WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2020 WAIRC 00019
CORAM	**:**	INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD	**:**	WEDNESDAY, 6 NOVEMBER 2019
DELIVERED	**:**	WEDNESDAY, 6 NOVEMBER 2019
FILE NO.	**:**	M 178 OF 2018
BETWEEN	**:**	JANINE MARIE CALLAN, DEPARTMENT OF MINES, INDUSTRY REGULATION AND SAFETY **CLAIMANT** AND SAMANTHA NARALEE GOH-EDWARDS TRADING AS SAMANTHA'S HIDDEN VALLEY **RESPONDENT**

Legislation	**:**	*Industrial Relations Act 1979* (WA) *Magistrates Court (Civil Proceedings) Act 2004* (WA) *Minimum Conditions of Employment Act 1993* (WA) *Taxation Administration Act 1953* (Cth) *Industrial Magistrates Court General Jurisdiction Regulations 2005* (WA)
Instrument	**:**	*Farm Employees Award 1985* (WA)
Case(s) referred to in reasons	**:**	***Sammut v AVM Holdings Pty Ltd No. 2*** [2012] WASC 27 ***Hollis v Vabu Pty Ltd*** [2001] 207 CLR 21 ***Paul Victor Genovesi v Affluence Pty Ltd T/As Swan Districts Real Estate*** [2005] WAIRC 00828 ***Sascha Milosevic v Mildesa Pty Ltd*** [2005] WAIRC 3206
Result	**:**	Claim proven
Representation:		
Claimant	**:**	Mr J. Bennett (of counsel) as instructed by Department of Mines, Industry Regulation and Safety
Respondent	**:**	No appearance

REASONS FOR DECISION

(Given extemporaneously at the conclusion of the hearing, extracted from the transcript of proceedings and edited)

1 On 23 October 2018, Janine Marie Callan, Department of Mines, Industry Regulation and Safety (the claimant) an Industrial Inspector, pursuant to s 98(1) of the *Industrial Relations Act 1979* (IR Act), lodged a claim in the Industrial Magistrates Court of Western Australia (IMC) alleging Samantha Naralee Goh-Edwards Trading As Samantha's Hidden Valley (the respondent) a sole trader, contravened or failed to comply with the *Farm Employees Award 1985* (WA) (the Award), in failing to pay Ms Christin Auras (Ms Auras) certain award entitlements as a farm hand.

2 On 28 November 2018, the respondent lodged a response to the claim, denying the claim, where she said Ms Auras was not an employee but was a volunteer at the farm, but as part of the arrangement with Ms Auras, she offered her food and accommodation and payslips for the purposes of her obtaining a second-year working visa. To that end, she also paid income tax and superannuation on behalf of Ms Auras.

3 Ms Auras was put on the books as a casual worker and paid the right amount and the respondent made a variety of other assertions that, in my view, appear, largely, unrelated to the claim.

4 Ms Auras denies that she received any wages or payment from the respondent, although she accepts she received food and accommodation and that income tax and superannuation was paid on her behalf.

5 However, the claimant says the amount of money withheld, by the respondent, for food and accommodation, was in excess of that provided by the Award and it was contrary to the Award for the respondent to defray the whole of the payments or wages owed to food and accommodation. The claimant says that a proper analysis of the evidence demonstrates that Ms Auras was an employee, not a volunteer, and subject to the terms of the Award during the course of her employment.

6 The claimant says, Ms Auras was not paid wages owed, minus deductions, under the award for food and accommodation, sick leave or annual leave, as required by the Award. In terms of the jurisdiction of the IMC, it has the jurisdiction conferred by the IR Act and other legislation.

7 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 instrument, where a person has failed or failed to comply, with the instrument. If the contravention or failure to comply is proved, the IMC may issue a caution or impose a penalty and make any other order, including an interim order, necessary for the purpose of preventing any further contravention.

8 The IMC must order the payment of any unpaid entitlements due under an instrument. Section 83 of the IR Act outlines those people or organisations that may apply to the IMC and includes, relevantly, at subsection 1(b), an Industrial Inspector. An instrument, to which s 83 of the IR Act applies, is provided in subsection (2) and relevantly includes an award.

9 The powers, practices and procedures 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 the standard of proof required to discharge this 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 seeks fit.

10 In ***Sammut v AVM Holdings Pty Ltd No. 2*** [2012] WASC 27, at [40] to [47], Commissioner Sleight, as he was, examined a similarly worded provision, regulating cases the State Administrative Tribunal of Western Australia, noting:

> *The 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.*

11 The claimant relied upon witness evidence provided by herself, Ms Auras and Ms Rachel England-Brassy (Ms England-Brassy). Having regard to the content of their evidence, elicited through witness statements, primarily, I found their evidence to be truthful and credible and therefore, their evidence is capable of being relied upon.

12 It is, following that, convenient to set out the relevant facts in a narrative form. Many of the relevant facts are either not in dispute or were the subject of uncontroverted evidence, that as I have already indicated, I consider to be reliable. Save where I identify conflicting evidence on a fact, I am satisfied, on the balance of probabilities, of the facts that I will now refer to. Where I identify conflicting evidence, my state of finding should be taken to be findings on the balance of probabilities.

Background

13 The respondent operates a farm located at 11486 Bussell Highway, Forrest Grove, Western Australia (the Farm). On the Farm, the respondent operated a business of breeding, selling and grazing miniature horses and other animals. A variety of animals, approximately 250, were kept at the property. Ms Auras, and her boyfriend, Mr Marcel-Dominik Linz (Mr Linz), were in Australia, as German citizens, on working holidays. There were similar to many other overseas travellers in Australia, originally on a tourist visa, and then converting this visa to a working holiday visa.

14 In order to obtain a second working holiday visa, Ms Auras needed to complete 88 days of work in three months, in a specified field, in regional Australia. Following her completion of work for the respondent, Ms Auras was subsequently granted a second working holiday visa on 19 January 2017. Ms Auras answered a Facebook advertisement, by the respondent, offering 'Willing Workers on Organic Farms', commonly referred to as WWOOFers, and 'Second Year visa regional work'.

15 Originally, the intention was for Mr Linz to commence a position to complete 88 days of regional work and Ms Auras, to be a WWOOFer. After some cursory messages, it was agreed for Mr Linz and Ms Auras to travel to South West of Western Australia and they arrived on 22 June 2016. On 23 June 2016, Ms Auras and Mr Linz met the respondent. Approximately one week later, the respondent informed them that she did not want Mr Linz undertaking the regional farm work and offered it to Ms Auras instead. Ms Auras agreed to take up the farm work.

16 In terms of the arrangements made. The respondent told Ms Auras that the respondent would pay wages because the money she would earn would cover the respondent's costs in providing food and accommodation. The respondent would provide payslips so that Ms Auras could obtain the second working holiday visa, and that she would pay income tax and superannuation on behalf of Ms Auras.

17 The respondent required Ms Auras to work:

- four 8-hour days on weekdays; and

- two 4-hour days, one on a weekday and one on a weekend.

This totalled an expected 40-hour week, although Ms Auras worked many more hours than this. Ms Auras was also required to do other menial tasks for the respondent, including taking the respondent's son to sporting events and being, in essence, a personal attendant to the respondent.

Issues For Determination

18 There are three essential issues for determination:

- was Ms Auras an employee or volunteer, in respect of the respondent's business;
- was Ms Auras' employment, if she was an employee, covered by the relevant award, being-the Award; and
- was Ms Auras paid in accordance with the Award, if she was an employee, and covered by the Award.

Was Ms Auras An Employee Or A Volunteer?

19 An employee is defined by s 7(1) of the IR Act, relevantly, as follows:

> ***Employee*** *means* [subject to subsection (3)]
>
> *(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.*

20 The exception indicated by the words 'subject to subsection (3)' of the definition is not applicable in this case. The definition, in paragraph (a), is made by reference to an employer. That term is relevantly defined by s 7(1) of the IR Act, as including persons employing one or more employees.

21 The issue is whether Ms Auras was either a person employed by the respondent to do work for hire or reward; or a person whose usual status was that of an employee.

22 In both cases, the characterisation of Ms Auras' relationship with the respondent depends on whether Ms Auras' position matches the common law tests for what constitutes an employee. That is, whether Ms Auras is an employee for the purposes of the IR Act and the Award, depends on whether she had a valid employment contract. If no employment contract can be established, then no employment relationship will exist. In those circumstances, the worker cannot be regarded as employed or having the usual status of employee.

23 The claimant's submissions helpfully outline the common law understanding of employee and the test to be applied by the IMC. For completeness, I will recite the claimant's submissions, which I have adopted for the purposes of stating the law.

24 In ***Hollis v Vabu Pty Ltd*** [2001] 207 CLR 21, the High Court stressed the need to examine the totality of the relationship between parties. This assessment takes into account a range of factors. In doing so, and I quote:

> *'The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another'*.[1]

25 In ***Paul Victor Genovesi v Affluence Pty Ltd t/as Swan Districts Real Estate*** [2005] WAIRC 00828, the Western Australian Industrial Relations Commission usefully set out the law governing whether a person can properly be characterised as an employee of an employer. This decision was cited, with approval, in ***Sasha Milosevic v Mildesa Pty Ltd*** [2005] WAIRC 03206. The decision cited in ***Genovesi*** and ***Milosevic*** are authorities for a range of forensic propositions to be considered when determining whether a person is an employee of an employer, as follows:[2]

- The relationship of employer and employee is a contract of service where an employee contracts to provide his or her work and skill.
- There is no conclusive test for determining whether a person is an employer; regard must be had to the whole of the relationship.
- A prominent factor is the degree of control which the person who engages the other can exercise over the person engaged to perform the work.
- Control is not the sole factor, others include:
    - the mode of remuneration;
    - the provision and maintenance of equipment;
    - the obligation to provide exclusive services;
    - provision of holidays;
    - deduction of income tax;
    - delegation of work;
    - the right to suspend or dismiss; and
    - the right to dictate the place of work and hours of work.
- Control does not have to be actually exercised by one person over another for it to be relevant. If there is a right to exercise control over a person then this will suggest that the relationship is one of employee and employer.
- Whether a person is carrying on the business for himself or for a superior is relevant to determining whether that person is an employee (the organisation test). If a person is carrying on work for the benefit of a superior then this suggests that the person is an employee of the superior.
- The parties' subjective intentions, while relevant, are not determinative. Merely because a person is labelled an ‘employee’, or considers him or herself to be one, does not mean that, at law, they are one.

26 For the following reasons, I find, on the balance of probabilities, that Ms Auras was an employee of the respondent and not a volunteer.

27 Firstly, there was no written contract between Ms Auras and the respondent, however, a contract of employment can exist where there is no written contract.

28 It was clear from Ms Auras' evidence that there was an agreement that Ms Auras would perform work, as directed by the respondent, for a period of 88 days. This was in exchange for Ms Auras receiving accommodation, food, payslips, superannuation and a signed Employment Verification Form for the purposes of obtaining her second year working visa. PAYG taxation was also paid by the respondent.

29 Ms Auras understood the wages she was to be paid were withheld to cover the expense of accommodation and food. This agreement was formed through an exchange via Facebook Messenger and subsequent conversations between the respondent and Ms Auras, approximately one week after Ms Auras commenced working at the Farm.

30 The respondent also exchanged Facebook Messenger conversations with Ms Auras, instructing her to perform certain tasks, which Ms Auras would then complete. On that basis, there was clearly an agreement between the respondent and Ms Auras, whereby Ms Auras agreed to perform various tasks for the respondent, on the Farm, in exchange for accommodation, food, payslips, superannuation and completion of the Employment Verification Form, in order for her to obtain the second working visa.

31 Secondly, in terms of control, the respondent issued Ms Auras instructions, often through Facebook Messenger, with the clear expectation that she would follow these instructions. Ms Auras did not work for any other person while she was working for the respondent.

32 It was apparent, from Ms Auras' evidence, that the respondent expected Ms Auras to:

- follow her directions to perform work;
- attend work at the times and on the days she directed;
- perform the work competently, exercising due care and skill;
- perform work that was productive for the operation of the business; and
- perform work independently of supervision but in the manner directed.

These are all indicative of a relationship of employment, irrespective of the party's subjective intentions, principally, the respondent's subjective intentions.

33 In terms of organisation, all of Ms Auras' work, whether it be looking after animals on the farm or the more menial tasks associated with the respondent, herself, was for the benefit of the respondent. In terms of mode of remuneration, Ms Auras received no monetary payment for her services. Instead, her understanding was that anything she would have earnt went towards food and accommodation.

34 In terms of taxation, Ms England-Brassy's evidence is that the respondent made PAYG taxation payments to the Australian Taxation Office, purportedly, out of wages paid to Ms Auras. In terms of other entitlements, including superannuation and workers' compensation, Ms Auras took a period of sick leave, while performing services for the respondent. Ms Auras and Ms England-Brassy's evidence is that superannuation was paid to Ms Auras' superannuation account.

35 In terms of the party's other subjective intentions, Ms Auras intended to work so that she could obtain a second working holiday visa and she understood she was being paid for her work from the respondent. However, she received no money, payments for her work, as it all went towards accommodation and food. Thus, her intention was that there was an employee/an employer relationship formed between her and the respondent.

36 Whatever might have been the arrangement leading up to 22 June 2016, between the respondent and Ms Auras, within a week of Ms Auras being at the Farm, that arrangement had changed and Ms Auras was no longer considered a WWOOFer. Further, comments made by the respondent in correspondence with Ms Auras, namely, an email dated 20 July 2017, indicated that, contrary to assertions by the respondent, that Ms Auras was a volunteer, the respondent did not consider that she was.

37 By way of example, this included reference by the respondent to the employment contract being terminated. I leave aside for one moment, that this was not, in fact, the case but it highlights the respondent's attitude, at the time. Further, an email dated 25 July 2017, to the claimant, stated that:

> *'Chrissy can as a Wwoof working but then wanted to get Second year visa … So then she became as farm hand (NOT WWOOF working)'.*

38 Further, there was the instruction, by the respondent, to Ms England-Brassy, to prepare payslips indicating, albeit falsely, that she had paid Ms Auras as an employee; and I leave aside, the thoroughly disingenuous nature of her doing so. Simply put, there is no basis for finding in the alternative, that Ms Auras was a volunteer.

Was Ms Auras' Employment Covered By The Award?

39 The second issue is whether, as an employee, as found of the respondent, was Ms Auras covered by the Award. Section 37(1) of the IR Act provides that:

> *An award has effect according to its terms …* [and] *extend to and bind:*
>
> *(i) all employees employed in any calling mentioned therein in the industry or industries to which the award applies; and*
>
> *(ii) all employers employing those employees.*

40 Clause 3 of the Award relevantly provides:

> *This award shall apply throughout the State of Western Australia to employees employed:*
>
> *(a) On farms in connection with the sowing, raising, harvesting and/or treatment of grain, fodder or other farm produce.*
>
> *(b) On farms or properties in connection with the breeding, rearing or grazing of horses, cattle, sheep, pigs or deer; or*
>
> *(c) In clearing, fencing, well sinking, dam sinking or trenching on such farms or properties except employees who are bound by the award of the Australian Conciliation and Arbitration Commission and known as the "Pastoral Industry Award, 1965" as varied or replaced from time to time and the award of the Western Australian Industrial Commission, known as the "State Research Stations, Agricultural Schools and College Workers" Award No 23 of 1971 as varied, and as varied or replaced from time to time.*

41 For the following reasons, I find on the balance of probability that Ms Auras was covered by the Award.

42 Ms Auras' evidence is that the respondent operated the Farm at a miniature horse stud in breeding, rearing and grazing miniature horses. Her work involved all aspects of animal husbandry, relating to the miniature horses, including feeding, maintaining the pastures and other animal accommodations and providing care and medication to the miniature horses.

43 As such, it is relatively clear that Ms Auras was an employee, employed on a property, in connection with the breeding, rearing or grazing of horses. That said, she also did other menial tasks, at the respondent's beck and call, and it is not to the point where I am satisfied Ms Auras' work was primarily as a farm hand carrying out farm type work. I also note that this farm work involved the care and attention to other animals also on the property.

44 I am also satisfied on the balance of probabilities that, contrary to assertions in correspondence by the respondent, that Ms Auras was a casual employee, and find that, in accordance with cl 5(a) of the Award, she was deemed to be employed on terms of weekly hiring.

Was Ms Auras Paid In Accordance With The Award?

45 In terms of issue three, what, if anything, is Ms Auras owed, under the Award, following on from whether the respondent contravened the Award in failing to comply with paying certain entitlements.

46 The respondent did not keep any records applicable to Ms Auras' employment. The respondent paid $1,755 in PAYG taxation to the Australian Taxation Office, in respect of wages, as recorded on the payslips. The respondent made superannuation payments, in respect of wages on the payslips, into Ms Auras' superannuation account. The respondent provided meals and accommodation to Ms Auras.

47 I accept the evidence by the claimant and Ms Auras, in relation to the minimum rates of pay applicable to Ms Auras, for the hours worked between 23 June 2016 and 25 September 2016, when she was employed, as a farm hand, by the respondent.

48 I find as follows:

- Ms Auras agreed to work 40 hours per week, but due to illness on three occasions, worked less than 40 hours, in those weeks.
- On other weeks, Ms Auras worked in excess of 40 hours, as required by the respondent.
- Ms Auras did not receive payment for:
    - any of the hours she worked between 23 June 2016 and 25 September 2016;
    - sick leave for any of the hours she did not work, when she was unable to work due to ill health; and
    - she did not receive accrued annual leave on termination.

49 In terms of the Award entitlements and contraventions, at the time Ms Auras commenced employment, the minimum weekly rate of wages, for an adult employee, pursuant to cl 14 of the Award, was $679.90. From the commencement of the first pay period after 1 July 2016, the minimum weekly rate of wages was $692.90. I accept that cl 14(1)(a) of the Award provides that minimum weekly wage payable for an adult employee, who is a farm hand, with less than 12 months experience, and I accept that at all material times, Ms Auras was an adult employee.

50 The hourly rate of pay for the Award is calculated on a 38-hour week. The minimum hourly rate of pay, from 23 June 2016 to was $17.89 and from the commencement of the first pay period after 1 July 2016, was $18.23. Clause 12 of the Award permits an employer to '*make a deduction at the rate of $45.60 per week of seven days'*, where board and lodgings are provided to an employee.

51 For the period 23 June 2016 to 29 June 2016, Ms Auras worked 48.75 hours and the respondent was required, pursuant to cl 14(1) of the Award, to pay Ms Auras a minimum of $17.89 per hour, totalling $872.14, in wages, less the deduction of $45.60 for board and lodging, allowed pursuant to cl 12 of the Award, resulting in a non-payment of wages for that period of $826.54.

52 The sick leave provisions in cl 9(1)(a) and cl 9(1)(b) of the Award are less favourable than the provisions of s 19 of the *Minimum Conditions of Employment Act 1993* (WA) (MCE Act). Therefore, the Award provisions have no effect and the sick leave entitlement, pursuant to s 19 of the MCE Act is implied into cl 9 of the Award, by virtue of s 5(1)(b) of the MCE Act.

53 The entitlement to sick leave accrues pro-rata, on a weekly basis, as provided for in s 19(2) of the MCE Act, based on the number of hours the employee is required, ordinarily, to work in a two-week period, up to 76 hours. In week one, Ms Auras accrued 1.461 hours of sick leave. A similar methodology will now be used by the IMC in determining the wages to be paid and entitlements owed for each following week.

54 For the period 30 June 2016 to 6 July 2016, Ms Auras worked 43 hours and the respondent was required to pay her $17.89 per hour, totalling $769.27 in wages, less the deduction of $45.60 for board and lodging, with a total of $723.67. Similarly, Ms Auras accrued 1.461 hours of sick leave at the end of week two, being 30 June 2016 to 6 July 2016.

55 For the period 7 July 2016 to 13 July 2016, Ms Auras worked 44 hours and the respondent was required to pay, pursuant to the same clause of the Award, now, $18.23 per hour (on the basis that a State wage order varied the minimum weekly wage, from 1 July 2016) totalling $802.12, less the deduction of $45.60 for board and lodging, with a total payment of $756.52. Similarly, for the same period, Ms Auras accrued 1.46 hours of sick leave.

56 For the period 14 July 2016 to 20 July 2016, Ms Auras worked 48.5 hours and the respondent was required to pay her at $18.23 per hour, totalling $884.16, less the deduction of $45.60 for board and lodging, resulting in a total of $838.58. Again, Ms Auras accrued 1.461 hours of sick leave during that week.

57 For the period 21 July 2016 to 27 July 2016, Ms Auras worked 36 hours and on 26 July 2016, left work after one hour, because she was unable to work due to illness. The respondent was required to, pursuant to the Award, to pay Ms Auras $18.23 per hour, for 36 hours, totalling $656.28 in wages, less the deduction of $45.60 for board and lodging, with a total owed, $610.68. Ms Auras had accrued sick leave entitlement balance of 5.844 hours of sick leave.

58 The respondent was required to pay Ms Auras, pursuant to s 20(1) of the MCE Act, for two hours of sick leave for 26 July 2016, totalling $36.46. Ms Auras was not paid $610.68 in wages or $36.46 in sick leave, thus the non-payment for that week was $647.14. Ms Auras had accrued 1.461 hours of sick leave, took two hours of sick leave and thus, had a balance of 5.305 hours of sick leave at the end of that week.

59 For the period 28 July 2016 to 3 August 2016, Ms Auras worked 44 hours and the respondent was required, pursuant to cl 14 of the Award, to pay Ms Auras $18.23, totalling $802.12, less the deduction of $45.60 for board and lodging, with a total of, $756.52. Similarly, Ms Auras accrued 1.461 hours of sick leave.

60 For the period 4 August 2016 to 10 August 2016, Ms Auras worked 47 hours and the respondent was required to pay her $18.23 per hour, totalling $856.81, less the deduction of $45.60 for board and lodging, with a total of, $811.21. Again, Ms Auras accrued 1.461 hours of sick leave.

61 For the period 11 August 2016 to 17 August 2016, Ms Auras worked 36.75 hours and the respondent was required to pay her at $18.23 per hour, totalling $669.95 in wages, less the deduction of $45.60 for board and lodging, resulting in a non-payment of $624.35. Similarly, Ms Auras accrued 1.461 hours of sick leave.

62 For the period 18 August 2016 to 24 August 2016, Ms Auras worked 39.5 hours and the respondent was required to pay her at the rate of $18.23 per hour, totalling $720.09 in wages, less the deduction of $45.60 for board and lodging, resulting in a total of $674.49. Again, Ms Auras accrued 1.461 hours of sick leave.

63 For the period 25 August 2016 to 31 August 2016, Ms Auras worked 25 hours and the respondent was required to pay her $18.23 per hour, totalling $455.75, less the deduction of $45.60 for board and lodging, with a total of $410.15. Ms Auras did not work 40 hours that week because she was unwell, on 29, 30 and 31 August, and worked less than her usual hours. As at 25 August 2016, Ms Auras' accrued pro-rata sick leave balance was 11.149 hours.

64 The respondent was required to pay Ms Auras 11.149 hours of sick leave, pursuant to s 20(1) of the MCE Act, resulting in a non-payment of sick leave for that period, totalling $203.25. Ms Auras was not paid $410.15 in wages and $203.25 in sick leave, thus the total is $613.40 for that week.

65 In week 10, Ms Auras took all accrued sick leave and accrued 1.390 hours of sick leave and therefore, had a balance of 1.39 hours of sick leave, at the end of this week.

66 For the period 1 September 2016 to 7 September 2016, Ms Auras worked 25.5 hours and the respondent was required to pay her 18.23 per hour, totalling $464.87, less the deduction of $45.60 for board and lodging, with a total of $419.27. On 1 and 2 September 2016, Ms Auras was unwell and did not work. At 1 September 2016, Ms Auras' accrued pro-rata sick leave balance was 1.390 hours.

67 The respondent was required to pay Ms Auras 1.390 hours of sick leave for 1 September 2016, resulting in a non-payment of sick leave for that pay period, totalling $25.34. Ms Auras was not paid $419.27 in wages, and $25.34 in sick leave, so the non-payment for that week is $444.61. In that week, Ms Auras took all accrued sick leave and accrued 1.034 hours of sick leave and therefore, had a balance of 1.034 hours of sick leave at the end of that week.

68 For the period 8 September 2016 to 14 September 2016, Ms Auras worked 41.83 hours and the respondent was required to pay her $18.23 per hour, totalling $762.56, less the deduction of $45.60 for board and lodging, with a total of $716.96. In that week, Ms Auras accrued 1.461 hours of sick leave.

69 For the period 15 September 2016 to 21 September 2016, Ms Auras worked 41.25 hours and the respondent was required to pay her $18.23 per hour, totalling $751.99, less the deduction of $45.60 for board and lodging, with a total of $706.39. Ms Auras accrued 1.461 hours of sick leave, at that stage.

70 For the period 22 September 2016 to 25 September 2016, Ms Auras worked 34.75 hours and the respondent was required, pursuant to cl 14 of the Award, to pay her $18.23 per hour, totalling $633.49. In week 14, Ms Auras accrued 1.336 hours of sick leave and therefore, had a balance of 5.292 hours of sick leave owing at the end of that week.

71 Pursuant to cl 9(1)(c) of the Award, an employee is entitled payment, on termination, in respect of absences '*on the grounds of personal ill health … for a period longer than his* [or her] *entitlement to paid sick leave, … to the extent the employee has become entitled to further paid sick leave during that year of service*'. The respondent was required, pursuant to cl 9(1)(c) of the Award, to pay Ms Auras 5.292 hours of sick leave at $18.23 per hour, totalling $96.47.

72 In respect of leave, Ms Auras took, for a period, longer than her entitlement to paid sick leave, to which she subsequently became entitled, prior to termination of her employment. Pursuant to s 24(2) of the MCE Act an employee is to be paid for annual leave to which he or she is entitled, if the employee leaves his or her employment before taking the annual leave.

73 Section 24 of the MCE Act is implied into cl 8 of the Award, by virtue of s 5(1)(b) of the MCE Act. Clause 8(9) of the Award has no effect, as it is less favourable than the MCE Act.

74 The respondent was required to pay Ms Auras for a pro-rata entitlement, based on 152 hours of annual leave for each year of service. The annual leave entitlement accrued pro-rata on weekly basis, at the rate of 2.923 hours per week, pro-rata, for weeks where unpaid sick leave was taken. Ms Auras was entitled to annual leave in respect of 14 weeks employment, totalling 39.675 hours annual leave and the respondent was required to pay, pursuant to cl 8 of the Award, $723.28, at the end or completion of Ms Auras' employment.

75 In terms of contraventions, I find that the following contraventions occurred. The respondent did not pay Ms Auras in contravention of the Award:

- wages, on 14 occasions, contrary to cl 14 of the Award, totalling $10,101.59 or $9508.79 after deductions of a total of $592.80 for board and lodging;
- sick leave on three occasions, in contravention of cl 9 of the Award, totalling $361.52;
- sick leave on termination of employment, contrary to cl 9(1)(c) of the Award, totalling $96.47; and
- pro-rata annual leave on termination of employment, in contravention of cl 8 of the Award, totalling $723.28.

76 In terms of a penalty, I note s 83(4) of the IR Act provides that the IMC may, upon finding that there has been a contravention of an instrument, in this case, an award, and found that the contravention has been proven by the claimant, may issue a caution or impose such penalty as the IMC thinks just but not exceeding $2,000 in the case of an employer, organisation or association and $500 in any other case or may dismiss the application.

77 I have had regard to the evidence given by, principally, Ms Auras, and I note that the respondent's failings, in my view, were both egregious and deliberate, and involved a vulnerable, overseas worker and demonstrated a poor representation, of Australian employers, on young workers who have come to Australia under the umbrella of a working holiday visa.

78 In my view, it was deliberate because the respondent had instructed Ms England-Brassy to prepare payslips after the work had been completed, paid income taxation and paid superannuation, both of which are, ordinarily, associated with somebody's employment status and thus, deliberately withheld an amount of money that could not have, in any way, reasonably, nor under the umbrella of the Award, been used to offset costs associated with food and accommodation. Accordingly, I impose a penalty of $1,500.

Orders

79 Subject to any liability to the Commissioner of Taxation under the *Taxation Administration Act 1953* (Cth), the respondent pay to the claimant, $10,593.58 for Ms Auras' award entitlements, arising from the non-payment of wages, sick leave, sick leave on termination of employment and pro-rata annual leave on termination of employment, in contravention of the Award.

80 Pursuant to reg 12(1) of the *Industrial Magistrates Court General Jurisdiction Regulations 2005* (WA), the respondent pay, to the claimant, prejudgment interest, on the judgment amount, at the 6% per annum, fixed in the amount $1,979.94, being from 25 September 2016 to 6 November 2019.

81 Pursuant to s 83(c)(1) of the IR Act, the respondent pay to the claimant disbursements, incurred by claimant, in bringing the claim, fixed at $595, and pursuant to s 83(4) of the IR Act, the respondent pay to the claimant, penalty, in respect of the contraventions, of $1,500.

D SCADDAN

INDUSTRIAL MAGISTRATE

[1] ***Roy Morgan Research Pty Ltd v Commissioner of State Revenue*** [2005] VSC 136; (2005) 22 VAR 467 [10].
[2] The claimant's statement at [14].