

## WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

**CITATION** : 2020 WAIRC 00804

**CORAM** : INDUSTRIAL MAGISTRATE D. SCADDAN

**HEARD** : WEDNESDAY, 26 AUGUST 2020

**DELIVERED** : THURSDAY, 17 SEPTEMBER 2020

**FILE NO.** : M 23 OF 2020

**BETWEEN** : DUC HIEN IN

**CLAIMANT**

AND

OAKSIDE GROUP PTY LTD ATF OAK FAMILY TRUST

**RESPONDENT**

**CatchWords** : INDUSTRIAL LAW – Small claim under the *Fair Work Act 2009* (Cth) – Failing to pay an amount in full – Failing to pay untaken paid annual leave upon cessation of employment – Contravention of a civil remedy provision – Withholding of entitlements – Jurisdiction of Industrial Magistrates Court to make orders sought pursuant to a contract of employment

**Legislation** : *Fair Work Act 2009* (Cth)  
*Corporation Act 2001* (Cth)  
*Fair Work Regulations 2009* (Cth)  
*Taxation Administration Act 1953* (Cth)  
*Industrial Relations Act 1979* (WA)

**Case(s) referred to in reasons:** : *Sharrock v Downer EDI Mining Pty Ltd* [2018] WAIRC 00377  
*Ghimire v Karriview Management Pty Ltd (No 2)* [2019] FCA 1627  
*WorkPac Pty Ltd v Rossato* [2020] FCAFC 84  
*McShane v Image Bollards Pty Ltd* [2011] FMCA 215  
*Mildren v Gabbusch* [2014] SAIRC 15  
*Miller v Minister of Pensions* [1947] 2 All ER 372  
*Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336

**Result** : Claim is proven in part

**Representation:**

Claimant : Self-represented  
 Respondent : Ms Y. Diao on behalf of the Respondent (as a director)

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**REASONS FOR DECISION**

- 1 The Claimant, Mr Duc Hien In, was employed as a permanent part-time manager of the North Perth Post Office by the Respondent, Oakside Group Pty Ltd as trustee for the Oak Family Trust, from 27 March 2019 to 29 October 2019 (the Claim Period).
- 2 The Claimant alleges the Respondent contravened s 323 and s 90(2) of the *Fair Work Act 2009* (Cth) (FWA) in failing to pay him:
  - (1) ordinary wages in full for work performed from 21 October 2019 to 29 October 2019; and
  - (2) untaken paid annual leave for the Claim Period following the termination of his employment.
- 3 The Claimant elected the small claims procedure under s 548 of the FWA.
- 4 Schedule I of these reasons for decision outline the jurisdiction, practice and procedure of the Industrial Magistrates Court of Western Australia (IMC).

**Background**

- 5 The Respondent is an Australian proprietary company limited by shares registered pursuant to the *Corporations Act 2001* (Cth) and operates a Post Office in North Perth (the Post Office). The Respondent is a '**constitutional corporation**' within the meaning of that term in s 12 of the FWA and is a '**national system employer**' within the meaning of that term in s 14(1)(a) of the FWA. The Claimant is an individual who was employed by the Respondent and is a '**national system employee**' within the meaning of that term in s 13 of the FWA.
- 6 The Claimant was originally contracted to undertake work for the Respondent at the Post Office and commenced permanent part-time employment with the Respondent on 27 March 2019 pursuant to a contract of employment dated 27 March 2019 (the Agreement).<sup>1</sup> The Claimant's employment ceased on 29 October 2019, although the reasons for the cessation are disputed by the parties.
- 7 Relevant to the Claimant's claim, the Agreement contained the following terms:
  - he was paid at the rate of \$29 per hour base rate '*plus super plus holiday entitlement*' and he was to be paid weekly in the first month and then fortnightly payments '*in regular*'; and
  - he was guaranteed a minimum of '*20 hours per week*' employment.
- 8 The Claimant worked the following hours and says that he was not paid wages for the work undertaken:<sup>2</sup>
  - four hours per day from 21 October 2019 to 25 October 2019 inclusive – 20 hours;
  - three and a half hours on 26 October 2019; and
  - four hours per day on 28 October 2019 and 29 October 2019 – 8 hours.

- 9 The Claimant claims 31.5 hours of unpaid wages he alleges were not paid in full and 47.69 hours of untaken paid annual leave he alleges were not paid upon the cessation of his employment.
- 10 The Respondent did not provide a final pay slip upon the Claimant's termination of employment. The Respondent did not provide any pay slips during the course of the Claimant's employment but relied upon handwritten records in a time and wages book as payslips.<sup>3</sup>
- 11 Ms Ying Diao (Ms Diao), director of the Respondent and licensee of the Post Office, agreed the Respondent did not pay the Claimant for the hours worked between 21 October 2019 and 29 October 2019, but says the Respondent was entitled to withhold payment for the time worked because the Claimant suddenly left his employment without notice.
- 12 Ms Diao also agreed that the Claimant did not take annual leave during the Claim Period and says the Respondent was not required to pay any untaken paid annual leave because the Claimant had been overpaid during his employment, both during the Claim Period and when he was a contractor.
- 13 I note the Claimant and the Respondent made various allegations against the other. For my part, these allegations had little or no relevance to the claim or to the claimed entitlements under the FWA. I put these allegations to one side.
- 14 The most significant factual issue in dispute is the circumstances surrounding the cessation of the Claimant's employment on 29 October 2019.
- 15 I also note the Claimant's claim makes no reference to his employment being covered by an industrial agreement, such as a modern award or an enterprise agreement. Similarly, the Respondent did not seek to rely upon any industrial agreement in answer to the Claimant's claim beyond Ms Diao mentioning in her evidence that the Claimant was paid above award wages.
- 16 Accordingly, I have limited my consideration and determination of the Claimant's claim to any entitlement under the FWA having regard to only the Agreement, which gives rise to an issue relating to the jurisdiction of the IMC to make the orders sought by the Claimant.

### **The Requirement To Provide Certain Employment Records**

- 17 At the outset, I note the Respondent did not maintain or provide any employment records<sup>4</sup> relevant to the Claimant's employment, save the Respondent completed a time and wages book. I also note that no pay slips were provided to the Claimant as required by s 536(1) of the FWA.
- 18 Further, the Respondent did not have any process of reconciling accrued or taken annual leave and did not make or keep any record relevant to annual leave.<sup>5</sup>
- 19 Section 557C(1) of the FWA provides that, relevantly, if '*in proceedings relating to a contravention by an employer of a civil remedy provision referred to in subsection (3) ... [a claimant] makes an allegation in relation to a matter*'; and the employer was required (by specified provisions) to keep a record in relation to the matter; and '*the employer failed to comply with the requirement*' (and there is no reasonable excuse as to why there has not been compliance), '*the employer has the burden of disproving the allegation*'.<sup>6</sup> A civil remedy provision includes s 44(1) of the FWA, which involves a contravention of a National Employment Standards (NES).<sup>7</sup>
- 20 Section 557C of the FWA positively requires a defaulting employer to disprove such an allegation and there is more than an evidentiary burden on the employer as it relates to the absence of records.<sup>8</sup>

- 21 The potential effect of s 557C of the FWA for a defaulting employer is that a claim will be upheld, notwithstanding there may be issues of credibility with respect to the employee's account.<sup>9</sup>
- 22 The Claimant said that he was never provided with pay slips or details of his accrued annual leave during the Claim Period.
- 23 Ms Diao said the Respondent maintained a handwritten time and wages book signed by Claimant, which Ms Diao says constituted the Respondent's payslips.<sup>10</sup> Beyond that, the Respondent did not keep and maintain the requisite statutory employment records.
- 24 The Respondent's time and wages book is not a payslip provided to the Claimant and does not substitute for a payslip provided to the Claimant. Therefore, in my view, the Respondent has not discharged its burden in establishing a reasonable excuse for its non-compliance with keeping and maintaining certain employment records, including payslips.

**Was The Respondent Entitled To Withhold Wages For The Claim Period?**

- 25 The Agreement is silent about the parties' obligation with respect to termination of employment.
- 26 The NES applies the minimum standards applicable to the employment of employees which cannot be displaced, and under the NES, the employer is to give to an employee notice of termination: s 61 and s 117 of the FWA.
- 27 '*A modern award or enterprise agreement may include terms specifying the period of notice*' (if any) an employee is to give to an employer: s 118 of the FWA.
- 28 Therefore, in the absence of any employment instrument requiring the Claimant to provide notice of termination of employment, the circumstances surrounding the Claimant leaving his employment are irrelevant to the Claimant's claim. That is, the outcome in the Claimant's claim for the payment of wages owed for work undertaken does not depend upon whether he voluntarily left his employment or whether he was 'dismissed' by Ms Diao.
- 29 Even if I accept Ms Diao's evidence that the Claimant suddenly left his employment on 29 October 2019 and he did not come back (that is, the Claimant left without notice), the Respondent was not entitled to withhold the Claimant's wages for the period worked from 21 October 2019 to 29 October 2019.
- 30 There are limited circumstances enabling an employer to withhold wages for work performed by the employee for the employer. These limited circumstances ordinarily require written agreement between the employer and the employee or are expressly provided for in an industrial agreement or another written law. None of these limited circumstances apply in the Respondent's case.
- 31 Further, the Respondent does not dispute that the Claimant worked the times he says that he worked from 21 October 2019 to 29 October 2019.
- 32 However, an issue arises with respect to the IMC's jurisdiction and power to make orders under the small claims procedure of the FWA where the Claimant seeks to enforce a contractual term without reference to an obligation to pay an amount under the FWA or an industrial instrument.
- 33 The Claimant relies upon s 323 of the FWA to establish that the failure by the Respondent to pay his wages in full under the Agreement is a failure to pay an amount required to be paid under the FWA.
- 34 I refer to the IMC decision in *Sharrock v Downer EDI Mining Pty Ltd* [2018] WAIRC 00377 which considered the meaning of '*to pay an amount*' and '*pay an amount under this Act*' in

s 548(1A) relative to s 545(3) of the FWA (at [33] to [49]) and the jurisdiction of the IMC to make orders arising from a breach of a contractual entitlement.

- 35 The conclusion in *Sharrock*, at [59], is that the ‘*IMC may have jurisdiction to hear a claim [and make orders] for breach of contractual entitlement in the small claim procedure*’ under the FWA, but this would depend on the nature of the claim.
- 36 The Claimant’s claim for unpaid wages relates solely to the Respondent’s failure to comply with a term of the Agreement. Absent the Agreement, there is no other industrial instrument or provision under the FWA upon which the Claimant can rely to establish a legal obligation to pay an amount the Respondent was required to pay.
- 37 While s 323 of the FWA creates an obligation to pay amounts in full for the performance of work, it says nothing of what this amount is referable to and does not create an amount for which there is a legal obligation to pay.
- 38 The IMC is not empowered under s 545(3) or s 548(1A) of the FWA to make an order for compensation and the nature of the order sought by the Claimant arises because there has been a breach of the Agreement by the Respondent in failing to pay wages. This breach is not referable to any amount required to be paid by the Respondent under the FWA or an industrial agreement.
- 39 While I am satisfied the Respondent erroneously withheld the payment of the Claimant’s wages for work performed between 21 October 2019 and 29 October 2019, I am not satisfied the payment of an amount for unpaid wages under a contract of employment is an amount the Respondent was required to pay under the FWA (rather the Respondent had, and arguably still has, an obligation to pay the amount under the Agreement).
- 40 Therefore, the IMC does not have jurisdiction to make an order under s 545(3)(a) of the FWA in respect of the Claimant’s claim for unpaid wages under the Agreement.
- 41 I note this decision does not lock out the Claimant from making a claim for denial of a contractual benefit or breach of a common law contract in other forums.

**Was The Respondent Entitled To Withhold Untaken Paid Annual Leave For The Claim Period?**

- 42 The Claimant says he never took annual leave during the Claim Period, which was not disputed by the Respondent.
- 43 The Respondent did not keep or maintain any records of the Claimant’s accrued annual leave.
- 44 The issue identified with respect to the IMC’s power to make orders under s 545(3) of the FWA does not arise in respect of the Claimant’s claim for untaken paid annual leave. The NES contained in the FWA applies ‘*to the employment of employees ... [and] cannot be displaced*’: s 61(1) of the FWA.
- 45 The NES relevant to annual leave is contained in pt 2 - 2, div 6 of the FWA. Section 87(1) of the FWA provides that ‘*[f]or each year of service ... an employee is entitled to 4 weeks of paid annual leave*’.
- 46 Section 90(2) of the FWA provides that if an ‘*employee has a period of untaken paid annual leave*’ at the cessation of employment, ‘*the employer must pay [to] the employee [that] amount that would have been payable ... had the employee taken [the] period of leave*’.

- 47 Nothing in pt 2 - 2, div 6 of the FWA provides for the withholding of untaken paid annual leave owed at the cessation of employment.
- 48 Similar to that stated with respect to the withholding of wages, in the absence of any employment instrument or other written law enabling the Respondent to withhold annual leave payments, the circumstances surrounding the Claimant leaving his employment are irrelevant to the Claimant's claim. Again, the outcome in the Claimant's claim for the payment of untaken paid annual leave does not depend upon whether he voluntarily left his employment or whether he was 'dismissed' by Ms Diao.
- 49 Even if I accept Ms Diao's evidence that the Respondent paid the Claimant additional monies over the course of his work at the Post Office, as a contractor and as an employee, there is no employment record of what monies were paid and for what purpose.
- 50 The time and wages book relied upon by the Respondent claims the Claimant was 'overpaid' on pages where the Claimant was referred to as a 'contractor'. Beyond that there is no way the Respondent's assertion of an 'overpayment' can be verified by the time and wages book.
- 51 In any event, the Respondent's reference to the Claimant being 'overpaid' and, therefore, there was some oblique basis upon which the Respondent could claim the alleged 'overpayment' as a set off of any amount owed for untaken paid annual leave is flawed.
- 52 In *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84 (*Rossato*), his Honour White J at [818] to [864] reviewed the law as in related to claims for set off and at [865] summarised the applicable principles into four propositions:
- (a) ... application of the parties [employment] contract ... [if the parties] 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 [employment] 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 ... [A]n employer cannot later reallocate an amount agreed to be paid to an employee in respect of [one purpose] ... (for example, ordinary hours of work) to meet a claim in respect of [another purpose] ... (for example, overtime pay) ... If [the purpose of the payment] arises out of the same purpose as the award obligation, it can be set off;
  - (b) ... application of the common law principles ... [w]hen 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';
  - (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 ... 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 ... implied from the parties' agreement or from the employer's conduct. (original emphasis)
- 53 On the Respondent's evidence the purpose for which the untaken paid annual leave amount was withheld was to set off alleged overpayments made to the Claimant while he was a contractor and as an employee. Leaving aside the fact that those alleged overpayments cannot be properly quantified or verified, some of the alleged overpayments were apparently made to the Claimant for doing work after 5.00 pm or when he was not even employed by the Respondent.
- 54 Simply put, the character of the alleged overpayments was completely different to that of untaken paid annual leave. There is no close correlation between the two payments to enable a claim for set off, even if one could be calculated in this case.

55 During the Claim Period, the Claimant claims 47.69 hours of annual leave and at the end of his employment he was entitled to be paid an amount the equivalent to that payable if he had taken the period of leave. As stated, the Respondent did not keep any employment records concerning the accrual or taking of annual leave and provided no reasonable excuse for failing to do so. Accordingly, I accept the Claimant's computation of accrued annual leave hours owing.<sup>11</sup>

### **Outcome**

56 Section 545(3) of the FWA enables an eligible State court (of which the IMC is an eligible State court) to '*order an employer to pay an amount to, or on behalf of, an employee of the employer if the court is satisfied that:*

- (a) *the employer was required to pay the amount under this Act or a fair work instrument; and*
- (b) *the employer has contravened a civil remedy provision by failing to pay the amount'.*

57 Therefore, there are three preconditions to an order by the IMC under s 545(3) of the FWA:

- (1) an amount payable by the employer to the employee;
- (2) a requirement to pay the amount by reference to an obligation under the FWA or a fair work instrument; and
- (3) the failure to pay constitutes a civil remedy provision under s 539(1) and s 539(2) of the FWA.

58 I note further that the Claimant elected the small claim procedure. Thus, the amount referred to in s 548(1)(a) and s 548(1A)(a) of the FWA refers to '*an amount that an employer was required to pay to ... an employee:*

- (i) *under [the FWA] or a fair work instrument; or*
- (ii) *because of a safety net contractual entitlement; or*
- (iii) *because of an entitlement of the employee arising under subsection 542(1)' of the FWA.*

59 I am satisfied that the Claimant has proven to the requisite standard the following:

- the Respondent failed to pay the Claimant's untaken paid annual leave accrued between 27 March 2019 and 29 October 2019 upon the cessation of the Claimant's employment, and I am satisfied the amount owed remains outstanding;
- the Claimant is entitled to 47.69 hours in untaken paid annual leave and the Respondent is required to pay to the Claimant the amount of \$1,383.01 pursuant to s 90(2) of the FWA; and
- in failing to pay the Claimant's untaken paid annual leave upon the cessation of employment, the Respondent has contravened s 44(1) of the FWA and such a contravention is a civil remedy provision: s 539(2) of the FWA, pt 2 - 1, item 1.

60 For the reasons already given, I am not satisfied that the Claimant's claim as it relates to unpaid wages under the Agreement is an amount the Respondent is required to pay under the FWA (nor is it a '*safety net contractual entitlement*' relating to any of the subject matters described in s 61(2) of the FWA). Accordingly, the Claimant's claim as it relates to unpaid wages under the Agreement is dismissed.

**Result**

61 I make the following order:

- pursuant to s 545(3) of the FWA and subject to any liability to the Commissioner of Taxation under the *Taxation Administration Act 1953* (Cth), the Respondent is to pay to the Claimant the amount of \$1,383.01 within 30 days of the date of this order.

**D. SCADDAN**  
**INDUSTRIAL MAGISTRATE**

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<sup>1</sup> Exhibit 1 – Attachment entitled ‘Agreement’.

<sup>2</sup> Exhibit 1 – Attachment of hours worked and Claimant’s evidence.

<sup>3</sup> Exhibit 4 – Time and wages book.

<sup>4</sup> Including pay slips in accordance with reg 3.33 of the *Fair Work Regulations 2009* (Cth).

<sup>5</sup> Contrary to reg 3.36 of the *Fair Work Regulations 2009* (Cth).

<sup>6</sup> *Ghimire v Karriview Management Pty Ltd (No 2)* [2019] FCA 1627 [13].

<sup>7</sup> Section 90(2) of the FWA applies as it constitutes a minimum standard under s 61(2) of the FWA.

<sup>8</sup> *Ghimire* [14].

<sup>9</sup> *Ghimire* [16].

<sup>10</sup> Exhibit 4.

<sup>11</sup> Exhibit 1.

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

**Jurisdiction**

- [1] An employee, an employee organization or an inspector may apply to an eligible State or Territory court for orders regarding a contravention of the civil penalty provisions identified in s 539(2) of the FWA.
- [2] The IMC, being a court constituted by an industrial magistrate, is an '*eligible State or Territory court*': FWA s 12 (see definitions of '*eligible State or Territory court*' and '*magistrates court*'); *Industrial Relations Act 1979* (WA) s 81, s 81B.
- [3] The application to the IMC must be made within six years after the day on which the contravention of the civil penalty provision occurred: FWA s 544.
- [4] The civil penalty provisions identified in s 539 of the FWA include contravening a term of the NES and failing to pay in full an amount owed under the FWA: FWA s 44(1), s 323 respectively.
- [5] An obligation upon an '*employer*' is an obligation upon a '*national system employer*' and that term, relevantly, is defined to include '*a corporation to which paragraph 51(xx) of the Constitution applies*': FWA s 12, s 14, s 42, s 47. A NES entitlement of an employee is an entitlement of an '*employee*' who is a '*national system employee*' and that term, relevantly, is defined to include '*an individual so far as he or she is employed ... by a national system employer*': FWA s 13, s 42, s 47.

**Small Claims Procedure**

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

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

**Contravention**

- [7] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the court may make orders for an *employer* to pay to an employee an amount that the employer was required to pay under the modern award: FWA s 545(3)(a).
- [8] The civil penalty provisions identified in s 539 of the FWA includes:
  - The Core provisions (including s 44(1)) set out in pt 2 - 1 of the FWA: FWA s 61(2) and s 539.
  - An '*employer*' has the statutory obligations noted above if the employer is a '*national system employer*' and that term, relevantly, is defined to include '*a corporation to which paragraph 51(xx) of the Constitution applies*': FWA, s 12 and s 14. The obligation is to an '*employee*' who is a '*national system employee*' and that term, relevantly, is defined

to include ‘*an individual so far as he or she is employed ... by a national system employer*’: FWA s 13.

- [9] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the court may make orders for:
- An employer to pay to an employee an amount that the employer was required to pay under the FWA: FWA s 545(3).
- [10] In contrast to the powers of the Federal Court and the Federal Circuit Court, an eligible State or Territory court has no power to order payment by an entity other than the employer of amounts that the employer was required to pay under the FWA. For example, the IMC has no power to order that the director of an employer company make payments of amounts payable under the FWA: *Mildren v Gabbusch* [2014] SAIRC 15.

#### Burden and standard of proof

- [11] In an application under the FWA, the party making an allegation to enforce a legal right or to relieve the party of a legal obligation carries the burden of proving the allegation. The standard of proof required to discharge the burden is proof ‘on the balance of probabilities’. In *Miller v Minister of Pensions* [1947] 2 All ER 372, 374, Lord Denning explained the standard in the following terms:

*It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say ‘we think it more probable than not’ the burden is discharged, but if the probabilities are equal it is not.*

- [12] In the context of an allegation of the breach of a civil penalty provision of the FWA it is also relevant to recall the observation of Dixon J said in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336:

*The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters ‘reasonable satisfaction’ should not be produced by inexact proofs, indefinite testimony, or indirect inferences [362].*