

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION : 2020 WAIRC 00406

CORAM : INDUSTRIAL MAGISTRATE M. FLYNN

HEARD : THURSDAY, 2 JULY 2020, FRIDAY, 10 JULY 2020 (WRITTEN SUBMISSIONS)

DELIVERED : TUESDAY, 14 JULY 2020

FILE NO. : M 166 OF 2018

BETWEEN : RAYMOND MOATE

CLAIMANT

AND

I.P.C. PTY LTD (ACN 061 746 996)

RESPONDENT

CatchWords : INDUSTRIAL LAW – *Fair Work Act 2009* (Cth) – Significance of *Workpac Pty Ltd v Rossato* [2020] FCAFC 84 – Principle of Finality – Whether employer entitled to set-off ‘over-Award’ payments

Legislation : *Fair Work Act 2009* (Cth)

Instrument : *Manufacturing and Associated Industries and Occupations Award 2010* (Cth)

Case(s) referred to in reasons: : *Workpac Pty Ltd v Rossato* [2020] FCAFC 84
DJL v Central Authority [2000] HCA 17; 201 CLR 226

Result : To be confirmed

Representation:

Claimant : Mr A. White (of counsel) from Eureka Lawyers

Respondent : Mr J. Raftos (of counsel) from Moray & Agnew Lawyers

ADDENDUM REASONS FOR DECISION

- 1 On 2 July 2020, Industrial Magistrates Court of Western Australia (the Court) published reasons for decision following a trial that concluded on 25 July 2019 (the First Liability Reasons). The issues addressed in the First Liability Reasons include those identified as the **Full-Time/Casual Issue**, the **Set-Off Issue**, the **FW Regulations Offset Issue** and the **Mistake and Unjust Enrichment Issue**. The First Liability Reasons include my provisional view on the significance of the decision of the Full Court of the Federal Court in *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84 (*Rossato*), delivered on 20 May 2020, to those issues (**the Four Rossato Issues**). After hearing submissions on 2 July 2020, the Court made orders for the filing of written submissions on the effect of *Rossato* and also made orders for a timetable of steps culminating in the fixing of a date for a hearing on the issue of penalties (the 2 July 2020 Orders). Each party has filed written submissions on *Rossato*.¹ These reasons consider those submissions.
- 2 The Respondent's Written Submissions of 9 July 2020 do not make reference to any of **the Four Rossato Issues**, other than the **Set-Off Issue**. The Claimant's Written Submissions of 10 July 2020 state that my provisional views on the **Four Rossato Issues** are correct. I will address the **Set-Off Issue** (below). In the circumstances it is also appropriate to record that my provisional views on the significance of *Rossato* to the **Full-Time/Casual Issue**, the **FW Regulations Offset Issue** and the **Mistake and Unjust Enrichment Issue**, set out in the First Liability Reasons, are now my final views.
- 3 The argument made in the Respondent's Written Submissions of 9 July 2020 on the **Set-Off Issue** involves two steps.
- 4 First, 'the Respondent takes issue with [a statement at] [100] of the [First Reasons] ... that, the [Respondent] did not seek to set off payments in relation to overtime'. The fact that the statement is an error is said to be revealed by comparing the contents of columns in Tables A to F of the 'Outline of Submissions of the First Respondent Filed 17 July 2019' (**Tables A - F**) where a (notional) calculation of overtime and public holiday entitlements of the claimant under the *Manufacturing and Associated Industries Award 2010* (Cth) (the Award) (columns 14 - 26) is undertaken for the purpose of a calculation, in column 28 of those tables, of a 'set-off amount' for each week.
- 5 Secondly, the respondent compares a finding in the First Liability Reasons with an extract on the law of set-off from *Rossato* to contend that the set-off amounts referred to in the previous paragraph, may be brought to account against the claim for \$7,878 overtime entitlements under the Award. The finding in the First Liability Reasons relied upon by the respondent appears at [105] and is the effect that an agreed purpose of the respondent's weekly payments to the claimant was for each hour of *work* and, 'so characterised, correlates with the FW Act Obligation with respect to payment for hours worked and payment for overtime' (original emphasis). The extract on the law of set-off is from the judgment of White J and appears at [865]. The extract is quoted in full below.

Error And Principle Of Finality

- 6 The claimant rejects the respondent's contentions. He argues that the First Liability Reasons contain no error and that the principle of finality operates to preclude the respondent from making those submissions.
- 7 Regrettably, I have reached the view that the First Liability Reasons reveal that I have proceeded on an erroneous assumption, namely, that the respondent did not seek to set off payments that it

made to the claimant against the claimant's overtime entitlements under the Award. The claimant's submission to the contrary, relying on the 'full context' of [104] - [105] of the First Liability Reasons is not persuasive.² The 'full context' must include the fact that the erroneous assumption is plainly stated in the second sentence of [100] of the First Liability Reasons. However, it is also apparent from the *absence* of references to overtime entitlements when applying the principles concerning set-off in:

- [103] (last sentence);
- [105] (last and second last sentences);
- [109] (last sentence);
- [110] (last sentence);
- [114] (first sentence);
- [115] (last sentence); and
- [116] (last sentence).

- 8 I also note that in its Amended Response filed on 5 April 2019, the respondent asserts a right to set-off payments it made to the claimant against *any* entitlements under the Award. The conclusions at [176] and [181] of the First Liability Reasons are flawed insofar as proper consideration has not been given to whether the respondent is entitled to set-off payments it made to the claimant against the claimant's overtime entitlements under the Award.
- 9 Fortunately, it is not too late to correct the error. In ***DJL v Central Authority*** [2000] HCA 17; 201 CLR 226 [90] - [91], Kirby J states by way of summary of relevant general principles (citations omitted):

[90] *The law, for very good reason, places a high store on the finality of court judgments and orders. There would be little point in having courts to resolve disputes between parties according to law with settled remedies of judicial review and appeal, and within a hierarchical judicial system, if no ultimate finality could be reached. The judicial system would become discredited if 'final' orders were revealed as provisional or always subject to reconsideration and collateral challenge thus compounding costs, delays and the anxiety of submitting disputes to independent judicial determination. People caught up in litigation would not be able to order their affairs with certainty following its outcome. They could be subjected to repeated attempts by their opponents to engage them in fresh argumentation on issues they thought had been decided. Litigants with long purses, uncompromising certainty of their own rectitude or spiteful desire to win although they lose (by constantly running up the costs of reopenings) would defeat one of the chief objectives of any civilised legal system: the bringing of a litigated contest to an end.*

[91] *On the other hand, because courts comprise decision-makers who are fallible human beings, not machines, occasionally errors and oversights will occur which can clearly be demonstrated and which produce a result that would be "manifestly unjust if the judgment were allowed to stand". Where the earlier decision has been announced but not yet "perfected" (in the sense of translated into a formal order entered in the records of the court) it is usually possible to repair the mistake and prevent the injustice by restraining (or securing agreement to withhold) the perfection of the order in question; relisting the matter before the court concerned; and attempting to persuade it to change its opinion and the orders which follow from it. In the course of judicial life it can happen that a party, receiving reasons for a decision pronounced in open court, notices a fundamental mistake, quickly calls it to the attention of the judge or judges involved and, before perfection of the orders, gains correction and even reversal of the previously announced decision. This has happened to most judges.*

- 10 Unless and until there has been the *entry* of judgment by the making of orders following the publication of reasons, this Court may revisit those reasons for the purpose of determining the appropriate order to make. If the reasons contain an error, the error may be addressed. It is not necessary for the purposes of this case to determine whether the *entry* of judgment in this Court *must* take the form of a written order or may be done by an oral pronouncement.³ Neither step has been taken in this case.
- 11 A copy of the First Liability Reasons was supplied to the parties by the registry of the Court on 26 June 2020 for the purpose of enabling the parties to prepare submissions on the orders that ought to be made upon publication of the First Liability Reasons. I have noted that the orders made on 2 July 2020 concerned the filing of written submissions on **Rossato** and a timetable of steps for a hearing on the issue of penalties. It might be added that the ‘**Result**’ recorded in the heading of the First Liability Reasons is stated as, ‘to be confirmed’. In these circumstances, the principle of finality has no application.

Set-Off And Overtime Entitlements

- 12 The First Liability Reasons determined that, for the purposes of the Award, the claimant:
- was *not* a casual employee (see [85] - [91]);
 - was entitled to be paid overtime in accordance with cl 40.1 of the Award (see [18]); and
 - that the Award entitlement under that clause was \$7,878 (see [96] - [97]).
- 13 The principles to be applied on the respondent’s claim to set-off amounts paid to the claimant are not in dispute. It is convenient to quote from the judgment of White J (with whom Bromberg J agreed on this point) in **Rossato** at [865]:

865 *For the purposes of the resolution of the present case, the authorities reviewed above may be taken to stand for the following propositions concerning the entitlement of an employer to set off in analogous circumstances:*

- (a) *the issue may require the application of the parties’ contract: Poletti v Ecob at 332. If they agree that a sum of money is paid and received for a specific purpose which is over and above or extraneous to an award entitlement, the contract precludes the employer from later seeking to rely on the payment as satisfying an award obligation which is outside the agreed purpose of the payment: ibid. If the payment was made for the purpose of satisfying the kind of award obligation sought to be satisfied, it may be brought into account as satisfaction or part satisfaction of that obligation. If it was paid for some other purpose, then the employer cannot bring the payment into account: Discount Lounge Centre at [23]. Stated more generally, an employer cannot later reallocate an amount agreed to be paid to an employee in respect of subject A (for example, ordinary hours of work) to meet a claim in respect of subject B (for example, overtime): Ray v Radano at 478-9 (Sheldon J); Pacific Publications at 419; Discount Lounge Centre at [57]. The focus is on the purpose of the payment. If it arises out of the same purpose as the award obligation, it can be set off: ANZ v FSU at [48] - [52]. I will refer to this as the ‘Contractual Principle’;*
- (b) *the issue may involve application of the common law principles concerning payment by a debtor to a creditor: Poletti v Ecob at 332 - 3. When there are outstanding award or enterprise agreement entitlements, a payment designated by the employer as being for a purpose other than satisfaction of the award entitlement cannot be regarded as having satisfied the award or enterprise agreement: ibid. I will refer to this as the ‘Designation Principle’;*

- (c) *close regard must be had to the character of the payment on which the employer relies for the claimed set off and the purpose (usually, the agreed purpose) for which it was made; and*
- (d) *the purpose for which a payment was made will be a question of fact in each case. It may be express or may be implied from the parties' agreement or from the employer's conduct: James Turner at [21(3)]. The 'designation and appropriation' are matters to be determined by reference to the whole of the evidence: ANZ v FSU at [56]. (original emphasis)*

14 The claimant's overtime Award entitlements of \$7,878 is the result of:

- two hours overtime each week over the 303 weeks of his employment being the thirty-ninth and fortieth hour of his usual working week;
- an overtime rate of time and a half as provided by cl 40.1 of the Award;
- a base rate of \$26 per hour being his rate of pay at the end of his employment; and
- 'setting off the amount of \$26 per hour already paid' by the respondent to the claimant for those thirty-ninth and fortieth hours.⁴

15 The respondent's actual weekly payments to the claimant over the same 303 weeks are set out in **Tables A - F** (column 10). The claimant's weekly overtime Award entitlement over the same 303 weeks, calculated by the respondent, is also set out in **Tables A - F** (column 26).

16 The respondent contends that the agreed purpose of the actual weekly payments was the discharge of all obligations with respect to 'hours worked and overtime' (see [105] First Liability Reasons) *for the week of payment*; any weekly amount in excess of the Award entitlement, paid to the claimant, was to be applied in satisfaction of the Award entitlement for that week.

17 The claimant replies that the agreed purpose of each payment, informed by an agreement between the parties providing for an *hourly* rate, was the discharge of all obligations with respect to work and overtime *for the hour* for which the payment is being made. It is not for the respondent to reallocate above-Award payments for 'different' hours to meet Award obligation to pay the respondent overtime for the thirty-ninth and fortieth hour of work.

18 The circumstance of the respondent's actual weekly payments appears in the First Liability Reasons at [24] - [28], [31], [59], [63], [104] - [108], [112], and [113]. In dealings between the parties there was invariably a delineation between the entitlements of the claimant for hours worked up to 40 hours and for hours worked in excess of 40 hours. The delineation is inconsistent with an agreed purpose of an 'all in' weekly payment. The finding in the First Liability Reasons at [105] that payments correlate with the FW Act Obligation 'with respect to payment for hours worked and payment for overtime' follows an earlier observation in the same paragraph on a contractual obligation to pay an agreed higher rate for each hour worked *in excess of 40 hours*. Payments for those hours *in excess of 40 hours* at those rates may be applied in satisfaction of any Award entitlement for those hours. Payments for those hours at those rates may *not* be applied in satisfaction of any Award entitlement for the thirty-ninth and fortieth hour. Further, the respondent had not done anything that might be construed as purporting to designate any actual weekly payments as being paid in discharge of any obligation under the Award.

Conclusion

- 19 The conclusions at [176] and [181] of the First Liability Reasons were flawed insofar as proper consideration was not been given to whether the respondent was entitled to set-off payments it made to the claimant against the claimant's overtime entitlements under the Award. However, upon considering the issue above, I have concluded that the respondent is not entitled to set-off payments. The conclusions at [176] and [181] of the First Liability Reasons do not require amendment.

M FLYNN
INDUSTRIAL MAGISTRATE

¹ Outline of Submissions of the Respondent in respect of the effect of the decision in **Rossato** filed 9 July 2020 (Respondent's Written Submissions of 9 July 2020); Claimant's Submissions on **Rossato** filed 10 July 2020 (Claimant's Written Submissions of 10 July 2020).

² Claimant's Written Submissions of 10 July 2020 [17] and [21].

³ I note that if a party proposes to take enforcement proceedings and money is to be paid under a judgment, s 81CB(2) of the *Industrial Relations Act 1979* (WA) requires the judgment to be in writing and certified by a clerk of the Court. I also note that reg 42 of the *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* (WA) makes reference to the 'making' of a judgment without reference to writing.

⁴ Claimant's Written Submissions of 10 July 2020 [27] and Amended Claim filed on 7 March 2019 [45](e).