WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2020 WAIRC 00273
CORAM	**:**	INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD	**:**	ON THE PAPERS
DELIVERED	**:**	FRIDAY, 15 MAY 2020
FILE NO.	**:**	M 230 OF 2019
BETWEEN	**:**	BERNARD CHIPADZA **CLAIMANT** AND FREO GROUP PTY LTD **RESPONDENT**

CatchWords	**:**	INDUSTRIAL LAW – Determination of application to dismiss claim – Refusal of application to amend prior claim between the same parties – Res judicata - Abuse of process
Legislation	**:**	*Fair Work Act 2009* (Cth) *Industrial Magistrates Court (General Jurisdiction) Regulations 2005* (WA) *Workplace Relations Act 1996* (Cth) *Industrial Relations Act 1979* (WA)
Instrument	**:**	*Freo Group Pty Ltd Wheatstone Project Agreement 2013* (Cth) *Freo Group Pty Ltd Maintenance and General Services Agreement 2016* (Cth)
Case(s) referred to in reasons	**:**	***Chipadza v Freo Group Pty Ltd*** [2019] WAIRC 342 ***Neil Pearson & Co Pty Ltd v Comptroller-General of Customs*** (1995) 38 NSWLR 443 ***Jackson v Goldsmith*** (1950) 81 CLR 466 ***Kuligowski v Metrobus*** (2004) 220 CLR 363 ***United Voice WA v Minister for Health*** [2011] WAIRC 1065 ***Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd*** [2009] HCA 43 ***Walton v Gardiner*** (1992) 177 CLR 378 ***D A Christie Pty Ltd v Baker*** [1996] 2 VR 582 ***Mineralogy Pty Ltd v Sino Iron Pty Ltd*** [2020] WASC 40

Patrick Jebb as trustee for the Trafalgar West Investments Trust, Superior Lawns Australia Pty Ltd [2019] WASC 121
Nominal Defendant v Manning [2000] NSWCA 80
Citigroup Pty Ltd v Mason [2008] FCA 389
Nikoloski v Molak Plastics Pty Ltd [2005] WAIRC 2110
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 : Application determined

Representation:

Claimant : Mr P. Mullally (agent) from Workclaims Australia
Respondent : Ms J. Flinn (of counsel) as instructed by Minter Ellison

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REASONS FOR DECISION

1 The Respondent, Freo Group Pty Ltd, employed the Claimant, Bernard Chipadza, in various roles from 2009. On 26 September 2015, the Claimant was offered employment as a mechanical fitter on the Wheatstone Project.

2 On 12 November 2016, the Respondent notified the Claimant that the Respondent's contract on the Wheatstone Project would finish by 31 December 2016. Consistent with the terms of the offer of employment, the Claimant was also informed that his employment on the Wheatstone Project would end at the same time and there was an opportunity to transfer his employment on the Wheatstone Project to Bechtel.

3 On 13 November 2016, the Claimant lodged an expression of interest seeking employment with Bechtel, but he was not offered employment. The Respondent offered the Claimant three further positions (not on the Wheatstone Project), which were not accepted by the Claimant.

4 The Claimant resigned from his employment on 6 December 2016 with a finish date on 22 December 2016. The Respondent's contract on the Wheatstone Project terminated on 31 December 2016.

5 On 30 December 2016, the Claimant was paid accrued entitlements in the amount of $52,445.14, including $6,949.12 as 'severance'.

6 On or around 3 August 2018, the Claimant lodged an Originating Claim in the Industrial Magistrates Court of Western Australia (IMC) alleging the Respondent failed to comply with the *Freo Group Pty Ltd Maintenance and General Services Agreement 2016* (Cth) (EBA 2016) by failing to pay the Claimant a redundancy payment under cl 20.8 of EBA 2016 and failing to pay in lieu of notice under cl 18.1 of the EBA 2016 (M 126 of 2018).

7 On 30 May 2019, the IMC considered two issues in respect of M 126 of 2018:

a. an application by the Claimant to amend his Originating Claim, which was opposed by the Respondent (the Claimant's Application); and

b. at the parties' request, a preliminary issue regarding the application of EBA 2016 (the Preliminary Issue).

8 On the same day the IMC refused the Claimant's Application and, on 4 July 2019, the IMC delivered its Reasons for Decision[1] with respect to the Preliminary Issue.

9 On 15 July 2019, the Respondent lodged an application to dismiss M 126 of 2018.

10 On 21 October 2019, the Claimant lodged a notice of discontinuance withdrawing M 126 of 2018.

11 On 14 November 2019, the Claimant lodged a second Originating Claim alleging the Respondent contravened the *Fair Work Act 2009* (Cth) (FWA) by failing to pay a redundancy payment contrary to s 119 of the FWA and failing to pay *in lieu* of notice contrary to s 117 of the FWA (M 230 of 2019) referrable to the National Employment Standards (NES).

12 On 6 December 2019, the Respondent lodged an application to strike out or dismiss M 230 of 2019 (the Respondent's Application).

13 As a result of the situation concerning novel coronavirus, COVID-19, the parties requested and agreed for the Respondent's Application to be heard on the papers and the parties lodged written submissions.

M 126 Of 2018 And M 230 Of 2019

14 M 126 of 2018 was a claim limited to alleged breaches of EBA 2016 and, if proven, the Claimant also sought a civil penalty pursuant to the FWA. While the face sheet of the Originating Claim indicated, with a 'tick the appropriate box', a contravention of another written law, namely the FWA, no other particulars of this alleged contravention were provided until the Claimant's Application was lodged on 21 May 2019.

15 Further to this, the particulars of claim of M 126 of 2018 alleged that the Respondent refused or neglected to pay a redundancy payment contrary to cl 20.8 of EBA 2016 and refused or neglected to pay in lieu of notice under cl 18.1 of EBA 2016.

16 The Claimant claimed $35,071.34 in respect of these alleged failures.

17 The Respondent denied the claim and denied that EBA 2016 applied to the Claimant's employment. Rather, the Respondent contended that *Freo Group Pty Ltd Wheatstone Project Agreement 2013* (Cth) (EBA 2013) applied to the Claimant's employment during the claimed time period.

18 Further, the Respondent stated that the Claimant's offer of employment specified the employment on the Wheatstone Project would end on completion of the task for which the Claimant was employed, namely the operation of the warehouse and storage facility.

19 Therefore, in respect of M 126 of 2018, the Claimant was on notice from an early stage that the Respondent denied liability under EBA 2016, leaving aside any other contentions raised by the Respondent in its response.

20 A hearing of M 126 of 2018 was listed for trial on 30 May 2019. A number of programming orders were made following a pre-trial conference and the parties complied with the programming orders, including lodging with the IMC an agreed statement of facts relevant to M 126 of 2018.

21 On 15 May 2019, the IMC conducted a directions hearing for M 126 of 2018 to determine any issues, if they arose, prior to the hearing.

22 During the directions hearing, the IMC identified a number of issues concerning the application of EBA 2016 and that M 126 of 2018 did not concern a claim for redundancy under the relevant

provisions of the FWA. The Respondent raised concerns about the Claimant amending his claim at trial.

23 On 21 May 2019, the Claimant lodged the Claimant's Application, along with an Affidavit of Patrick Mullally, Industrial Advocate for the Claimant, sworn on 21 May 2019 (Mr Mullally's Affidavit). The Claimant's Application sought:

> *That there be added to the claim as follows: '8. In the alternative the respondent failed to pay notice and redundancy to the claimant (as particularised above) pursuant to s 117 and s 119 of the Fair Work Act 2009.'*

24 The reasons for the amendment were contained in Mr Mullally's Affidavit and included (relevantly):

> *2. On viewing the material for hearing I formed the view that if the EBA* [2016 EBA] *did not apply to the Claimant then the notice and redundancy provisions of the Fair Work Act 2009 can be relied upon.*
>
> *3. I have previously (on the 17th May 2019) given notice of the Claimant's intention to apply for this amendment.*

25 The Respondent opposed the Claimant's Application.

26 The Claimant's Application was heard before the trial on 30 May 2019.

27 The Claimant's Application was refused and oral reasons were given by the IMC, which included:

- the Claimant sought to introduce a new cause of action;
- the Claimant had been on notice since the Respondent lodged its response that the Respondent denied EBA 2016 applied to the Claimant's employment;
- the Claimant gave no reason for the delay in applying to amend M 126 of 2018 or why the provisions of the FWA had been overlooked until the Claimant's advocate had viewed '*the material for hearing*';
- the Claimant's Application contained no basis for why the amendment sought may apply to the Claimant;
- the need to balance the potential prejudice suffered by the parties in terms of delay and preparation of its case (relevant to the Respondent) and not having the claim determined on all fairly arguable grounds (relevant to the Claimant);
- considering case management principles, but also that the ultimate aim is the attainment of justice and a party should not be shut out of litigating an issue which is fairly arguable;
- considering whether the amendments sought were fairly arguable and determining on the information before the IMC that they were not where:
    - the Claimant was employed for a specified task for, arguably, a specified period of time and was, thus, not entitled to a redundancy payment under s 119 of the FWA under s 123 (1)(a) of the FWA; and
    - the Claimant was given at least five weeks' written notice prior to the proposed termination of his employment at the completion of the contract between the Respondent and the third party in compliance with s 117 of the FWA.

28 In M 230 of 2019 the Claimant claims the Respondent contravened another written law, namely the FWA, by failing to pay the Claimant a redundancy payment under s 119 of the FWA and failing to make a payment in lieu of notice under s 117 of the FWA.

29 The Claimant claims $26,819.26 in redundancy payment and $8,252.08 for four weeks' pay in lieu of notice, being a total of $35,071.34.

30 In M 230 of 2019, the Claimant alleges the Respondent's course of conduct between 13 November 2016 and 6 December 2016 'forced' the Claimant to resign and he then particularises five 'dot points' of the course of conduct he alleges 'forced' him to tender his resignation.

31 The Respondent lodged its response to M 230 of 2019 repeating the same reasons for the denial of the claim to that contained in M 126 of 2018.

32 The Respondent says the Claimant is not entitled to payment *in lieu* of notice under s 117 of the FWA, where the Claimant received seven weeks' notice that his employment would be ending upon the termination of the Respondent's contract with a third party.

33 The Respondent also says the Claimant is not entitled to redundancy pay under s 119 of the FWA, where s 123(1) of the FWA provides that div 2 (of s 119 of the FWA) does not apply to an employee employed for a specified time period for a specified task.

The Respondent's Application

34 The Respondent's Application seeks M 230 of 2019 be struck out or dismissed for the following reasons:

- it does not disclose any reasonable grounds for any claim that was known to the Claimant after the hearing on 30 May 2019 in respect of M 126 of 2018;
- its purpose is to cause the Respondent delay and detriment by causing it to further expend resources, and incur legal costs, where the substantive merits have been determined in favour of the Respondent in M 126 of 2018;
- it is an abuse of the Court's process and a waste of the Court's resources where M 230 of 2019 is essentially a resubmission of arguments that the Claimant has had determined by the Court and is *res judicata*; and
- it is frivolous and vexatious in nature.

35 The Respondent's Application is supported by an Affidavit affirmed by Jennifer Joan Flinn, lawyer, on 6 December 2019 with various annexures (Flinn Affidavit). The Flinn Affidavit summarises the procedural history of M 126 of 2018 and M 230 of 2019.

36 The Claimant opposes the Respondent's Application and lodged written submissions containing reference to evidence not in a proper format before the IMC (that is, affidavit evidence).

The Respondent's Contentions

37 The Respondent contends:

- a case may be struck out or otherwise dismissed under the IMC's broader power conferred by reg 7(r) of the *Industrial Magistrates Court (General Jurisdiction) Regulations 2005* (WA) (Regulations), which permits the Court to '*take any other action or make any other order for the purpose of complying with regulation 5*'. Regulation 5 of the Regulations contains the IMC's overarching duties when dealing with cases;

- the parties have already participated in litigation and the IMC has handed down judgment in favour of the Respondent;
- the Claimant's Application was dismissed;
- the Claimant is now estopped from continuing M 230 of 2019 on the basis of the doctrine of *res judicata* where there has been a final decision regarding the Claimant's entitlement to payment *in lieu* of notice and redundancy payment under the FWA and where the IMC is a judicial tribunal having competent jurisdiction of the cause or matter in litigation;
- the facts and law raised by the Claimant in M 230 of 2019 are the same as that determined in the Claimant's Application in M 126 of 2018 and were determined against the Claimant. Therefore, the certainty of outcome exists in M 230 of 2019 and, accordingly, there is no prospects of success; and
- M 230 of 2019 has been instituted for an improper purpose to circumvent the Respondent's application to dismiss in M 126 of 2018 before it could be determined by the IMC. M 230 of 2019 has been couched in slightly different terms so as to afford the Claimant a second opportunity in respect of an aspect of a claim that has already been dismissed.

The Claimant's Contentions

38 The Claimant contends:

- he was constructively dismissed when he resigned on 6 December 2016 and that this is a reasonable ground for a claim and it was not litigated on 30 May 2019;
- the subject matter of M 230 of 2019 has never been finally litigated as the IMC refused to allow the Claimant's Application to amend M 126 of 2018 and, thus, the Claimant's current claim has not been determined at all. The only issue determined by the Court in M 126 of 2018 was that EBA 2016 did not apply to the Claimant's employment;
- the doctrine of *res judicata* does not apply to M 230 of 2019 because there was no final judgment in M 126 of 2018 where a preliminary issue was determined. M 126 of 2018 was withdrawn following determination of the preliminary issue and no final judgment was given in respect of the issues in M 230 of 2019; and
- he is pursuing his lawful rights under the FWA and it would be a miscarriage of justice to strike out M 230 of 2019 and deny him the opportunity to litigate his claim.

What Was Determined In M 126 of 2018?

39 There were two determinations made in M 126 of 2018:

1. the Preliminary Issue – that is, EBA 2013, not EBA 2016, applied to the Claimant's employment by the Respondent; and
2. the Claimant's Application – that is, the Claimant's application to amend M 126 of 2018 was dismissed.

40 Following these determinations, the Claimant lodged a notice of discontinuance in M 126 of 2018 after the Respondent's application to dismiss M 126 of 2018. That is, the Claimant did not appeal the two determinations and did not proceed to final judgment.

41 In determining the Claimant's Application, the IMC considered, amongst other things, whether the Claimant had a fairly arguable case with respect to the amendments sought based on the information before the IMC in support of the Claimant's Application (that is, Mr Mullally's Affidavit) and the statement of agreed facts. The amendments sought by the Claimant mirror the Originating Claim in M 230 of 2019.

42 In determining the Preliminary Issue, the IMC was requested, as a matter of construction, to give a ruling on which of two enterprise agreements applied to the Claimant's employment. The IMC determined it was EBA 2013.

Does The Doctrine Of *Res Judicata* Or Issue Of Estoppel Apply To M 230 of 2019?

43 The doctrine of *res judicata* applies where an action has been brought and the action has been finally determined by a competent tribunal, whereupon the parties cannot challenge the adjudication in subsequent litigation as between the same parties.[2]

44 Therefore, the requirements which need to be established for *res judicata* to take effect include:

- the action is between the same parties (or their privies);
- the judicial decision which is said to create the estoppel is final; and
- the same cause of action has been decided.

45 The parties in M 230 of 2019 are the same parties in M 126 of 2018. The judicial decision determined in M 126 of 2018 was the refusal of the Claimant's Application and the Preliminary Issue. The reasons for refusing the Claimant's Application included reference to whether the Claimant's proposed amendments were fairly arguable. The Preliminary Issue determined the application of an enterprise agreement. Neither of these determinations finally determined the Claimant's cause of action, which was a claim for redundancy payment and payment *in lieu* of notice under EBA 2016, albeit that the determinations may have resulted in the Claimant lodging a notice of discontinuance.

46 Issue of estoppel, on the other hand, is based on a determination of an issue (that is, the same question) where the judicial decision creating the estoppel is final and the parties to the judicial decision are the same (or their privies).[3] Relevant to the Claimant and the Respondent, the determination of the Preliminary Issue would constitute an issue estoppel if the Claimant sought to re-litigate the application of EBA 2016.

47 However, while the determination of the Claimant's Application involved consideration of whether the amendments sought, namely the addition of alleged contraventions of s 117 of the FWA and s 119 of the FWA, was fairly arguable, it cannot be said that this involved the IMC making a final decision about the application of s 117 of the FWA and s 119 of the FWA to the Claimant's circumstances. The ultimate decision concerned whether the Claimant ought to be granted leave to amend M 126 of 2018 and, as part of that decision, the IMC expressed a view on whether, for the purposes of determining the Claimant's Application, the Claimant's proposed amendments were fairly arguable, having regard to the information it had for the purposes of making a determination.

48 Thus, in my view the doctrines of *res judicata* and issue estoppel do not apply to M 230 of 2019.

Does M 230 of 2019 Disclose Any Reasonable Grounds For The Claim?

49 The IMC has the power to summarily dispose of a claim on the basis that there is no reasonable prospect of success.[4] Further, the IMC's duties in dealing with cases are set out in reg 5 of the

Regulations.[5] Regulation 7 of the Regulations sets out what the IMC may do for the purpose of controlling and managing cases and trials, including, at reg 7(1)(h) of the Regulations '*order that an issue not be tried*', and at reg 7(1)(r) of the Regulations '*take any other action or make any other order for the purpose of complying with regulation 5*'.

50 Therefore, the IMC has the power to make the orders sought by the Respondent if it concludes that the Claimant's claim is so clearly untenable that it could not possibly succeed and, if that circumstance exists, to dismiss the claim so as to deal with the case efficiently, economically and expeditiously and to ensure that the IMC's resources are used as efficiently as possible. Further, the IMC has the power to make the orders sought by the Respondent if it otherwise concludes, in the alternative, that M 230 of 2019 has been commenced for an improper purpose, is oppressive, frivolous or vexatious.[6]

51 The balance of the Respondent's Application, in essence, seeks to have M 230 of 2019 dismissed as an abuse of process.

52 A limited form of estoppel occurs when a Court prevents a party from litigating an issue because to do so would amount to an abuse of process.

53 The categories of abuse of process are not closed,[7] but this does not mean that the concept of an abuse of process is without meaning or at large. Further, it does not mean '*that any conduct of a party … in relation to judicial proceedings is an abuse of process if it can be characterised as in some sense unfair to a party … however … abuse of process extends to proceedings that are "seriously and unfairly burdensome, prejudicial or damaging" or "productive of serious and unjustified trouble and harassment"*.[8]

54 Proceedings may be characterised as an abuse of process if, '*notwithstanding that the circumstances do not give rise to an estoppel, their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate anew a case which has already been disposed of by earlier proceedings'*.[9]

55 Categories may include:[10]

(a) proceedings which involve a deception on the court, or are fictitious or constitute a mere sham;

(b) proceedings where the process of the court is not being fairly or honestly used but is employed for some ulterior or improper purpose or in an improper way;

(c) proceedings which are manifestly groundless or without foundation or which serve no useful purpose;

(d) multiple or successive proceedings which cause or are likely to cause improper vexation or oppression.

56 An abuse of process argument may apply to repeated interlocutory proceedings.[11] However, there appears to be no reason why an abuse of process argument, not involving *res judicata* or *issue of estoppel*, could not apply to a current claim from interlocutory proceeding in another prior claim, where the two claims involve the same parties and ostensibly the same issue. Of course, whether there is abuse of process is a different question.

57 I also note that a recent Western Australian Supreme Court case, ***Mineralogy Pty Ltd v Sino Iron Pty Ltd*** [2020] WASC 40, discussed in detail general principles relevant to abuse of process.[12] I do not intend to recite the general principles referred to by Kenneth Martin J, however, two principles identified by His Honour are relevant, albeit not of themselves necessarily determinative:

(g) *An abuse of process event can extend beyond a mere situation of a party seeking to relitigate matters or issues which have been finally decided. There may be an abuse of process found by a person seeking to litigate matters which could and should have been litigated in earlier proceedings, as was observed by Lord Bingham of Cornhill in an important House of Lords decision concerning abuses of process, namely* ***Johnson v Gore Wood & Co*** *[2000] UKHL 65; [2002] 2 AC 1, 31. See also* ***Tomlinson*** *[26], where four members of the High Court of Australia had observed:*

> *…[M]aking a claim or raising an issue which was made or raised and determined in an earlier proceeding,* ***or which ought reasonably to have been made or raised for determination in that earlier proceeding****, can constitute an abuse of process even where the earlier proceeding might not have given rise to an estoppel.*

(h) *Vaughan J observed in* ***Jebb v Superior Lawns*** *[119] by reference to* ***UBS AG v Tyne****, that an abuse of process can be ascertained notwithstanding (1) the factual merits of the underlying claim having not been determined and (2) the delay in prosecuting the claim not rendering a potential fair trial as impossible.* (original emphasis)

58 Importantly, the power of a court to dismiss proceedings as an abuse of process must be exercised with caution and only in exceptional cases.[13]

59 There is no formula or general rule in determining whether an abuse of process applies, either in respect of interlocutory or in other proceedings, but the types of factors that may be considered in determining whether an abuse of process applies include:[14]

- an explanation for any delay (if delay applies);
- a change of circumstances or the discovery of new evidence;
- if evidence existed previously, any explanation for the failure to refer to the evidence earlier;
- whether the Court is invited to revisit questions of law or facts which have been fully argued;
- the availability of other remedies, including appeal rights and costs orders;
- public policy reasons in finality of litigation and preventing parties from presenting the same material to the same or a different Court in the hope the outcome will be different, or failing or avoiding putting their best case forward and then later seeking to remedy the position; and
- all the circumstances of the case, including considerations of fairness and justness in closing the gate to litigants and whether a trial is just and fair for all parties can be carried out.

60 For the following reasons, M 230 of 2019 ought to be dismissed as an abuse of process:

- M 126 of 2018 was a narrowly pleaded claim, which at all times was disputed by the Respondent on the basis that EBA 2016 did not apply to the Claimant's employment;
- the Claimant provided no explanation for the delay in applying to amend M 126 of 2018 beyond preparing for hearing;
- when the application to amend M 126 of 2018 was refused, the parties requested the IMC to rule on the applicable EBA;

- pursuant to s 565(1) of the FWA, the Claimant was entitled to appeal the determinations of the Claimant's Application and the Preliminary Issue and, pursuant to s 565(2) of the FWA, leave to appeal is not required (albeit leave may be required to admit new evidence on appeal);[15]
- following determination of the Preliminary Issue, the Respondent applied to dismiss M 126 of 2018, but before the application could be heard the Claimant lodged a notice of discontinuance;
- approximately one month later the Claimant lodged M 230 of 2019 claiming the exact same amount of money for the exact same reasons as provided in the Claimant's Application, namely a failure to comply with s 117 of the FWA and s 119 of the FWA, which had been refused;
- the reasons particularised in M 230 of 2019 must have been in the Claimant's knowledge at the time of commencing M 126 of 2018, given the subject matter, and was never raised in M 126 of 2018 and never part of the Claimant's Application;
- the Claimant has not in any way explained why the subject matter in M 230 of 2019 was never pursued in M 126 of 2018; and
- given the limitations of any costs award under the FWA, an award of costs, arguably, cannot remedy the Respondent's position: s 570(2) of the FWA.

61 The Claimant seeks to overcome the loss of an application to amend (the Claimant's Application) by commencing a new action in circumstances where the Claimant had an opportunity to run the whole of his claim, but did not seek to do so until the last minute and failed to explain the delay involving circumstances that must have been within his knowledge at the commencement of M 126 of 2018. This exposes the Respondent to the prejudice that refusing the Claimant's Application sought to avoid.

62 I have paid particular regard to the Claimant's position where the decision will operate harshly, acknowledging that in M 126 of 2018 and M 230 of 2019, from the Claimant's perspective, there is no final judgment.

63 However, having regard to all of the circumstances, including the Claimant's decisions with respect to litigating both claims, in my view, M 230 of 2019 constitutes an abuse of process where it seeks to litigate the same issue against the same party in circumstances where that issue was refused by the IMC in the Claimant's Application in M 126 of 2018. In that sense I am satisfied M 230 of 2019 is oppressive and unfairly revives previous failed litigation, and it is not efficient, economical and expeditious for the claim to continue.

The Respondent's Application Of Costs

64 The Respondent submits that if the Respondent's Application is granted the IMC ought to make an order as to costs, pursuant to s 570(2)(a) of the FWA.

65 The Claimant disputes that M 230 of 2019 is vexatious or frivolous.

66 Section 570(2) of the FWA provides that a party *may* '*be ordered to pay costs only if: (a) the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause*'.

67 Vexatiousness imports intent on the part of one party to abuse the process.[16] While I found that M 230 of 2019 ought to be dismissed an abuse of process, similar to the IMC decision in

Nikoloski (citation below), I cannot conclude the Claimant has *intended* to abuse the process. An abuse of process can result from other misguided reasons without an intention to harass or embarrass. Therefore, it cannot be said that it is axiomatic that once there has been a finding of an abuse of process, a finding of vexatiousness follows. I do not find that the Claimant intended to abuse the process. He was of the view that he could start again following the refusal of the Claimant's Application. In my view, he was wrong, but that does not amount necessarily to his actions being vexatious, nor does it amount the claim being frivolous in all the circumstances.

68 For those reasons I decline to exercise the discretion to award costs as sought by the Respondent.

Outcome

69 For the reasons given, the Respondent's Application is granted and the whole of the claim M 230 of 2019 is dismissed pursuant to reg 5 and reg 7(1)(r) of the Regulations.

70 Further, there be no order as to costs.

D. SCADDAN
INDUSTRIAL MAGISTRATE

[1] ***Chipadza v Freo Group Pty Ltd*** [2019] WAIRC 342.
[2] ***Neil Pearson & Co Pty Ltd v Comptroller-General of Customs*** (1995) 38 NSWLR 443, 450 (referring to ***Jackson v Goldsmith*** (1950) 81 CLR 466).
[3] ***Kuligowski v Metrobus*** (2004) 220 CLR 363.
[4] ***United Voice WA v Minister for Health*** [2011] WAIRC 1065.
[5] The IMC is exercising federal jurisdiction in respect of Mr Smith's claim and the Regulations apply to govern the practice and procedure in this regard.
[6] Regulation 5(2)(a) and reg 5(2)(c) of the Regulations.
[7] ***Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd*** [2009] HCA 43 [28].
[8] ***Jeffrey*** [28].
[9] ***Walton v Gardiner*** (1992) 177 CLR 378, 393.
[10] ***Jeffrey*** [27].
[11] ***D A Christie Pty Ltd v Baker*** [1996] 2 VR 582; ***Nominal Defendant v Manning*** [2000] NSWCA 80.
[12] Paragraph 68(a) to (r). In doing so, at [67], His Honour Kenneth Martin J also referred to, and adopted, applicable legal principles identified by His Honour Vaughan J in ***Patrick Jebb as trustee for the Trafalgar West Investments Trust, Superior Lawns Australia Pty Ltd*** [2019] WASC 121 [102] - [118].
[13] ***Walton v Gardiner***, 392-393.
[14] ***Nominal Defendant*** (Mason P, dissenting), (Heydon JA) (also referring to ***D A Christie*** (Charles JA)).
[15] ***Citigroup Pty Ltd v Mason*** [2008] FCA 389. ***Citigroup*** discussed similar provisions under the *Workplace Relations Act 1996* (Cth).
[16] ***Nikoloski v Molak Plastics Pty Ltd*** [2005] WAIRC 2110 [12].

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 Industrial Magistrates Court (WA) (IMC), being a court constituted by an industrial magistrate, is '***an eligible State or Territory court***': FWA, s 12 (see definitions of '***eligible State or Territory court***' and '***magistrates court***'); *Industrial Relations Act 1979* (WA), s 81 and s 81B.

[3] The application to the IMC must be made within six years after the day on which the contravention of the civil penalty provision occurred: FWA, s 544.

[4] The civil penalty provisions identified in s 539 of the FWA include contravening National Employment Standards: FWA, s 44(1).

[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 and s 47. A National Employment Standard 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 and s 47.

Contravention

[6] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the Court may make orders for an *employer* to pay to an employee an amount that the employer was required to pay under the modern award: FWA, s 545(3)(a).

[7] The civil penalty provisions identified in s 539 of the FWA include:

- The National Employment Standards set out in Part 2-2 of the FWA: FWA, s 44(1) and s 539. Those standards include obligations of employers to employees with respect to notice of termination or payment in lieu of notice as set out s 117 of the FWA and redundancy pay as set out in s 119 to s 123 of the FWA.
- An '***employer'*** has the statutory obligations noted above if the employer is a '***national system employer***' and that term, relevantly, is defined to include '*a corporation to which paragraph 51(xx) of the Constitution applies*': FWA, s 12 and s 14. The obligation is to an '***employee'*** who is a '***national system employee***' and that term, relevantly, is defined to include '*an individual so far as he or she is employed … by a national system employer*': FWA, s 13.

[8] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the court may make orders for:

- An employer to pay to an employee an amount that the employer was required to pay under the FWA: FWA, s 545(3).
- A person to pay a pecuniary penalty: FWA, s 546.

[9] In contrast to the powers of the Federal Court and the Federal Circuit Court, an eligible state or territory court has no power to order payment by an entity other than the employer of amounts that the employer was required to pay under the FWA. For example, the IMC has no power to order that the director of an employer company make payments of amounts payable under the FWA: ***Mildren v Gabbusch*** [2014] SAIRC 15.

Burden and standard of proof

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

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

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

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