WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2020 WAIRC 00359
CORAM	**:**	INDUSTRIAL MAGISTRATE M. FLYNN
HEARD	**:**	WEDNESDAY, 23 OCTOBER 2019
DELIVERED	**:**	THURSDAY, 25 JULY 2020
FILE NO.	**:**	M 213 OF 2018
BETWEEN	**:**	RICHARD NEIL MORGAN **CLAIMANT** AND SERCO AUSTRALIA PTY LIMITED (ABN 44 003 677 352) **RESPONDENT**

CatchWords	**:**	INDUSTRIAL LAW – dispute on meaning of the clause of on enterprise agreement providing for the allowance of a detention service officer when returning from an international escort – employee claims clause provides for entitlement to pay after 10 hours 'stand down time' – employer claims no entitlement to pay during 'stand down time' – employee's interpretation is correct
Legislation	**:**	*Fair Work Act 2009* (Cth)
Instruments	**:**	*Serco Immigration Services Agreement 2015* (Cth)
Case(s) referred to in reasons:	**:**	***Sammut v AVM Holdings Pty Ltd [No2]*** [2012] WASC 27 ***Australasian Meat Industry Employees Union v Golden Cockerel Pty Limited*** [2014] FWCFB 7447 ***Re Harrison; Ex parte Hames*** [2015] WASC 247 ***Polan v Goulburn Valley Health*** [2016] FCA 440 ***City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union*** [2006] FCA 813 ***Workpac Pty Ltd v Skene*** [2018] FCAFC 131 ***Linkhill Pty Ltd v Director FWBII*** **[**2015] FCAFC 99
Result	**:**	Judgment for the claimant

Representation:

Claimant	**:**	In person
Respondent	**:**	Mr C. Graham, IR Manager

REASONS FOR DECISION

Introduction

1 The Claimant, Mr Richard Neil Morgan (Mr Morgan) was employed by the Respondent (the Company) as a detention service officer at the Perth Immigration Detention Centre (PIDC). On 26 occasions between July 2015 and February 2018, he escorted detainees from the PIDC to a country outside of Australia (an International Escort). Mr Morgan's time on each International Escort was divided between time spent accompanying the detainee from the PIDC to an international airport outside of Australia where the detainee would be handed over to a local official (Escort Time) and the time spent returning to the PIDC after the handover of the detainee (Return Time). The Return Time included time spent by Mr Morgan at local accommodation awaiting his return flight to Perth (Local Accommodation Time or LAT).

2 Mr Morgan's pay for Escort Time and Return Time is governed by the *Serco Immigration Services Agreement 2015* (Cth) (the Enterprise Agreement).[1] More specifically, his entitlement is found in cl 19(k) of the Enterprise Agreement (Clause 19(k) EA). The first paragraph of Clause 19(k) EA provides for normal rates of pay (including overtime) for Escort Time and for normal rates of pay (without overtime) for Return Time. However, the second paragraph of Clause 19(k) EA creates an exception to the payment obligations of the Company. It provides that 'payment does not apply to periods of up to 10 hours duration in any 24 hours as a stand down time (ie overnight accommodation time) but does not include travelling time, time in transit time waiting to travel or time otherwise worked on Serco duties' (the Stand Down Time Exception Clause or SDTE Clause).

3 The parties are in dispute on the effect of the Stand Down Time Exception Clause.

4 Mr Morgan contends that the effect the SDTE Clause is that the *only* part of Return Time for which is he is unpaid is the first 10 hours in each 24 hour period of Local Accommodation Time. His case is that Clause 19(k) EA provides for payment to him at normal rates (without overtime) for each hour of Local Accommodation Time after 10 hours has elapsed.

5 The Company argues that, while the SDTE Clause makes it clear that the first 10 hours of each 24 hour period of Local Accommodation Time is unpaid, Clause 19(k) EA is *silent* on whether Mr Morgan is entitled to be paid for *any* subsequent period of Local Accommodation Time. Absent the Enterprise Agreement *expressly* providing for an entitlement, the Company contends that Mr Morgan has no entitlement to pay for *any* period of Local Accommodation Time other than time spent while working at the express request of the Company.

6 However, the Company also relies upon its practice, admitted by the Company not to be expressly supported by any provision of the Enterprise Agreement, of making payments necessary to ensure that employees are paid for a minimum of 12 hours (without overtime) on each day of an International Escort, excluding the days that the escort commenced and ended (Top Up Payments or TUP). The practice is relied upon for two purposes. First, the Company seeks to set-off the Top Up Payments against any outstanding obligation it is found to owe to Mr Morgan. Mr Morgan, in reducing the quantum of his claim to the extent of the Top Up Payments,[2] has implicitly accepted the right of the Company to set-off the Top Up Payments

against his claim. Secondly, the Company argues that, consistent with sensible industrial practices favouring the interpretation of Clause 19(k) EA advanced by the Company, those same practices favour making the Top Up Payments to ensure that a sufficient number of Company employees register an interest in undertaking International Escort work.

7 The issue in this case is whether, properly construed, Clause 19(k) EA has the meaning contended by Mr Morgan or by the Company or has some other meaning. If, in the result, the Company has any outstanding obligation of payment to Mr Morgan, it will be necessary to consider whether the Company is entitled to set-off any of the Top Up Payments against that obligation (the Set-Off Issue).

8 This claim will be determined according to the law governing the jurisdiction, practice and procedure of the Industrial Magistrates Court of Western Australia (Court) where determining a claim under the *Fair Work Act 2009* (Cth) (FW Act). The relevant law is identified in an endnote.[3] Relevant to the determination of this case:

a. The Company is a '***national system employer***' and Mr Morgan is a '***national system employee***' as those terms are defined in the FW Act.

b. The Enterprise Agreement, made under pt 2 - 4 of the FW Act, was approved by the Fair Work Commission and operated from 14 August 2014.[4]

c. The Enterprise Agreement applies to and covers the Company. As a result of Mr Morgan being a detention service officer employed by the Company, the Enterprise Agreement also applies to and covers him.[5]

d. Mr Morgan's claim will be dealt with the procedures that apply to Small Claims proceedings.

e. Mr Morgan prove his claim 'on the balance of probabilities'. When, in these reasons, 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.

Facts

9 Mr Morgan and, on behalf of the Company, Payroll Projects Officer Ms Suzanne Moody (Ms Moody), give the same evidence on Mr Morgan's departure and return dates with respect to each of his 26 International Escorts.[6] Mr Morgan gives evidence of the date and time of the commencement of the Local Accommodation Time of each of the 26 International Escorts.[7] Mr Morgan and Ms Moody also give the same evidence of the date and time of the end of Local Accommodation Time of each of the 26 International Escorts.[8] I am satisfied as to the accuracy of all the evidence identified in this paragraph.

10 The significance of this evidence to the competing contentions of the parties may be illustrated by way of an example drawing upon the International Escort of Mr Morgan departing on 1 May 2017 and returning on 3 May 2017.[9] After hand-over of a detainee, Mr Morgan checked into a local hotel at 5.00 pm on 2 May 2017. He checked out of the hotel 12 hours later at 5.00 am on 3 May 2017. The Return Time paid by the Company to Mr Morgan for this International Escort does not include payment for *any* of the 12 hours of Local Accommodation Time. The Company argues that Clause 19(k) EA does not provide for *any* entitlement for an employee who is not working, and that Mr Morgan was not working during the Local Accommodation Time. Mr Morgan contends that he is entitled to payment for two hours of the Local Accommodation Time. He argues that the effect of Clause 19(k) EA is to provide for payment for the *whole* of Return Time excepting *only* the first 10 hours of Local Accommodation Time

resulting in an entitlement to the two hour difference between 12 hours and 10 hours. The same calculation may be undertaken with respect to International Escorts commencing:

- 7 March 2017 (16.5 hours LAT, claim is for 6.5 hours);[10]
- 31 January 2017 (14 hours LAT, claim is for 4 hours);[11]
- 19 December 2016 (14.5 hours LAT, claim is for 4.5 hours);[12] and
- 2 November 2016 (17 hours LAT, claim is for 7 hours).[13]

11 In none of the international escorts identified in the preceding paragraph does the issue of Top Up Payments arise. Ms Moody stated that 'whilst not obliged to do so pursuant to Clause 19(k) EA, the Company pays additional ordinary time hours to give the employee 12 hours ordinary time … excluding the last returning day which is based on actual hours worked'.[14] Mr Morgan and Ms Moody gave the same evidence as to the amount of a Top Up Payments by the Company in respect of each of the balance of the International Escorts undertaken by Mr Morgan.[15] I am satisfied as to the accuracy of this evidence.

12 The significance of this evidence to the competing contentions of the parties may be illustrated by way of an example drawing upon the International Escort of Mr Morgan departing on 6 December 2017.[16] After hand-over of a detainee, Mr Morgan checked into a local hotel at 9.00 pm on 7 December 2017. He checked out the hotel 16 hours later at 1.00 pm on 8 December 2017. The Return Time paid by the Company to Mr Morgan for this International Escort is calculated without reference to payment for *any* of the 16 hours of Local Accommodation Time. As already noted, Mr Morgan contends that he is entitled to payment for six hours of Local Accommodation Time being the six hours difference between the 16 hours LAT and 10 hours. As already noted, the Company argues that Clause 19(k) EA does not provide for *any* entitlement to payment for LAT. However, the Company did make payments to Mr Morgan for the remaining 11 hours of 8 December 2017 *after* he checked out of the hotel (i.e. 1.00 pm – 12.00 am) being Return Time. The policy of the Company required a Top Up Payment for one hour to ensure that Mr Morgan was paid for at least 12 hours on 8 December 2017. Mr Morgan and Ms Moody each record that payment as having been made and Mr Morgan reduces his claim for this International Escort from six hours by the amount of the Top Up Payment, resulting in a claim for payment for five hours.[17]

13 The same calculation may be undertaken with respect to International Escorts commencing:

- 29 January 2018 (15.5 hours LAT, 12 hours TUP, 3.5 hour claim);[18]
- 12 December 2017 (8.5 hours LAT, 6.5 hours TUP, 2 hour claim);[19]
- 7 September 2017 (13.25 hours LAT, 2 hours TUP, 11.25 hour claim);[20] and
- so on for each of the remaining International Escorts.

14 In the result, if Mr Morgan is successful with his contention on the meaning of Clause 19(k) EA, I am satisfied that the extent of the underpayment over the 26 International Escorts[21] is in a total amount of $3,529.21 as calculated by Mr Morgan.[22]

15 Clause 19(k) EA also provides that ordinary time worked while returning without a detainee 'will be used for the accrual of ordinary time within the roster'. The Company accepts that, if Mr Morgan is successful with his claim under Clause 19(k) EA based on unpaid hours of Local Accommodation Time, then those hours may also be applied to calculate any entitlement to overtime under the Enterprise Agreement.[23] Clause 22 of the Enterprise Agreement provides for

ordinary hours of an average of 42 hours per week up to a maximum of a 12 week period. Clause 25 of the Enterprise Agreement provides for overtime. Mr Morgan has undertaken a calculation by which he has added the hours he claims for each International Escort (*after* set-off) to his rostered ordinary hours for the relevant fortnight.[24] He makes a claim for overtime (at normal rates) for each hour exceeding 84 hours per fortnight. In most fortnights, the result is to add 'hour for hour' to each hour of underpayment claimed under Clause 19(k) EA for overtime (at normal rates). However, in some fortnights, presumably where Mr Morgan's rostered hours were *less* than 84 hours, a lesser number of hours is claimed as overtime (at normal rates).[25] Mr Morgan was not cross-examined on his calculations and no submission was made by the Company of any error in those calculations. I am satisfied that the extent of the underpayment for overtime arising from not correctly accruing ordinary time in Mr Morgan's roster as provided by Clause 19(k) EA is in a total amount of $3,405.91 as calculated by Mr Morgan.[26]

Submissions of the Parties

16 The submissions of each party address the meaning of Clause 19(k) EA. The full text of the clause is as follows:

> *(k) When an Employee is on international escort then normal rates of pay shall apply when escorting with a detainee, including overtime rates if applicable, but an Employee will be paid ordinary time (without overtime) where the escort is returning without a detainee. This ordinary time worked will be used for the accrual of ordinary time within the roster.*
>
> *Payment does not apply to periods of up to 10 hours duration in any 24 hours as a stand down time (ie overnight accommodation time) but does not include traveling time, time in transit, time waiting to travel or time otherwise worked on Serco duties. Where an Employee's roster permits and the Employee elects to stay over for additional time (subject to Company approval), this time will be unpaid and any additional costs will be borne by the Employee.*

17 Mr Morgan contends that the meaning Clause 19(k) EA is revealed by a 'three step' approach to the text of the two paragraph clause.

18 First, the first paragraph of the clause is said to create a distinction between *two* mutually exclusive periods of time: the time 'when escorting with a detainee' (i.e. Escort Time) and the time 'where the escort is returning without a detainee' (i.e. Return Time).

19 Secondly, the effect of the first paragraph is clear from the ordinary meaning of the words of the paragraph itself. Return Time commences upon completion of Escort Time and an employee is entitled to ordinary pay without overtime for the *whole* of Return Time. In support of this construction, Mr Morgan points to the practices of the Company in recording on an 'Aviation Payroll Capture Form' the time of detainee handover and in paying Mr Morgan at ordinary time rates (without overtime) for the portion of Return Time between detainee handover and checking into local accommodation.

20 Thirdly, the effect of the second paragraph of the clause is also clear from the ordinary meaning of the words of the paragraph. Mr Morgan's entitlement to pay for Return Time is suspended only for so much of any 10 hour period that he is booked into local accommodation: 'payment does not apply to periods of up to 10 hours duration'. The length of Local Accommodation Time varies according to the circumstances of each International Escort. On occasion, those circumstances result in an employee spending long periods alone awaiting a return flight to Perth. Mr Morgan points to the possibility of return flight delays and cancellations resulting in Local Accommodation Time of periods of several days. Any interpretation of the SDTE Clause that results in no payments to an employee for these periods is eschewed as absurd.

21 Mr Morgan makes a further submission based upon the contents of Company's *Policy and Procedure Manual: International Removals*.[27] The manual covers topics that include collection of the detainee, airport procedures, in flight procedures, transit points, arrival (including detainee handover) and the return journey.

22 The manual provided states that 'at destination and [during] the return journey', escort officers: 'are on duty until their arrival back in Australia'; 'may receive notification of a further escorting task'; and must not consume alcohol 'whilst on duty'.[28] Mr Morgan observes that, as a result of this policy Local Accommodation Time was not exclusively available for his personal purposes. It follows, Mr Morgan submits, that a construction of the SDTE Clause resulting in employee compensation (after 10 hours of LAT) for that time is to be preferred over a construction of the clause, suggested by the Company, that results in no compensation for that time.

23 The Company also contends that the meaning Clause 19(k) EA is revealed by a 'three step' approach to the clause.

24 First, Clause 19(k) EA creates a distinction between *three* mutually exclusive time periods: the time 'when escorting with a detainee' (Escort Time); the time 'where the escort is returning without a detainee' (Return Time) which time is expressly taken to include 'travelling time, time in transit, time waiting to travel or time otherwise worked on Serco duties'; and the time called 'stand down time' in the clause (Stand Down Time) which is *all* time other than Escort Time and Return Time. Stand Down Time is expressly taken to include any 'overnight accommodation time' and, by implication, includes the whole of the time between the commencement of the check-in to accommodation and the time (after check-out) of commencement of the return journey to Perth (i.e. LAT).

25 Secondly, Clause 19(k) EA expressly creates an entitlement to pay for Escort Time ('normal rates of pay shall apply including overtime') and for Return Time ('ordinary time (without overtime)'). The clause expressly disentitles pay 'for the first 10 hours duration in any 24 hours' of Stand Down Time ('payment does not apply'). The Company submits that the evident purpose of (unpaid) Stand Down Time is a concern for the occupational health and safety needs of employees. This purpose is said to be evident from the clause providing an incentive of employee rest of at least 10 hours after Escort Time (i.e. after a period of work).

26 Thirdly, the plain meaning of Clause 19(k) EA, given the presence of an express entitlement to pay for Escort Time and for the tasks comprising of Return Time (travelling et cetera) and the absence of an express entitlement to pay for Stand Down Time, is that Clause 19(k) EA does not provide for pay to employees for Stand Down Time. Mr Morgan has an express entitlement to pay for his Escort Time. He finished that work before commencing Stand Down Time and no further entitlement arises. Mr Morgan has an express entitlement to pay for Return Time. During Stand Down Time he is not engaged on any of the tasks included in Return Time that are identified in Clause 19(k) EA. He is not 'travelling, in transit, waiting to travel or otherwise working on Serco duties'.

27 The Company observes, correctly, that the 'the task of interpreting Clause 19(k) EA does not involve rewriting the clause to achieve what might be regarded as a fair or just outcome'.[29] In the absence of an express entitlement in Clause 19(k) EA to pay for Stand Down Time (after 10 hours) and given that Mr Morgan is not working during Stand Down, the Company submits that his claim is misconceived.

Analysis

28 The resolution of this claim will require a finding on the meaning and effect of Clause 19(k) EA. The law to be applied when resolving a disputed interpretation of an enterprise agreement is not in dispute.[30] In summary, relevant to the meaning of Clause 19(k) EA and omitting citations:

a. The meaning of the Enterprise Agreement is to be determined by the objectively ascertained intention of the parties as it is expressed in the words used in the agreement. The subjective intentions of the parties are irrelevant.

b. The ordinary meaning of the words of Clause 19(k) EA is the starting point for ascertaining the intention of the parties.

c. In ascertaining the ordinary meaning of the words of Clause 19(k) EA, it will be relevant to consider the purpose, objective and context of the clause as well as the purpose, objective and context of the whole agreement. A construction that makes the various parts of the agreement harmonious is to be preferred.

d. The task of interpreting Enterprise Agreement does not involve rewriting (or adding words to) the agreement to achieve what might be regarded as a fair or just outcome or to fill any real or perceived gaps in the agreement. The task is always one of interpreting the Enterprise Agreement itself.

e. The parties may presume to have intended that the Enterprise Agreement: reflect a practical frame of mind; result in a sensible industrial practice; and avoid inconvenient or nonsensical outcomes. However, it must be borne in mind that the parties may legitimately disagree on whether a particular outcome is sensible.

29 It is convenient to reproduce a summary and extracts of the whole of cl 19 of the Enterprise Agreement, including the full text of Clause 19(k) EA:

> ***19. Allowances***
>
> *(a)* *Meals taken at Post.* [Employee at post provided with a meal at a cost of $3.50 or $15.02 meal allowance] …
>
> *(b)* *Overtime Meal Allowance.* [Employee on overtime duty for more than two hours provided with a meal or paid $15.02 as a meal allowance] …
>
> *(c)* *Remote District allowance.* [Employee located at Christmas Island, and Wickham will receive a remote district allowance] …
>
> *(d)* *Christmas Island annual leave travel concession.* [Annual Travel Allowance paid to Christmas Island employees] …
>
> *(e)* *Travelling & working away from normal place of work.*
>
> *(i)* *Where an Employee is travelling under the instructions of the Company, the Employee will be deemed to be working. The Company will pay for all costs, actually and reasonably incurred, associated with such travel (including travel and accommodation), on the basis of the most economical method of travel.*
>
> *(ii)* *Where the Company requires an Employee to perform duty at other than his/her normal place of work, the Company will pay the Employee, in addition to all other entitlements, for all time in excess of that normally taken to travel between the Employee's residence and his/her normal place of work. Payment will be at the relevant ordinary time rate in clauses 16(a) or 18(a) hereof. In addition, if an Employee uses his/her own vehicle, the*

Company will pay the Employee for all excess traveling at the rate prescribed by the Modern Award.

(iii) [Employee travelling or duty at other than normal place of work entitled to meal allowances] …

(iv) [Employee travelling or duty at other than normal place of work and requiring an overnight stay will be paid a travel allowance] …

(v) *Travel time will be paid at ordinary time rates.*

(f) *Secondments*

(i) [Company will pay costs of overnight accommodation of employee on secondment] …

(ii) *The location of that secondment becomes the normal place of work for the period of that secondment. The excess travelling, fares in clause 19(e) will not apply.*

(iii) [Employee will be paid a secondment hardship allowance] …

(iv) [Allowance paid during sick leave] …

(v) [Company will pay the Employee for travel time] …

(g) [Company will pay for travel by economy transport] …

(h) *Shared accommodation allowance*

[Allowance if share a bedroom at remote district/Centre] …

Transport and Escort

(i) *When an Employee undertakes transport and escort duties away from his/her normal place of work, the provisions of sub clauses 19(e)(iii), 19(j), 19(k) and 19(l) apply. The provisions of this sub clause do not apply when the provisions of sub clauses 19(e)(iv) and/or (f) apply.*

(j) *When an Employee is on escort within Australia normal rates of pay will apply when escorting with a detainee, including overtime rates if applicable, but an Employee will be paid ordinary time (without overtime) where the escort is returning without a detainee. This ordinary time worked will be used for the accrual of ordinary time within the roster. Payment does not apply to periods of stand down (time not traveling or worked; eg overnight accommodation time).*

(k) *When an Employee is on international escort then normal rates of pay shall apply when escorting with a detainee, including overtime rates if applicable, but an Employee will be paid ordinary time (without overtime) where the escort is returning without a detainee. This ordinary time worked will be used for the accrual of ordinary time within the roster.*

Payment does not apply to periods of up to10 hours duration in any 24 hours as a stand down time (ie overnight accommodation time) but does not include traveling time, time in transit, time waiting to travel or time otherwise worked on Serco duties. Where an Employee's roster permits and the Employee elects to stay over for additional time (subject to Company approval), this time will be unpaid and any additional costs will be borne by the Employee.

(l) *Escorts requiring an overnight stay*

(i) *Where an Employee performs duty away from his/her normal place of work, and requires an overnight stay during a period of stand down whilst off duty, the Company will pay the cost of accommodation, and the Employee will be paid the domestic travel allowance expenses in clause 19(e) (iv) for each night he/she is away from home. This amount covers the cost of all meals. Meal allowances in clauses 19(b) and 19(e) (iii) will not apply.*

(ii) *Where an Employee remains on duty overnight, and no accommodation is required, the domestic travel allowance expenses in clause 19(e)(iv) will not apply. The T & E meal*

allowance in sub clause 19(e) (iii) hereof will still apply, unless a meal is provided to the Employee.

(m) *International Aviation Assignments*

(i) *The Company will ensure all detention services Employees, who meet the Company criteria, have a reasonably equitable opportunity to perform International Aviation Assignments (IAAs).*

(ii) [Systems will be developed Nationally to ensure equitable distribution of IAAs including a register] … *At the time an offer of an IAA is made the Company will provide anticipated timings of the IAA, including accommodation arrangements and times. When an Employee agrees to undertake an IAA, they agree to vary their rostered hours for the duration of the assignment.*

(iii) [Each Employee on the register will receive training] …

(iv) [On the selection of employees for IAAs] …

(vi) *The Company will discuss the proposed date/time that the Employee will re-engage at his/her Centre with the Employee. The agreed date/time must take into account work, health and safety of the Employee, the predicted impact of the travel on the Employee and can be no earlier than 10 hours after completion of the assignment.*

(n) *Increases in allowances.*

[Allowances stated in specified clauses above to increase by amount stated].

30 In my view, the following considerations are particularly relevant to interpreting Clause 19(k) EA:

a. The ordinary meaning of the first sentence of the first paragraph of Clause 19(k) EA is to create an unqualified entitlement to pay for the *whole* time that an employee is escorting a detainee on an International Escort and for the *whole* time that an employee is returning without a detainee. However, this sentence must be read in conjunction with the first sentence of the second paragraph of Clause 19(k) EA which proceeds to qualify the entitlement to pay for the *whole* time that an employee is returning without a detainee. The qualification is discussed at (c). below.

b. In my view, the employee time spent 'returning without a detainee' in the first sentence of the first paragraph of the clause, in context, means the whole of the time taken by the employee to travel from the point of detainee handover back to the employee's home centre in Australia, *including any time that the employee is stationary at local (overseas) accommodation awaiting transport*. This interpretation of 'returning' accords with the ordinary meaning of 'returning' as 'coming back'. It is also consistent with the second sentence of the first paragraph of Clause 19(k) EA describing the time 'the escort is returning' as 'ordinary time *worked*' (emphasis added). It is also relevant that the 'return' journey identified in the clause is a return from a 'forward' journey between the employee's home centre to the place of detainee handover. The forward journey necessarily also involved stationary periods awaiting transport. This interpretation is also consistent with the employee's right, contained in the last sentence of the second paragraph of Clause 19(k) EA, to elect to request an *unpaid* stay over while returning without the detainee.

c. The ordinary meaning of the first sentence of the second paragraph of Clause 19(k) EA is to qualify the entitlement provided for in the first paragraph by providing that an employee has no entitlement to pay for the first 10 hours in each 24 hours of 'stand down

time'. The qualification with respect to stand down time creates a maximum period of non-payment for 'stand down time' of 10 hours in each 24 hour period. Upon reaching the 10 hour limit, the entitlement to pay for the *whole* time that an employee is returning without a detainee (in the first sentence of the first paragraph of the clause) will apply.

d. It is necessary to attribute a meaning to the phrase, 'stand down time'. The first sentence of the second paragraph of Clause 19(k) EA contains two relevant statements. First, 'stand down time' is stated to be synonymous with 'overnight accommodation time'. Secondly, 'stand down time' is expressly stated not to include the time that an employee spent: travelling, in transit, waiting to travel, otherwise worked on Serco duties.

31 My view, drawing upon the meaning of the word 'returning' and the application of ordinary conventions of grammar to the first sentence of each paragraph of Clause 19(k) EA, is that the clause creates an entitlement, subject to a qualification concerning 10 hours of stand down time, to pay for two mutually exclusive time periods - Escort Time and Return Time.

32 The meaning I have ascribed to Clause 19(k) EA on pay to employees on International Escorts is consistent with the *different* text of cl 19(j) of the Enterprise Agreement on pay to employees on escorts within Australia. The text of each clause is identical in providing an employee entitlement to ordinary time (without overtime) where the escort is returning without an employee and in providing that payment does not apply to stand down time on the return journey. However, whereas Clause 19(k) EA includes a 10 hour maximum period of non-payment for stand down time, cl 19(j) of the Enterprise Agreement does *not* contain any limits. The evident purpose of the two clauses is to provide for payment to employees on stand down time while returning from an International Escort *after 10 hours* and not to provide for any payments to employees on stand down time while returning from domestic escorts.

33 The meaning I have ascribed to Clause 19(k) EA is not inconsistent with the purpose or context of cl 19 of the Enterprise Agreement. The purpose of the whole clause, revealed by the text, is three fold.

34 First, the clause provides for entitlements for employees when specific employment situations arise: working at Christmas Island, working away from the employees normal place of work, working on secondment, escorting a detainee within Australia, and escorting a detainee outside of Australia. Some of the entitlements are by way of a 'flat' allowance, for example, a meal allowance or a travel allowance. Some of the entitlements are by way of specifying that an employee will be paid for the time involved in certain tasks, for example, travel to work (and home) when working away from employee's usual place of work (cl 19(e) of the Enterprise Agreement). Overall, there is no discernible bias 'for' or 'against' entitlements by way of pay for travel time in employment situations that involve temporary travel. Clause 19(e)(i) of the Enterprise Agreement provides for pay for travel time when working away from the employee's usual place of work. However, I noted above that cl 19(j) of the Enterprise Agreement provides for no pay for stand down time for Australian escorts.

35 Secondly, the clause creates a mechanism to encourage the 'reasonably equitable' distribution among employees with an interest in the work of escorting a detainee outside of Australia (see cl 19(m) of the Enterprise Agreement). I have noted below, when analysing the Company's submission, that this clause includes a specific means of addressing the 'work, health and safety' concerns that arise from the length of time on an International Escort.

36 Thirdly, the clause creates a mechanism to increase the 'flat' allowances over time (see cl 19(n) of the Enterprise Agreement).

37 In ascertaining the meaning of Clause 19(k) EA, I have not had regard to the 'Aviation Payroll Capture Form', the practice of the Company in paying Mr Morgan for time before checking into local accommodation or the content of the Company's *Policy and Procedure Manual: International Removals*. There may be occasions when reference to the practices and procedures of an employer is appropriate as evidence of matters in the common contemplation and constituting the common assumption of the parties at the time of the making of an agreement.[31] However, it is not appropriate to have regard to the practices and procedures of an employer to advance the argument made by Mr Morgan that the Enterprise Agreement ought to be interpreted in a manner that is consistent with those practices and procedures. The text of the Enterprise Agreement governs the rights and obligations of the employer and employees. Practices and procedures of the Company that are inconsistent with the text of the Enterprise Agreement do not modify the meaning of the Enterprise Agreement.

38 The meaning that I have ascribed to Clause 19(k) EA is not inconsistent with the purpose or context of the agreement as a whole, summarised by me in an endnote.[32] Although cl 12 of the Enterprise Agreement is entitled 'stand down', it provides for the deduction of pay for any day an employee cannot be usefully employed. Given this different context, the phrase 'stand down' in the title of cl 12 offers no assistance in ascertaining the meaning of cl 19(k) of the Enterprise Agreement.

39 It is apparent that I disagree with the meaning ascribed to Clause 19(k) EA by the Company. I do not agree with the Company that Clause 19(k) EA creates three mutually exclusive time periods – Escort Time, Return Time and Stand Down Time – and no entitlement to pay for Stand Down Time. The Company's submission, without warrant from the text of the first sentence of the first paragraph of Clause 19(k) EA, equates the tasks listed in the first sentence of the second paragraph of the clause (travelling time, time in transit et cetera) with Return Time for which an employee is entitled to payment. This approach ignores the ordinary conventions of grammar that would result in an entitlement to payment for time that the employee is 'returning' as stated in the first sentence of the first paragraph of Clause 19(k) EA.

40 The approach of the Company to the meaning of Clause 19(k) EA also suffers from not satisfactorily explaining the purpose of the words 'up to10 hours duration in any 24 hours' in the first sentence of the second paragraph of the clause. The Company submits that non-payment for *at least* 10 hours provides an incentive for employee to rest of at least 10 hours after completing Escort Time. The causal relationship between 'non-payment' and 'rest' is not obvious. In any event, Stand Down Time will be more or less than 10 hours depending upon a factor that is independent of 'work, health and safety' considerations, namely, the availability of return transport. More importantly, elsewhere in cl 19 of the Enterprise Agreement, namely in cl 19(m)(vi) there is a mechanism by which Enterprise Agreement address' the issue of the health and safety of the employee on conclusion of Return Time. It provides for employer/employee discussion *before* the trip commences on an agreed date/time to re commence work *after* the trip provided that the employee must have no rostered work for at least 10 hours after return from the trip.

Conclusion

41 I have concluded that Clause 19(k) EA has the meaning contended by Mr Morgan. After handing over a detainee during an International Escort he is entitled to be paid for the whole time spent returning to the PIDC excepting only the first 10 hours spent at local accommodation waiting for the first available transport. He is also entitled to have that time applied in calculations of his

entitlement to overtime under the Enterprise Agreement. The Company seeks to set-off against this outstanding liability to Mr Morgan the Top Up Payments.

42 The Top Up Payments, not expressly provided by the Enterprise Agreement, were payments made to Mr Morgan to ensure that he was paid for at least 12 hours on each day of his International Escort (excluding the first and last days). Mr Morgan does not dispute the right of the Company to set off the Top Up Payments. An employer's payment to an employee may be applied in satisfaction of a legal obligation if, at the time of the payment, the employer designates the payment to be for the purpose of satisfying the obligation; there must be a correlation between the employer's purpose in making the payment and the purpose of the legal obligation.[33] I am satisfied that, at the time of making each Top Up Payment, it designated the payment for a purpose that correlated with the purpose of the entitlement provided by Clause 19(k) EA, namely, compensation of an employee for a minimum number of hours in each 24 hour period of an International Escort.

43 The result is that I am satisfied of underpayments of $3,529.21 for hours spent by Mr Morgan returning to the PIDC over 26 International Escorts and I am satisfied of underpayments of $3,405.91 for overtime arising from not correctly accruing those hours in Mr Morgan's roster, a total amount of $6,935.12.

M. FLYNN
INDUSTRIAL MAGISTRATE

[1] The *Serco Immigration Services Agreement 2011* governed Mr Morgan's two International Escorts in July and August 2015 and *Serco Immigration Services Agreement 2015* governed his subsequent escorts. The relevant text of each agreement is the same and it will be convenient to refer to the 2015 agreement in these reasons.

[2] See the penultimate column of the table at Annexure B of the Witness Statement of Mr Morgan, entitled 'Time paid as top up', and note that the 'Time Spent waiting to travel' in the preceding column is reduced by this amount to arrive at the 'Underpayment' in the final column.

[3] Jurisdiction, Practice and Procedure of the Industrial Magistrates Court (WA): FW Act, Enterprise Agreements and Small Claims Procedure.

a) Civil remedy provisions cast obligations upon national system employers to national system employees as set out in enterprise agreements that have been made under the FW Act and approved by the FWC (s 50 of the FW Act and Parts 2-4, 4-1).

b) An enterprise agreement does not impose obligations unless the agreement applies to the parties (see s 51 and s 52) and the agreement is expressed to cover the parties (s 53).

c) Proceedings in this court may be dealt with as *small claims proceedings* (SCP) (s 548 FW Act).

   (1) SCP arise where the following criteria are satisfied: the claimant applies for an order (other than a pecuniary penalty order); the order relates to an amount that an employer was required to pay under the Act (including under a fair work instrument) or because of a 'safety net contractual entitlement'; and the claimant has indicated that he or she wants the small claims procedure to apply (s 548(1) and s 548(1A) of the FW Act).

   (2) In SCP, the court may not award more than $20,000 (s 548(2) FW Act).

   (3) In SCP, the court is not bound by any rules of evidence and procedure and may act informally. (s 548(3) FW Act). This provision must be read in light of the obligations upon a court called upon to exercise judicial power. A court can only make a finding on the basis of probative evidence and 'a decision must be supported by a reasoned judgment that addresses the issues in the case.' See ***Sammut v AVM Holdings Pty Ltd [No2]*** [2012] WASC 27 [40] - [47] (Commissioner Sleight).

d) 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'.

[4] [2014] FWCA 5322.

[5] On the application of the agreement, see cl 2 of the Enterprise Agreement. On the coverage of the agreement, see cl 6(b) of the Enterprise Agreement.

[6] Witness Statement of Mr Morgan, Annexure B; Witness Statement of Ms Moody, Annexure 3.

[7] Witness Statement of Mr Morgan, Annexure B. Identified by Mr Morgan as, 'Date and time of hotel check-in'.

[8] Identified by Mr Morgan as, 'Date and time of hotel check-out'. Identified by Ms Moody as, 'Date and time of commencement of return escort without a detainee'.

[9] Row 8 of the tables in each of: Witness Statement of Mr Morgan, Annexure B; Witness Statement of Ms Moody, Annexure 3.

[10] Row 10 of the tables in each of: Witness Statement of Mr Morgan, Annexure B; Witness Statement of Ms Moody, Annexure 3.

[11] Row 12 of the tables in each of: Witness Statement of Mr Morgan, Annexure B; Witness Statement of Ms Moody, Annexure 3.

[12] Row 13 of the tables in each of: Witness Statement of Mr Morgan, Annexure B; Witness Statement of Ms Moody, Annexure 3.

[13] Row 16 of the tables in each of: Witness Statement of Mr Morgan, Annexure B; Witness Statement of Ms Moody, Annexure 3.

[14] Witness Statement of Ms Moody [25].

[15] Identified by Mr Morgan as, 'Time paid as top up'. Identified by a comparison of the amounts identified as 'Hours 'worked' on escort without a detainee' and the 'Amount paid for the day of the return escort' with the difference between those amounts being the Top Up Payment.

[16] Row 3 of the tables in each of: Witness Statement of Mr Morgan, Annexure B; Witness Statement of Ms Moody, Annexure 3.

[17] Identified by Mr Morgan as, 'Underpayment'.

[18] Row 1 of the tables in each of: Witness Statement of Mr Morgan, Annexure B; Witness Statement of Ms Moody, Annexure 3.

[19] Row 2 of the tables in each of: Witness Statement of Mr Morgan, Annexure B; Witness Statement of Ms Moody, Annexure 3.

[20] Row 4 of the tables in each of: Witness Statement of Mr Morgan, Annexure B; Witness Statement of Ms Moody, Annexure 3.

[21] No claim is made for two of those trips: 9 November 2016 and 15 September 2016.

[22] Witness Statement of Mr Morgan, Annexure B.

[23] See Transcript, 36.

[24] Witness Statement of Mr Morgan, Annexure C

[25] See Witness Statement of Mr Morgan, Annexure C for the trips on the following dates: 17 May 2016; 12 February 2016; 10 December 2015.

[26] Witness Statement of Mr Morgan, Annexure C.

[27] Witness Statement of Mr Morgan, Annexure D.

[28] Witness Statement of Mr Morgan, Annexure D [6.21].

[29] ***Australasian Meat Industry Employees Union v Golden Cockerel Pty Ltd*** [2014] FWCFB 7447 [41] and (10)

[30] The general principles that apply to the construction of legal instruments, including instruments of the nature of the Enterprise Agreement were identified in ***Re Harrison; Ex parte Hames*** [2015] WASC 247 [50] - [51]. On particular principles, applying to the construction of legal instruments that were created in an industrial context, see ***Polan v Goulburn Valley Health*** [2016] FCA 440 [34] (Mortimer J); ***City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union*** [2006] FCA 813 [57]. On principles applying to the construction of instruments made under the FW Act, including an enterprise agreement, see ***Australasian Meat Industry Employees Union v Golden Cockerel Pty Limited*** [2014] FWCFB 7447 [41]; ***Workpac Pty Ltd v Skene*** [2018] FCAFC 131 [197].

[31] ***Australasian Meat Industry Employees Union v Golden Cockerel Pty Limited*** [2014] FWCFB 7447 [41](6)(c)

[32]

Clause 1, cl 2, cl 3, cl 4, cl 5, and cl 6 concerns introductory matters (Title, Scope, Period, et cetera).

Clause 7 (Flexibility term) provides for the possibility for a company and an employee making independent flexibility arrangement that varies that the Enterprise Agreement.

Clause 8 (Definition) included definitions of Detainee, DIBP (Commonwealth Department of Immigration and Border Protection), and normal place of work.

Clause 9 (Objectives of Agreement) includes principal objectives of the Agreement to: consolidate conditions of employment that supports the operation of Centers, encourage a collaborative and flexible work environment.

Employment

Clause 10 (Types of employment) provides for full time, part time, specified term or casual employee.

Clause 11 (Contract of employment) provided for the creation of a contract of employment with each employee after satisfactory pre-employment procedures. It is a condition of employment that employees 'maintain a state of readiness on duty and conduct themselves in a manner which ensures their ability to respond throughout their period

of duty'. The company is responsible for determining work practices to meet Occupational Health and Safety Obligations.

Clause 12 (Ending employment, suspension and stand down) provides for termination of employment by either party on notice. It provides for suspension for disciplinary reasons. It provides for the deduction of pay for any day an employee cannot be usefully employed because of the cause for which the company cannot be reasonably be held responsible (a stand down clause).

Clause 13 and cl 14 concern redundancy and change of service provider if the company's contract is terminated by the DIBP.

Job Classification, Rates of Pay, Allowances and related matters

Clause 15 (Job Classifications) describes the duties and responsibilities of detention service officer, accredited detention service officer (that is detention service officer Level 2), detention support workers, detention service managers. A detention service officer Level 2 is expected to perform duties that include 'escort duties of detainees both within the Centre and externally when required', and 'lead Escort on T&E tasks'.

Clause 16 (Minimum rates of pay), nominate aggregate weekly rate, hourly rate and causal hourly rate for each classification (eg detention service officer Level 2). The aggregate weekly rate is stated to represent guarantee earning for a full-time employee, averaging 42 ordinary hours per week.

Clause 17 and cl 18 concern job classification and minimum rates to pay for cleaning and catering positions.

Clause 19 – Allowance

[See '**Analysis**' in Reasons for Judgment]

Clause 20 and cl 21, concerns payments of earning and superannuation.

Hours of Work, Rosters, Secondments

Clause 22 (Flexible work arrangements) provides that the ordinary hours of detention dervice employees will be an average of 42 hours per week over a maximum of 12 weeks (inclusive of meal breaks).

Clause 23 (Hours of work) provides that ordinary hours of work will not exceed 12 hours per shift. Provision is made for rosters and guild lines are to be use.

Clause 24 (Breaks) provides that the employees are entitled to a paid meal break of not less than half an hour. Employees are entitled to 10 minutes rest break, without deduction of pay in the half of each shift. An employee is entitled to an additional 20 minutes paid break if required to work more than 2 hours overtime after completion of roster hours.

Clause 25 (Overtime) provides overtime for specified rate for hours worked in excess of 12 hours per shift or 'returning from escorting duty without a detainee'. The company cannot require an employee to work more than 16 hours in any one day. Provision is made for a circumstance when an employee on a travel and escort Aviation Assignment has not had 8 hours of duty between earning the assignment and commencing work on the next day.

Clause 26 and cl 27 concerns notifications of rosters and attendance at meetings.

Leave

The Enterprise Agreement provides for paid leave (cl 28), cashing out leave (cl 29), personal leave (cl 30), compassionate leave (cl 31), parental leave (cl 32), long service leave (cl 33), public holidays (cl 34), jury service (cl 35), court leave (cl 36), and special leave (cl 37).

Training and related matters

The Enterprise Agreement provides for employees to attend training at specified pay rate. Clause 39 provides for the employee first aid qualifications at cost to the company.

Occupational Health and Safety, and related matters

The Enterprise Agreement provides for workers' compensation benefits (cl 40), Occupation health and safety (cl 41), and clothing, equipment and tools (cl 42).

Consultation, Grievances and Dispute Resolution

Consultation term (cl 43), consultative committee structure (cl 44), grievances dispute resolution procedure (cl 45) are set out.

[33] ***Linkhill Pty Ltd v Director FWBII*** [2015] FCAFC 99 [84].