

## WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

**CITATION** : 2019 WAIRC 00871

**CORAM** : INDUSTRIAL MAGISTRATE D. SCADDAN

**HEARD** : THURSDAY, 7 NOVEMBER 2019

**DELIVERED** : THURSDAY, 12 DECEMBER 2019

**FILE NO.** : M 234 OF 2018

**BETWEEN** : ADRIAN MANESCU

**CLAIMANT**

AND

BAKER HUGHES AUSTRALIA PTY. LIMITED ABN: 20 004 752  
050

**RESPONDENT**

**CatchWords** : INDUSTRIAL LAW – Application of Federal and State limitation periods to the claim – Accrual of cause of action – Alleged contraventions of *Fair Work Act 2009* (Cth) and *Professional Employees Award 2010* (Cth) – Jurisdiction of Industrial Magistrates Court under *Industrial Relations Act 1979* (WA) – Application of *Minimum Conditions of Employment Act 1993* (WA)

**Legislation** : *Corporations Act 2001* (Cth)  
*Fair Work Act 2009* (Cth)  
*Industrial Relations Act 1979* (WA)  
*Limitation Act 2005* (WA)  
*Minimum Conditions of Employment Act 1993* (WA)  
*Magistrates Court (Civil Proceedings) Act 2004* (WA)

**Instruments** : *Professional Employees Award 2010* (Cth)  
*Western Australian Professional Engineers (General Industries) Award 2004* (WA)

**Case(s) referred to in reasons:** : *Cigna Insurance Asia Pacific Ltd v Packer* [2000] WASCA 415  
*Miller v Minister of Pensions* [1947] 2 All ER 372  
*Briginshaw v Briginshaw* (1938) 60 CLR 336  
*Sammut v AVM Holdings Pty Ltd [No2]* [2012] WASC 27

**Result** : Claim is dismissed

**Representation:**

Claimant : Mr. A. Manescu (in person)  
 Respondent : Mr J. Parkinson (of counsel) from K&L Gates

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**REASONS FOR DECISION**

- 1 On 16 December 2016, Mr Adrian Manescu's (Mr Manescu) employment with Baker Hughes Australia Pty Ltd (the respondent) was terminated by reason of redundancy.
- 2 Mr Manescu was employed by Western Atlas International Incorporated (Western Atlas) in July 1997 as a data processor.<sup>1</sup> Western Atlas was acquired by the respondent and Mr Manescu's employment was transferred to that organisation in January 1999.<sup>2</sup>
- 3 On 1 December 2005, Mr Manescu was promoted to Geoscientist Staff, Grade 13.<sup>3</sup>
- 4 On 1 November 2010, Mr Manescu's employment was transferred to the respondent and his current terms and conditions of his employment remained the same.<sup>4</sup>
- 5 Between 23 and 29 March 2016, Mr Manescu's employment terms were varied to part-time with his base salary and any allowances paid pro rata.<sup>5</sup>
- 6 On 19 December 2018, Mr Manescu lodged a claim in the Industrial Magistrates Court of Western Australia (IMC), alleging the respondent failed to:
  - comply with the *Professional Employees Award 2010* (Cth) (Professional Award) and/or the *Western Australian Professional Engineers (General Industries) Award 2004* (WA) (WA Engineers Award); and
  - pay overtime and 'respect its bonus promises' made in writing.
- 7 The claim was purported to be made under the *Fair Work Act 2009* (Cth) (FWA), the *Industrial Relations Act 1979* (WA) (IR Act) and the *Minimum Conditions of Employment Act 1993* (WA) (MCE Act).
- 8 The basis for Mr Manescu's claim is that he was not paid:
  - overtime during his 20 years of service with the respondent and its predecessors; and
  - an incentive bonus until the second half of 2005, when he was promised a bonus payment which was cancelled and replaced with the promise of stable and continuous employment.
- 9 To that end Mr Manescu says that the underpayments or non-payments occurred on 16 December 2016 when the promise of stable employment was not honoured, and he was made redundant. Further, while Mr Manescu accepts the payment of a bonus payment is discretionary, he says it should not be exercised whimsically. Mr Manescu says that his employment is covered by either the Professional Award or the WA Engineers Award.
- 10 Mr Manescu claims an amount to be paid between \$35,000 and \$100,000 depending upon which calculation he uses.
- 11 The respondent denies Mr Manescu's claim in its entirety because it says:

- the claim for an underpayment related to the bonus payment and a portion of overtime is outside the applicable statutory limitation periods under the FWA, the IR Act and the MCE Act for the period claimed by him; and
  - Mr Manescu's total remuneration represented full payment and compensated him for all entitlements, benefits or additional payments that may otherwise have been due under any applicable industrial instrument or law.
- 12 At the commencement of the hearing IMC clarified, and Mr Manescu confirmed, what he was seeking in his claim, namely:
- a bonus payment from 2001 to the first quarter of 2005 according to an employee/employer agreed incentive bonus scheme pursuant to the IR Act or at common law; and
  - payment for overtime worked in excess of ordinary hours from 4 January 2011 to 3 January 2017 pursuant to the Professional Award or WA Engineers Award or the FWA.
- 13 The respondent accepts that:
- Mr Manescu was an employee of the respondent;
  - Mr Manescu is a national systems employee within the meaning of s 13 of the FWA;
  - Mr Manescu is an employee within the meaning of s 15 of the FWA;
  - it is an Australian proprietary company limited by shares registered pursuant to the Corporations Act 2001 (Cth) that engaged in substantial activity trading maintenance services for fees;
  - it is a constitutional corporation within the meaning of s 12 of the FWA;
  - it was Mr Manescu's employer until his employment was terminated by reason of redundancy; and
  - accordingly, it is a national systems employer within the meaning of s 14(1)(a) of the FWA.
- 14 Schedule I outlines the jurisdiction, practice and procedure of the IMC under the FWA.
- 15 Schedule II outlines the jurisdiction of the IMC under the IR Act.

### **Issues For Determination**

- 16 To resolve the claim, the following issues require determination:
- When did the cause of action accrue with respect to the payment of an incentive bonus and any purported overtime?
  - Is Mr Manescu subject to any limitation period with respect to any aspect of his claim?
  - Does the Professional Award contain any terms applicable to Mr Manescu and the respondent, and do the terms of the award cover his employment?
  - Is Mr Manescu otherwise entitled to overtime under the FWA, IR Act or MCE Act?
  - What entitlements, if any, are payable by the respondent to Mr Manescu?

### When Did Mr Manescu's Cause Of Action Accrue?

- 17 A cause of action accrues when all the facts have occurred which the claimant must prove in order to succeed: *Cigna Insurance Asia Pacific Ltd v Packer* [2000] WASCA 415 [31] (Malcolm CJ) (other references omitted).
- 18 The principle issue for determination in answering this question is identifying the date on which any cause of action accrued, both with respect to the payment of a bonus or incentive payment and any alleged underpayment of overtime.
- 19 Mr Manescu says this date is 16 December 2016 when he was made redundant and the respondent broke its promise to provide him with stable and continuing employment.
- 20 The respondent says that s 545(5) of the FWA, s 83A(2) of the IR Act and s 13(1) of the *Limitation Act 2005* (WA) (Limitation Act) applies and Mr Manescu is statute barred in relation to both aspects of his claim for any alleged underpayment that may have accrued prior to 19 December 2012.

### What is the applicable date with respect to the accrual of a cause of action related to the alleged failure to pay a bonus or incentive payment?

- 21 According to Mr Manescu:<sup>6</sup>
- in the first half of 2001, David Barr, company president for Baker Atlas, informed Geoscience employees at a town hall meeting that a bonus would be paid, and Mr Manescu was provided with a letter confirming his qualification in the quarterly bonus plan to be implemented in 2001;
  - on 10 August 2001 the bonus was cancelled by email, which Mr Manescu described as done for 'bogus reasons';
  - no performance bonus was paid between 2001 and the second quarter of 2005; and
  - the payment of a performance bonus resumed in the third quarter of 2005 and was paid thereafter for the remainder of 2005 to 2016.
- 22 In clarifying his evidence, Mr Manescu stated that he thinks there is a contractual failure by the respondent where in December 2016 he was 'let go' contrary to a previous comment made by someone that he would have 'stable employment'. As I understood his evidence, Mr Manescu's assertion is that once the respondent broke its purported promise to him of stable employment and made him redundant, the bonus payments from 2001 to 2005 were required to be paid to him.
- 23 I do not accept Mr Manescu's submission that the applicable date on which the cause of action accrued for the alleged failure to pay an incentive payment for the period 2001 to the second quarter of 2005 was 16 December 2016.
- 24 Leaving aside his eligibility for a bonus or incentive payment or what the terms of any bonus or incentive payment might have been, it is clear from Mr Manescu's evidence that when a bonus or incentive payment was paid from the third quarter of 2005 to sometime in 2016, it was paid as and when it fell due under the terms of any bonus scheme.
- 25 Further, Mr Manescu was aware from August 2001 that the incentive payment that he thought would be paid was not paid and he was aware of the reasons, bogus or otherwise, for why it had not been paid. Thereafter, he was aware that he had not been paid a bonus payment from August 2001 to the third quarter of 2005.

- 26 Therefore, the date on which his cause of action (leaving aside whether he has one or not) accrued for any purported failure to pay a bonus or incentive payment was the date on which the payment would be paid but was not paid. The latest date that this must have been was sometime in mid-2005. That is, on Mr Manescu's evidence a bonus payment for the second quarter of 2005 would be paid on or around 30 June 2005 where he received a performance bonus in the third quarter of 2005.
- 27 In this case the exact date in 2005 is unimportant because Mr Manescu lodged his claim on 19 December 2018, which is some 13 years after the latest bonus payment Mr Manescu says that he was entitled to receive.

What is the applicable date with respect to the accrual of a cause of action related to the alleged failure to pay overtime?

- 28 Mr Manescu clarified his claim for overtime which he claims is for hours worked in excess of 38 hours per week from 4 January 2011 to 3 January 2017 and he stated:
- on his conservative guess he worked about 5% more than the minimum 38 hours per week which he says equates to around 42 hours per week every week; that is between two and four hours per week overtime every week;
  - this additional work comprised attendance at technical meetings, conferences and carrying out scientific work; and
  - he did not maintain any personal records of overtime hours he says he worked but says the respondent has a time writing procedure and this should reflect the overtime hours he worked.
- 29 Mr Manescu says that his entitlement to be paid overtime is under the Professional Award and/or the FWA.
- 30 Again, leaving aside his eligibility for overtime payment, on Mr Manescu's evidence he was not paid overtime for hours he says he worked in excess of 38 hours per week every week from 4 January 2011 to 3 January 2017. That is, each alleged non-payment or underpayment of overtime gives rise to a separate cause of action.
- 31 Mr Manescu was paid on the fifteenth of each month.<sup>7</sup>
- 32 Therefore, on the fifteenth of each month, on Mr Manescu's evidence, he expected he should be paid overtime for the preceding month's overtime hours worked.
- 33 Mr Manescu lodged his claim for failure to pay overtime for hours worked in excess of 38 hours per week on 19 December 2018.
- 34 Therefore, the first date on which his cause of action accrued for any purported failure to pay overtime for hours worked in excess of 38 hours per week was 15 January 2011 and the fifteenth of each month thereafter.

**Is Mr Manescu Subject To Any Limitation Period With Respect To Any Aspect Of His Claim?**

Limitation period applicable to the payment of a bonus or incentive payment

- 35 Section 544 of the FWA provides:

*A person may apply for an order under this Division in relation to contravention of one of the following only if the application is made within 6 years after the day on which the contravention occurred:*

- (a) *a civil remedy provision;*
- (b) *a safety net contractual entitlement;*
- (c) *an entitlement arising under subsection 542(1).*

- 36 The Division referred to in s 544 of the FWA is Division 2 in Chapter 4, Part 4.1, which contains the power of courts to make orders.
- 37 The IMC has limited powers to make orders under the FWA. Relevant to Mr Manescu's claim, the orders the IMC can make are contained in s 545(3) of the FWA. That is, the IMC may order an employer to pay an amount to an employee 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.*
- 38 For the purposes of determining whether s 544 of the FWA applies to Mr Manescu's claim, it is assumed that the failure to pay a bonus or incentive payment is a contravention of a civil remedy provision and the respondent is required to pay the amount claimed under the FWA or Professional Award. That is, for the purposes of determining a preliminary issue of whether Mr Manescu's claim is subject to a limitation period, I accept Mr Manescu's claim most favourable to him under the relevant provisions of the FWA.
- 39 Mr Manescu's claim for a bonus or incentive payment must fail under the FWA where his application was made well outside the six-year time limit on which the contravention occurred. With respect to the payment of a bonus payment, the date on which the contravention was found to have occurred was between 2001 to mid-2005, some 13 to 17 years out of time.
- 40 Therefore, if Mr Manescu's claim for the failure to pay a bonus or incentive payment is made under the FWA, he is statute barred from doing so pursuant to s 544 of the FWA and this aspect of his claim must be dismissed.
- 41 Section 82A of the IR Act provides:
- An application under section 77, 83, 83B, 83E or 84A shall be made within 6 years from the time of the alleged contravention or failure to comply.*
- 42 The IMC has limited jurisdiction under the IR Act: s 81A of the IR Act. Relevant to Mr Manescu's claim, the IMC's enforcement jurisdiction is contained in s 83 of the IR Act and applies to the enforcement of an award, an industrial agreement, an employer-employee agreement and an order made by the Western Australian Industrial Relations Commission (WAIRC) (which has no application in this case): s 83(1) and s 83(2) of the IR Act.
- 43 Again, for the purposes of determining whether s 82A of the IR Act applies to Mr Manescu's claim, it is assumed that the failure to pay a bonus or incentive payment is a contravention of one of the instruments in s 83(2) of the IR Act.<sup>8</sup> That is, again for the purposes of determining a preliminary issue of whether Mr Manescu's claim is subject to a limitation period, I accept Mr Manescu's claim most favourable to him under the relevant provisions of the IR Act.
- 44 Mr Manescu's claim for a bonus or incentive payment must also fail under the IR Act as his application was made well outside the six-year time limit on which the contravention occurred for the reasons already given.
- 45 Therefore, if Mr Manescu's claim for the failure to pay a bonus or incentive payment is made under the IR Act, he is statute barred from doing so pursuant to s 82A of the IR Act and this aspect of his claim must be dismissed.

46 Further, pursuant to s 83A(2) of the IR Act, an order for the payment of an entitlement to be paid under an industrial instrument referred to in s 83(2) of the IR Act can only be made under s 83A(1) provided the amount relates to a period not being more than six years prior to the commencement of proceedings. For reasons already given, where Mr Manescu commenced proceedings in the IMC on 19 December 2018, any payment for a bonus or incentive payment from 2001 to mid-2005 is outside the limitation period referred to in s 83A(2) of the IR Act.

47 Section 7 of the MCE Act provides:

*A minimum condition of employment may be enforced –*

- (aa) *where the condition is implied in an employer-employee agreement, under section 83 of the IR Act; or*
- (b) *where the condition is implied in an award, under Part III of the IR Act; or*
- (c) *where the condition is implied in a contract of employment, under section 83 of the IR Act as if it were a provision of an award, industrial agreement or order other than an order made under section 32 or 66 of that Act.*

48 Further, s 13(1) of the Limitation Act provides:

*An action on any cause of action cannot be commenced if 6 years have elapsed since the cause of action accrued [subject to any exemptions that do not apply in this case or have not been applied in this case].*

49 Thus, if Mr Manescu's claim for a failure to pay a bonus or incentive payment from 2001 to mid-2005 is made under s 7 of the MCE Act, any application to the IMC for the enforcement of minimum conditions of employment is subject to the same legislative regime contained in s 83 of the IR Act, and, accordingly, s 82A and s 83A(2) of the IR Act apply to statute bar the enforcement proceedings or the making of an order to pay an amount of money purported to be owed.

50 However, if Mr Manescu relies upon principles applicable to common law breach of contract, the IMC has no jurisdiction to consider a claim for breach of contract or denial of contractual benefits which is within the jurisdiction of the WAIRC or the IMC. Further to this, Mr Manescu would then be subject to the limitation period in s 13(1) of the Limitation Act.

#### Limitation period applicable to the payment of overtime

51 Subject to one further point related to the application of the FWA, the reasons stated from [35] to [46] apply equally to the limitation period applicable to the alleged failure to pay overtime.

52 The further point related to the FWA is the application of s 545(5) of the FWA which provides that

*[a] court must not make an order under this section in relation to an underpayment that relates to a period that is more than 6 years before the proceedings concerned commenced.*

53 The effect of s 545(5) of the FWA means the IMC, even if satisfied of the factors in s 545(3), cannot make an order for the payment of an amount of money relating to a period more than six years before Mr Manescu made his claim in the IMC.

54 Therefore, leaving aside the merits of the claim, Mr Manescu's claim for failure to pay overtime for hours worked in excess of 38 hours is subject to a six-year limitation period (and thus is statute barred) from 19 December 2018. The effect of this limitation period is that Mr Manescu can make a claim for overtime for the period after 19 December 2012 only.

Outcome of the applicable limitation periods to Mr Manescu's claim

- 55 Mr Manescu's claim for the alleged failure by the respondent to pay a bonus or incentive payment for the period 2001 to mid-2005 is statute barred under the FWA, the IR Act and the MCE Act, and this part of the claim is dismissed.
- 56 The IMC has no jurisdiction to consider Mr Manescu's claim for the payment of a bonus or incentive payment for the period 2001 to mid-2005 under the common law principles applicable to breach of contract.
- 57 Mr Manescu's claim for the alleged failure by the respondent to pay overtime as it relates to the period prior to 19 December 2012 is statute barred under the FWA, the IR Act and the MCE Act, and this part of the claim is dismissed.

**Is Mr Manescu Entitled To Overtime Under The Professional Award Or WA Engineers Award?**

- 58 In simple terms, Mr Manescu's claim in the IMC, as it relates to the respondent's alleged failure to pay overtime, can only succeed if Mr Manescu demonstrates on the balance of probabilities:
- the FWA or one of the awards referred to by him apply to his employment with the respondent;
  - the FWA or a term of the award has been contravened by the respondent; and
  - the IMC can make an order for payment under the FWA or the IR Act.
- 59 As previously stated, the IMC has no jurisdiction to consider a bare common law breach of contract claim.
- 60 During the hearing, Mr Manescu referred principally to the respondent's failure to comply with the Professional Award and/or the FWA by not paying him overtime for hours worked in excess of 38 hours per week. Mr Manescu made no reference in evidence or submission about the applicability of the WA Engineers Award and relied solely on the terms of the Professional Award.

Do overtime rates apply under the Professional Award?

- 61 It is convenient to consider whether overtime rates in the manner claimed by Mr Manescu apply under the Professional Award. If overtime rates do not apply there can be no contravention of the Professional Award. If there is no contravention of the Professional Award then there is no contravention of a civil penalty provision under the FWA and no contravention of an industrial instrument under the IR Act, and, therefore, no power to make an order for a payment of an amount of money purported to be owed.
- 62 Again, for the purposes of determining whether Mr Manescu is entitled to overtime pay for hours worked in excess of 38 hours per week under the Professional Award, it is assumed that the Professional Award applies to his employment with the respondent.
- 63 Clause 2.2 of the Professional Award provides that

*[t]he monetary obligations imposed on employers by this award may be absorbed into overaward payments. Nothing in this award requires an employer to maintain or increase any overaward payment.*



64 Clause 18 of the Professional Award details ordinary hours of work and rostering. In cl 18.1 the ordinary hours of work are 38 hours per week. In cl 18.2 the employer is to compensate for, amongst other things:

- (a) *time worked regularly in excess of ordinary hours of duty;*
- (d) *time spent carrying out professional engineering duties or professional scientific/information technology duties outside of the ordinary hours of duty over the telephone or via remote access arrangements; or*
- (e) *time worked on afternoon, night or weekend shifts.*

In cl 18.3 of the Professional Award the compensation may include, amongst other things:

- (c) *taking this factor into account in the fixation of annual remuneration.*

65 Clause 18.3 of the Professional Award requires that any compensation or remuneration for additional work in cl 18.2 of the Professional Award will include consideration of the penalty rate or equivalent and the conditions as applicable from time to time to the majority of employees employed in a particular establishment in which the employee is employed. Further, under cl 18.4 of the Professional Award the compensation and/or remuneration will be reviewed annually to ensure that it is set at an appropriate level having regard to the factors listed in cl 18 of the Professional Award.

66 The minimum wage payable to full-time employees is contained in cl 15 of the Professional Award (varied from time to time). The minimum wage is an annual wage. No other provision or clause of the Professional Award contemplates the payment of hourly overtime rates.

67 Mr Manescu's evidence concerning the payment of overtime is outlined in [28] to [31] above.

68 Mr Manescu's claim in relation to an alleged failure to pay overtime is not referable to any clause in the Professional Award, and, to the extent that he sought to clarify his claim in his evidence, it is apparent that he seeks to be paid for the hours he says he worked in excess of 38 hours per week.

69 The Professional Award makes no provision for an hourly rate payable for hours worked in excess of 38 hours per week. The Professional Award contemplates two things:

- (1) as a professional employee, the employee will be paid an annualised salary; and
- (2) where the employee regularly works in excess of 38 hours per week the employer will compensate the employee for doing so and such compensation can be considered in the fixation of the annual remuneration.

70 Therefore, where the Professional Award does not contain, nor does it contemplate, the payment of an hourly rate for hours worked in excess of 38 hours per week, the respondent cannot have contravened the Professional Award in the manner alleged by Mr Manescu.

#### An alternate argument under the Professional Award

71 Mr Manescu does not allege the respondent contravened the Professional Award by failing to pay him compensation in accordance with cl 18.3 and cl 18.4 for time worked in accordance with cl 18.2 of the Professional Award. Further, he led little, or no, evidence consistent with this allegation, save, without more, he says the respondent failed to keep track with salary increases in the oil and gas industry and to provide promotions.<sup>9</sup>

- 72 But even if Mr Manescu's oblique reference in submission documents enables consideration of an alleged contravention of cl 18.2 or cl 18.3 of the Professional Award for failing to compensate him for overtime worked, Mr Manescu's claim is, arguably, deficient.
- 73 In cross-examination, Mr Manescu was asked about salaried amounts he was paid, which included the following annual amounts:
- April 2013 - \$132,230
  - March 2014 - \$137,518
  - April 2015 - \$140,957 (Mr Manescu disagreed with this figure saying it was closer to \$134,000)
  - April 2016 - \$140,957 (again, Mr Manescu disagreed with this figure saying it was closer to \$134,000)
- 74 Notably the above figures do not include bonus or incentive payments.
- 75 The minimum wage for a level 4 professional/experienced medical research employee in July 2019 was \$74,885 (gross) based on a 38-hour week.<sup>10</sup>
- 76 Having regard to Mr Manescu's evidence that he estimates he was working between two and four hours per week more than the ordinary 38 hour working week, he was paid an annualised salary in excess of the applicable minimum wage for July 2019 (which is the minimum wage for the same position three years after Mr Manescu's cessation of employment) as follows:
- April 2013 - \$57,345
  - March 2014 - \$62,633
  - April 2015 - \$66,072 (or \$59,115 if Mr Manescu's oral assertion is accepted)
  - April 2016 - \$66,072 (or \$59,115 if Mr Manescu's oral assertion is accepted)
- 77 On the assumption that Mr Manescu never took annual leave in any year from 2013 to the end of 2016, on his own estimate of hours worked per week, he worked an additional maximum 208 hours per year, which equates to the equivalent of between approximately \$275 to \$298 per hour for purported overtime hours worked over the minimum wage for July 2019.
- 78 Beyond this, however, Mr Manescu:
- led no evidence consistent with his assertion his annualised salary was in the range of academia rather than industry standard (whatever that might be);
  - led no evidence how the annualised salary he was paid failed to compensate him for purported work undertaken outside of the ordinary 38 hours per week;
  - led no evidence of what the applicable compensation was having regard to comparable positions in the same or similar industry working under the same or similar terms or conditions; and
  - at best, estimated what he thought he should be paid based on an estimate of purportedly between two and four hours per week worked in excess of 38 hours per week.
- 79 With respect to Mr Manescu, he has made an oblique assertion that in some way he was not properly compensated, which, when regard is had to the minimum wage in July 2019 that would be applicable to him if the Professional Award applied to his employment and to the annualised

salary he was paid each year from 2013 to 2016, is not proven to the requisite standard on the evidence before the IMC.

### **Outcome Of The Payment Of Overtime Under The Professional Award And The WA Engineers Award**

- 80 There is no provision or clause in the Professional Award requiring the payment of overtime rates on an hourly basis for work done over the ordinary hours of 38 hours per week.
- 81 The respondent cannot contravene a clause of the Professional Award that does not exist.
- 82 While Mr Manescu's claim was for an alleged failure to pay overtime for hours worked in excess of 38 hours per week, when consideration is given to a possible alternate argument referable to cl 18.2 or cl 18.3 of the Professional Award, Mr Manescu has not proven to the requisite standard that the respondent did, in fact, contravene either of these clauses of the Professional Award by failing to compensate him for time worked in excess of his ordinary hours of duty.
- 83 As stated, Mr Manescu led no evidence about the applicability of the WA Engineers Award to his employment with the respondent. Mr Manescu's claim always applied the Professional Award to his employment. Accordingly, I have not considered, nor do I intend to consider, the WA Engineers Award where Mr Manescu has made no other reference to this award save for writing it on the front of the claim form and referring to it in the alternative to Professional Award on page 2 of a document entitled 'Statement on The Grounds of Contractual Entitlement Underpayment'. The IMC is not required to discover a claimant's claim.
- 84 I am not satisfied that Mr Manescu has proven his claim to the requisite standard that the respondent has contravened a term of the Professional Award as it relates to an alleged failure to pay overtime (based on the assumption that the Professional Award applies to him and the respondent).

### **Is Mr Manescu Entitled To Payment For Overtime Under The FWA?**

- 85 Mr Manescu's claim makes no substantive reference to how he says the respondent has breached the FWA in failing to pay him overtime as alleged.
- 86 While the National Employment Standards apply to Mr Manescu and his employment by the respondent, none of the minimum standards in s 61(2) of the FWA refer to the requirement to pay overtime in the way alleged by Mr Manescu.
- 87 Mr Manescu's claim otherwise makes no other reference to how he says the respondent has breached the FWA.<sup>11</sup>
- 88 Accordingly, I am not satisfied that Mr Manescu has proven his claim to the requisite standard that the respondent has contravened the FWA as it relates to an alleged failure to pay hourly rates of overtime for hours worked in excess of 38 hours per week.

### **Is The IR Act Or MCE Act Relevant To Mr Manescu's Claim?**

#### **Enforcement of an alleged provision of an industrial instrument under the IR Act**

- 89 Pursuant to s 83 of the IR Act, an application to the IMC for enforcement can only be made in respect of an instrument to which subsection (1) applies. These instruments are detailed in s 83(2) of the IR Act and include an award, an industrial agreement, an employer-employee agreement or an order made by the WAIRC. This provision is also referable to s 7 of the MCE Act.

- 90 To invoke the IMC's enforcement jurisdiction, a claimant must first identify which instrument he or she says they are seeking to enforce. In Mr Manescu's case, he can only rely upon the Professional Award as there is no other applicable industrial agreement (referred to him in any substantive way), there is no employer-employee agreement (as that term is defined in s 7 of the IR Act) and no order made by the WAIRC.
- 91 Thereafter, once the instrument is identified, consistent with the words in s 83(1) of the IR Act, Mr Manescu must also identify the provision he says has been contravened or not complied with by the respondent.
- 92 Relevant to Mr Manescu's claim, he refers to a failure to comply with the Professional Award.
- 93 One of the orders sought by Mr Manescu is the payment of an amount of money he says he was entitled to be paid under the Professional Award, namely overtime rates for hours worked in excess of 38 hours per week. Any such order can only be made by the IMC under s 83A(1) of the IR Act in proceedings under s 83, where the employee has not been paid an amount to which they are entitled under the relevant instrument.
- 94 Leaving aside the IMC's jurisdiction to consider an application under s 83 of the IR Act for an alleged contravention of a Federal Modern Award, Mr Manescu has made an ambit claim. He has not identified the provision he says has been contravened by the respondent.
- 95 Further, for the same reasons stated in [63] to [69] above, the Professional Award contains no clause referable to the payment of hourly overtime rates for work undertaken in excess of 38 hours per week. Further, for the same reasons stated in [71] to [78] above, even if Mr Manescu relied upon the alternative argument, he has failed to prove his claim to the requisite standard that his annualised salary failed to compensate him in the manner provided in cl 18.2 and cl 18.3 of the Professional Award.
- 96 But in any event, the definition of '*award*' in s 7 of the IR Act means '*an award made by the Commission under that Act*'. An '*employee-employer agreement*' means '*an employer-employee agreement provided for by section 96UA*'.
- 97 The Professional Award is an award made under the FWA and not by the WAIRC under the IR Act. It is not a state-based award. There is no employer-employee agreement, or other industrial agreement or order made by the WAIRC, applicable to Mr Manescu and the respondent. Therefore, there is no instrument to which s 83(1) of the IR Act applies capable of enforcement in the IMC.

#### Enforcement of an alleged condition implied by the MCE Act

- 98 There are two reasons why the MCE Act does not apply to Mr Manescu's claim for the payment of overtime for time worked in excess of 38 hours per week:
- Section 3 of the MCE Act contains the definition of *minimum condition of employment* which includes:
    - (aa) *the requirement as to maximum hours of work prescribed in Part 2A; or*
    - (a) *a rate of pay prescribed by this Act; or*
    - (b) *a requirement as to pay, other than a rate of pay, prescribed by this Act; or*
    - (c) *a condition for leave prescribed by this Act; or*
    - (d) *the use, in a manner prescribed by this Act, of a condition for leave prescribed by this Act; or*

(e) a condition prescribed by Part 5.

- Pursuant to s 5(1) of the MCE Act, the minimum conditions of employment are deemed to be implied into any employer-employee agreement, any award or if a contract of employment is not governed by an employee-employer agreement or an award, in that contract.
- Pursuant to s 5(1) of the MCE Act,
  - [a] *provision in, or condition of, an employer-employee agreement, an award or a contract of employment that is less favourable to the employee than a minimum condition of employment has no effect.*
- Section 7 of the MCE Act provides that a minimum condition of employment is enforceable as provided in (aa), (b) and (c).
- Mr Manescu claims payment of overtime worked in excess of 38 hours per week. The payment of overtime is not a minimum condition of employment as that term is defined in the MCE Act and thus is not implied in a contract of employment under s 7(c) of the MCE Act. Therefore, an alleged non-payment of overtime for hours worked in excess of 38 hours per week cannot be enforced under s 7 of the MCE Act.
- The definition of ‘award’ in s 3 of the MCE Act means ‘an award made under the IR Act and includes any industrial agreement or order of the Commission under that Act’. An ‘employee-employer agreement’ in s 3 of the MCE Act means ‘an employer-employee agreement under Part VID of the IR Act’.
- As stated previously, the Professional Award is an award made under the FWA and not the IR Act. There is no other industrial agreement or order of the WAIRC or employer-employee agreement applicable to Mr Manescu and the respondent.

99 Therefore, s 7(aa) and s 7(b) of the MCE Act does not apply to the Professional Award or to Mr Manescu and any condition (if it existed) cannot be enforced under s 83 of the IR Act.

### **Outcome Of The Payment Of Overtime Under The FWA, The IR Act And The MCE Act**

100 Mr Manescu has not identified an applicable provision of the FWA that he says the respondent has contravened with respect to the alleged failure to pay hourly overtime for hours purported to have been worked in excess of 38 hours per week.

101 Further, and in any event, I am not satisfied that Mr Manescu has proven his claim to the requisite standard that the respondent has contravened the FWA as it relates to an alleged failure to pay hourly rates of overtime for hours worked in excess of 38 hours per week.

102 The IMC does not have jurisdiction under s 83 of the IR Act to consider Mr Manescu’s application for enforcement of an alleged failure to pay overtime rates for purported hours worked in excess of 38 hours per week in contravention of instrument to which s 83(1) of the IR Act applies, as it relates to a provision of the Professional Award or as a deemed minimum condition of employment.

103 Further, and in any event, I am not satisfied that Mr Manescu has demonstrated that any such condition of employment (if it exists) is a minimum condition of employment or a term of the Professional Award capable of enforcement under s 83 of the IR Act.

**Result**

104 Having regard to the reasons provided, Mr Manescu's claim is dismissed.

**D SCADDAN  
INDUSTRIAL MAGISTRATE**

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<sup>1</sup> Exhibit 2 - witness statement of Ignatius Jayapragasam dated 24 October 2019 at annexure IJ-1.

<sup>2</sup> Exhibit 2 at annexure IJ-2.

<sup>3</sup> Exhibit 2 at annexure IJ-3.

<sup>4</sup> Exhibit 2 at annexure IJ-4.

<sup>5</sup> Exhibit 2 at annexure IJ-5.

<sup>6</sup> Exhibit 1 - witness statement of Adrian Manescu lodged on 17 October 2019 at [13] to [24].

<sup>7</sup> Exhibit 2 at annexures IJ-2, IJ-3.

<sup>8</sup> For the avoidance of doubt, this assumption in no way reflects a determination that an alleged failure to pay an incentive bonus is a contravention of one of the industrial instruments referred to in s 83(2) of the IR Act.

<sup>9</sup> Exhibit 1 at [40].

<sup>10</sup> Mr Manescu's employment type is not level 5 because he is not a medical research employee, experienced or otherwise.

<sup>11</sup> In particular, any reference to s 323 of the FWA as it may relate to consideration of 'safety net contractual entitlements'. However, the definition of 'safety net contractual entitlement' in s 12 of the FWA is referable to s 61(2) of the FWA in any event.

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

**Jurisdiction**

- [1] An employee, an employee organisation 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. IMC being a court constituted by an industrial magistrate, is ‘an eligible State or Territory court’: s 12 of the FWA (see definitions of ‘eligible State or Territory court’ and ‘Magistrates Court’); the IR Act, s 81, s 81B.
- [2] The application to the IMC must be made within six years after the day on which the contravention of the civil penalty provision occurred: s 544 of the FWA.
- [3] The civil penalty provisions are identified in s 539 of the FWA.
- [4] 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’: s 14, s 12 of the FWA. 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’: s 13 of the FWA. It is not in dispute and it was found that the respondent is a corporation to which paragraph 51(xx) of the Constitution applies and that the claimant was employed by the respondent.
- [5] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the court may make orders for a person to pay a pecuniary penalty: s 546 of the FWA.

**Burden And Standard Of Proof**

- [6] In an application under the IR Act, the claimant carries the burden of proving the claim. 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.*
- [7] In the context of an allegation of the breach of a civil penalty provision of the IR Act 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].*
- [8] Where in this decision it is stated that a finding has been made, the finding is made on the balance of probabilities. Where it is stated that a finding has not been made or cannot be made, then no finding can be made on the balance of probabilities.

**Practice And Procedure Of The Industrial Magistrates Court**

- [9] The IR Act provides that, except as prescribed by or under the FWA, the powers, practice and procedure of the IMC is to be the same as if the proceedings were a case under the *Magistrates Court (Civil Proceedings) Act 2004* (WA): s 81CA. Relevantly, regulations



prescribed under the IR Act provide for an exception: a court hearing a trial is not bound by the rules of evidence and may inform itself on any matter and in any manner as it thinks fit: reg 35(4).

- [10] In *Sammut v AVM Holdings Pty Ltd [No2]* [2012] WASC 27, Commissioner Sleight examined a similarly worded provision regulating the conduct of proceedings in the State Administrative Tribunal and made the following observation (omitting citations):

*... The tribunal is not bound by the rules of evidence and may inform itself in such a manner as it thinks appropriate. This does not mean that the rules of evidence are to be ignored. The more flexible procedure provided for does not justify decisions made without a basis in evidence having probative force. The drawing of an inference without evidence is an error of law. Similarly, such error is shown when the tribunal bases its conclusion on its own view of a matter which requires evidence [40].*

**Schedule II: Jurisdiction, Practice And Procedure Of The Industrial Magistrates Court Of Western Australia Under The *Industrial Relations Act 1979* (WA)**

**Jurisdiction**

- [1] The IMC has the jurisdiction conferred by the IR Act and other legislation. Section 83 and s 83A of the IR Act confer jurisdiction on IMC to make orders for the enforcement of a provision of an industrial agreement where a person has contravened or failed to comply with the agreement. If the contravention or failure to comply is proved, the IMC may issue a caution or impose a penalty and make any other order, including an interim order, necessary for the purpose of preventing any further contravention. The IMC must order the payment of any unpaid entitlements due under an industrial agreement.
- [2] The same principles referred to in Schedule 1 at [6] to [10] otherwise apply.