delighted to make contact to attest to your employ with me*';<sup>55</sup>
- on 12 December 2017, Mr Jones prepared an employment separation certificate for Centrelink and the reason provided for separation was '[s]hortage of work';<sup>56</sup>
- on 8 December 2017, Mr Jones signed a reference, albeit authored by Mr Smith, stating '*Gavin is a polite, considerate person who is very organised and has a practical and positive approach to the task at hand. In recommending Gavin, I would cite his maturity, commitment, initiative and unassuming address, will surely achieve great things during his lifetime*';<sup>57</sup>
- the Company's client files remained at Mr Smith's home address in Harrisdale until they were obtained by Mr Jones in April 2018;

- Mr Jones did not identify what risk to clients existed or what serious and imminent risk existed to the Company related to Mr Smith, where Mr Smith remained employed after he was issued with a letter of termination; and
- Mr Jones agreed that the written documents were not consistent with termination for alleged 'serious misconduct'.

137 Having regard to the all of the evidence, I do not accept that Mr Smith's employment was terminated for 'serious misconduct'. I find that Mr Smith's employment was terminated because there was either a shortage of work or because the Company was restructuring its business.

138 However, even if Mr Smith had been terminated because he did not attend the Morley Address in mid-November 2017, I do not consider that this, of itself, would amount to 'serious misconduct' of such gravity to deny Mr Smith long service leave entitlements under the LSL Act.

139 There is no evidence that Mr Smith was not otherwise performing the role that was expected of him and there is no evidence of what risk existed to the Company, the business or to clients related to Mr Smith's work conduct.

Is Mr Smith entitled to payment on account of pro rata long service leave?

140 Mr Smith was employed on a continuous basis by the Company from 7 February 2008 to 8 December 2017. That is, for nine years and 10 months.

141 Section 8(1) of the LSL Act provides that '*[a]n employee is entitled ... to long service leave on ordinary pay in respect of continuous employment with one and the same employer*'.

142 Section 8(3) of the LSL Act applies,

*[w]here an employee has completed at least 7 years of such continuous employment since the commencement thereof, but less than 10 years, and the employment is terminated —*

*(c) by his death; or*

*(d) for any reason other than serious misconduct,*

*the amount of leave to which the employee is entitled shall be a proportionate amount on the basis of 8 2/3 weeks for 10 years of such continuous employment.*

143 Where s 8(3) of the LSL Act applies, pursuant to s 9(2) of the LSL Act, where the employee's employment is terminated before long service leave is taken or fully taken, the employer is to pay to the employee '*a sum equivalent to the amount which would have been payable in respect of the period of leave to which he [or she] is entitled or deemed to have been entitled and which would have been taken but for such termination*'.

144 Section 4 of the LSL Act defines, relevantly, '**ordinary pay**' to mean,

*subject to subsection (2), remuneration for an employee's normal weekly number of hours of work calculated on the ordinary time rate of pay applicable to him [or her], as at the time when any period of long service leave granted to him [or her] under ... [the LSL Act] commences, or is deemed to commence ... but does not include ... overtime, penalty rates, allowances, or the like.*

145 At the time of his termination of employment, Mr Smith's annualised salary was \$45,000 or \$807.70 per week. By reason of s 8(3) and s 9(2) of the LSL Act, Mr Smith would have been entitled to a proportionate amount of 8.52 weeks of long service leave.

146 Therefore, pursuant to s 9(2) of the LSL Act, the equivalent amount the Company was required to pay upon termination of employment was \$6,881.60

147 The Company is required to pay to Mr Smith the amount of \$6,881.60 on account of unpaid pro rata long service leave.

### **Issue Six – Penalties and Orders**

148 Mr Smith claims *compensation for loss and damage* arising from the breaches of the FWA and the Award pursuant to s 545(3) of the FWA.

149 IMC cannot make orders for *compensation for loss and damage* under s 545(3),<sup>58</sup> but ‘*may order an employer to pay an amount to, or on behalf of, an employee ... if the court is satisfied that:*

(a) *the employer was required to pay the amount under ... [the FWA] or a fair work instrument [the Award]; and*

(b) *the employer has contravened a civil remedy provision by failing to pay the amount’.*

150 In this case, notwithstanding Mr Smith’s erroneous nomenclature of the orders capable of being made by IMC, I will make an order requiring the Company to pay the following amount to Mr Smith where I am satisfied the Company is required to pay this amount under the FWA and the Company has contravened a civil penalty provision, namely s 44 of the FWA when read with s 90(2) of the FWA, by failing to pay the amount of:

- \$33,244 in accrued untaken paid annual leave.<sup>59</sup>

151 Mr Smith also claims payment for unpaid pro rata long service leave and I will make an order for the Company to pay the following amount where I am satisfied the Company is required to pay the amount of:

- \$6,881.60 for pro rata long service leave

152 I also make an order for pre-judgment interest of \$5,517.66<sup>60</sup> where interest on the judgment amount is sought by the Claimant.

153 I will now hear from the parties concerning the issue of penalties and any other orders.

**D SCADDAN  
INDUSTRIAL MAGISTRATE**

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<sup>1</sup> The total amount claimed in the Claimant's Further and Better Particulars does not equate to the individual amounts claimed, which is \$49,243.79.

<sup>2</sup> *City of Wanneroo v Australian Municipal, Administrative, Clerical Services Union* (2006) 153 IR 426, 438.

<sup>3</sup> *City of Wanneroo* (438 and 440).

<sup>4</sup> *City of Wanneroo* (440).

<sup>5</sup> *Kucks v CSR Ltd* (1996) 66 IR 182; *Ancor Ltd v CFMEU* [2005] HCA 10.

<sup>6</sup> Cambridge Dictionary.

<sup>7</sup> Exhibit 1 - Witness Statement of Gavin Stanley Smith dated 11 June 2019 at attachment 'GS22'.

<sup>8</sup> Exhibit 1 at attachment 'GS1'.

<sup>9</sup> Exhibit 1 at attachment 'GS6'.

<sup>10</sup> Exhibit 1 at attachment 'GS7'.

<sup>11</sup> Exhibit 1 at attachment 'GS8'.

<sup>12</sup> Exhibit 1 at attachment 'GS9'.

<sup>13</sup> Exhibit 1 at attachment 'GS10' and 'GS11' and 'GS14'.

<sup>14</sup> Exhibit 1 at attachment 'GS4'.

<sup>15</sup> Exhibit 1 at attachment 'GS23'.

<sup>16</sup> Exhibit 1 [37] and [38].

<sup>17</sup> Exhibit 1 at attachment 'GS21'.

<sup>18</sup> Exhibit 1 [7].

<sup>19</sup> Exhibit 1 at attachment 'GS4'.

<sup>20</sup> Exhibit 7 - Witness Statement of Lyall Jones dated 9 October 2019 [3].

<sup>21</sup> Exhibit 7 [3].

<sup>22</sup> Exhibit 7 [3.6] and [3.7].

<sup>23</sup> Exhibit 1 [7].

<sup>24</sup> Exhibit 1.

<sup>25</sup> Exhibit 1 [8] and [14].

<sup>26</sup> Exhibit 1 [13] and [33] and attachment 'GS20'.

<sup>27</sup> Including pay slips in accordance with reg 3.33 of the *Fair Work Regulations 2009*.

<sup>28</sup> Contrary to reg 3.36 of the *Fair Work Regulations 2009*.

<sup>29</sup> Sections 535(1) and 536(1) of the FWA.

<sup>30</sup> Exhibit 7 [9].

<sup>31</sup> *Ghimire v Karriview Management Pty Ltd (No 2)* [2019] FCA 1627 [13].

<sup>32</sup> Section 90(2) of the FWA applies as it constitutes a minimum standard under s 61(2) of the FWA.

<sup>33</sup> *Ghimire* [14].

<sup>34</sup> *Ghimire* [16].

<sup>35</sup> Exhibit 13 - Witness statement of Simon Lau [16] - [19].

<sup>36</sup> Exhibit 8 - Witness statement of Shayne Pye [4] - [9].

<sup>37</sup> Exhibit 9 - Witness statement of Mathew Clune [3].

<sup>38</sup> Exhibit 11 - Witness statement of Irene Jones [6] - [9].

<sup>39</sup> Exhibit 8 [8]; Exhibit 9 [3]; Exhibit 11[5].

<sup>40</sup> Exhibit 13 [19].

<sup>41</sup> Exhibit 13 [20].

<sup>42</sup> Exhibit 11 [14] and [15]; Exhibit 13 [20].

<sup>43</sup> Exhibit 7 at 'R1' and 'R2'.

<sup>44</sup> Exhibit 7 at 'R1'.

<sup>45</sup> Exhibit 1 at 'GS24'.

<sup>46</sup> Exhibit 1 at 'GS6'.

<sup>47</sup> Exhibit 1 at 'GS7'.

<sup>48</sup> Exhibit 1 at 'GS8'.

<sup>49</sup> Exhibit 1 at 'GS9'.

<sup>50</sup> Section 8(1) and s 8(2) of the LSL Act are applicable for the purposes of determining the principle entitlement to long service leave, but are not the relevant sections of the LSL Act determining in this case whether an entitlement to long service leave exists and, if so, the amount to be awarded.

<sup>51</sup> Exhibit 7 [9][q].

<sup>52</sup> Exhibit 1 [12] and [14].

<sup>53</sup> Exhibit 7 [9.q].

<sup>54</sup> Exhibit 1 at 'GS3'.

<sup>55</sup> Exhibit 1 at 'GS2'.

<sup>56</sup> Exhibit 1 at 'GS3'.

<sup>57</sup> Exhibit 1 at 'GS4'.

<sup>58</sup> See s 545(2) of the FWA relevant to the Federal Court and Federal Circuit Court.

<sup>59</sup> Contravening s 44 of the FWA as it relates to accrued annual leave by failing to comply with the NES.

<sup>60</sup> Interest calculated at 6% per annum for the period 8 December 2017 to 15 May 2020 with a daily rate of \$6.60 per day.

**Schedule I: Jurisdiction, Practice and Procedure of the Industrial Magistrates Court (WA) under the Fair Work Act 2009 (Cth): Alleging Contravention of Modern Award**

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 of Western Australia (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 the terms of a modern award where the award *applies* to give an entitlement to a claimant employee and to impose an obligation upon a respondent employer: FWA, s 45 and s 46. The award *applies* if it *covers* the employee and the employer and there are no relevant statutory exceptions (for example, high income employees such as \$138,900 per annum from 1 July 2016): FWA, s 47. The award *covers* the employee and the employer if it is expressed to cover the employee and the employer: FWA, s 48(1).
- [5] An obligation upon an '*employer*' covered by an award 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. An entitlement of an employee covered by an award 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 44(1) and s 539. Those standards include obligations of employers to employees with respect to annual leave as set out s 86 to s 94 of the FWA.
  - Other terms and conditions of employment as set out in pt 3 - 6 of the FWA: FWA, s 535, s 536 and s 539. Those terms and conditions include obligations of employers to employees with respect prescribed records under the FWR.
  - 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).
  - A *person* to pay a pecuniary penalty: FWA, s 546.
- [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]
- [12] Where in this decision I state that ‘*I am satisfied*’ of a fact or matter I am saying that ‘*I am satisfied on the balance of probabilities*’ of that fact or matter. Where I state that ‘*I am not satisfied*’ of a fact or matter I am saying that ‘*I am not satisfied on the balance of probabilities*’ of that fact or matter.