WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2020 WAIRC 00388
CORAM	**:**	INDUSTRIAL MAGISTRATE M. FLYNN
HEARD	**:**	FRIDAY, 8 MAY 2020
DELIVERED	**:**	THURSDAY, 2 JULY 2020
FILE NO.	**:**	M 77 OF 2016
BETWEEN	**:**	PETA BUCHANAN **CLAIMANT** AND G&R ROSSEN PTY LTD **RESPONDENT**

CatchWords	**:**	INDUSTRIAL LAW – FAIR WORK – Assessment of pecuniary penalties for contraventions of *Fair Work Act 2009* (Cth) – Liability of non-party to a pecuniary penalty order – Costs – application for claimant's costs pursuant to *Fair Work Act 2009* (Cth) pursuant to s 570(2) – Whether the respondent's defence of claim was an 'unreasonable act that caused the other party to incur the costs' – Liability of non-party to costs
Legislation	**:**	*Fair Work Act 2009* (Cth) *Long Service Leave Act 1958* (WA) *Taxation Administration Act 1953* (Cth) *Judiciary Act 1903* (Cth) *Industrial Relations Act 1979* (WA)
Case(s) referred to in reasons:	**:**	***Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd (ACN 075 400 529)*** [2006] FCA 1427 ***Fair Work Ombudsman v Al Hilfi*** [2015] FCA 313 ***Association of Professional Engineers, Scientists and Managers Australia v Bulga Underground Operations Pty Ltd*** [2019] FCA 1960 ***Blight v Integrity Estates Pty Ltd & Nikou*** [2019] SAET 39 ***Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)*** [2017] FCA 557 ***Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith*** [2008] FCAFC 8; (2008) 165 FCR 560

NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission [1996] FCA 1134; (1996) 71 FCR 285, 295
Jones v Human Synergistics Australia Limited [2016] FCCA 368
Murrihy v Betezy.com.au Pty Ltd (No 2) [2013] FCA 1146
Gibbs v Mayor, Councillors and Citizens of City of Altona (1992) 37 FCR 216
Pas v State of Western Australia [2009] WASCA 210
Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336
Liquor Hospitality and Miscellaneous Union v Arnotts Biscuits Ltd [2010] FCA 770; (2010) 188 FCR 221
Kelly v Fitzpatrick [2007] FCA 1080
Textile Clothing Footwear Union Of Australia v Icon Print Innovations Pty Ltd [2018] FCCA 1135
Mildren v Gabbusch [2014] SAIRC 15
Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd [2015] FCAFC 25
Ezy Accounting 123 Pty Ltd v Fair Work Ombudsman [2018] FCAFC 134
Pettit v Evolution Mining Ltd [2016] FCA 1304
Fair Work Ombudsman, Kearns & Schmidt v Atkins Freight Services Pty Ltd [2016] SAIRC 19
Construction, Forestry, Mining and Energy Union v Hail Creek Coal Pty Ltd [2016] FCA 1526
Clarke v Dixie Cummings Enterprises Pty Ltd [2013] FCA 987
Suda Ltd v Sims (No.3) [2014] FCCA 2127
Australian and International Pilots Association v Qantas Airways Ltd (No.3) [2007] FCA 879
Swansdale Pty Ltd v Whitcrest Pty Ltd [2010] WASCA 129 (S)
Construction Forestry Mining and Energy Union v North Goonyella Coal Mine Pty Ltd [2013] FCA 1444
Knight v FP Special Assets Ltd [1992] HCA 28; (1992) 174 CLR 178
Rodwell v Hutchinson [2010] WASCA 197
Smoothy Resource Logistics Pty Ltd v Kimberley Shayne McAullay [No 2] [2016] WADC 48
Yirra Pty Ltd (t/as Richmond Demolition and Salvage) v Summerton [2009] FCAFC 50
Solomons v District Court (NSW) [2002] HCA 47; (2002) 211 CLR 119
Dunghutti Elders Council (Aboriginal Corporation) RNTBC v Registrar of Aboriginal and Torres Strait Islander Corporations (No 4) [2012] FCAFC 50
FPM Constructions Pty Ltd v Council of the City of Blue Mountains [2005] NSWCA 340
Bray v Ryan [1999] WADC 66

Result **:** Pecuniary penalty assessed; Costs fixed.

Representation:

Claimant	:	Mr P. Brunner (of Counsel) as instructed/from Bailiwick Legal
Respondent	:	Mr G. Rossen (Director) on behalf of the respondent Ms A. Pascoe of Counsel instructed by Coulson Legal (written submissions)

REASONS FOR DECISION

1 The claimant, Ms Peta Buchanan (Ms Buchanan) was employed by the respondent, G&R Rossen Pty Ltd (the Company) as a property manager between December 1996 and March 2016. On 20 May 2016, she commenced this case, making a claim for statutory entitlements of $51,848.76 on account of long service leave (LSL Entitlement) and wages of $1,885.41 owed for her last week of employment (Unpaid Wages Entitlement).[1] After the Company failed to comply with directions to lodge witness statements, judgment was entered against the Company (the Default Judgment) and orders were made on 18 March 2020 that the Company pay amounts claimed by Ms Buchanan together with pre-judgement interest. The Company neither consented to nor opposed the making of those orders.

2 Ms Buchanan's case also includes a claim for pecuniary penalties under the *Fair Work Act 2009* (Cth) (FW Act) and costs. The Company opposes those claims.

3 At the conclusion of the hearing on the claims for penalties and costs on 8 May 2020 (the Penalty Hearing), I made orders that the Company pay Ms Buchanan's costs incurred after 20 November 2019 on a party and party basis in accordance with the appropriate determination in respect of the jurisdiction of the Industrial Magistrates Court of Western Australia (Court) (the Costs Order).[2] These are my reasons for:

- the Costs Order, fixing the amount of costs to be paid pursuant to that order in the sum of $5,654; and
- dismissing Ms Buchanan's application for an order that would result in Mr Rossen being jointly and severally liable for the Costs Order.

4 These reasons also determine Ms Buchanan's applications for pecuniary penalties against the Company and pecuniary penalties against the Company's director, Mr Gregory Rossen (Mr Rossen). For the reasons given below, pecuniary penalties are fixed in the amount of $13,500 (long service leave) and $1,000 (unpaid wages) for the contraventions of s 323 of the FW Act being a civil remedy provision concerning 'amounts payable … in relation to the performance of work'. Those penalties must be paid by the Company to Ms Buchanan. The application for an order that a penalty be paid by Mr Rossen is dismissed.

5 It will be convenient to refer in these reasons to a summary of the contents of a selection of documents on the Court file (the Chronology) contained in an endnote.[3]

Pecuniary Penalties Against The Company

6 A consequence of the Default Judgment is that the facts alleged in Ms Buchanan's Originating Claim (together with any admissions in the Response filed by the Company) are taken to be the relevant facts for the purpose of determining appropriate relief, including relief in the form of a pecuniary penalty.[4] Those facts, set out in the Chronology, are short in compass and are reproduced in the following paragraph.

7 Ms Buchanan was employed by the Company as a property manager, commencing 1 December 1996. In February 2016, Ms Buchanan gave the Company four weeks' notice of termination of her employment. Subsequently, by agreement, Ms Buchanan ceased attending her workplace on 23 March 2016 and, for the purpose of calculation of her statutory entitlements, employment was taken to have ended on 31 March 2016. Her gross weekly wage pursuant to a contract of employment was approximately $3,150.[5] At the end of her employment by the Company, Ms Buchanan was not paid either her LSL Entitlement as provided by s 8 of the *Long Service Leave Act 1958* (WA) (LSL Act) or her Unpaid Wages Entitlement.

8 The particulars of the relief sought by Ms Buchanan in the Originating Claim refers to orders that the Company 'pay pecuniary penalties to [Ms Buchanan] in relation to the [Company's] breaches of section 44(1) [of the FW Act] in relation to section 323(1)' of the FW Act.[6] In oral submissions at the Penalty Hearing, Ms Buchanan confirmed that two pecuniary penalty orders were sought. A pecuniary penalty order was sought as a result of a contravention of s 323(1) of the FW Act by the Company failing to pay the LSL Entitlement (the LSL Penalty Claim). A pecuniary penalty order was also sought as a result of a contravention of s 323(1) of the FW Act by the Company failing to pay the Unpaid Wages Entitlement (the Unpaid Wages Penalty Claim).

9 The statutory obligation created by s 323 of the FW Act is *not* one of the National Employment Standards (NES). The reference in the Originating Claim to s 44(1) of the FW Act concerning the NES in connection with s 323 of the FW Act is confusing. It is also confusing that the Originating Claim also contains references to LSL Entitlements without reference to the FW Act.[7] Notwithstanding those observations, I am satisfied that no procedural unfairness arises from the Court considering the LSL Penalty Claim and the Unpaid Wages Penalty Claim. From the time of filing of her Originating Claim, it is apparent that Ms Buchanan has sought entitlements *and* pecuniary penalty orders. There is reference to pecuniary penalties in relation to s 323 of the FW Act in the 'prayer for relief' of the Originating Claim. From the time of filing of Ms Buchanan's Originating Claim, the Company has engaged with the responding to the claims for the LSL Entitlement and the Unpaid Wages Entitlement. From the time that the Court made directions on 18 March 2020 (in anticipation of the Penalty Hearing), the Company has engaged with responding to the LSL Penalty Claim and the Unpaid Wages Penalty Claim.

10 Ms Buchanan, an employee, may make application to this Court, an '***eligible State or Territory Court***',[8] for orders in relation to an alleged contravention of s 323 of the FW Act.[9]

11 Section 323 of the FW Act is a 'civil remedy provision'. If the court is satisfied that the Company has contravened this provision, the court may order the Company 'to pay a pecuniary penalty that the court considers is appropriate'.[10]

12 The obligation created by s 323(1) of the FW Act is for a '[national system] employer to pay an [national system] employee amounts payable … in relation to the performance of work in full'.[11]

13 The Company is a '***national system employer***' by reason of being a corporation to which paragraph 51(xx) of the Constitution applies.[12] Ms Buchanan is a '***national system employee***' by reason of being an employee of the Company.[13]

14 The claim for the Unpaid Wages Entitlement is, indisputably, a claim for an amount payable 'in full' in relation to 'the performance of work' by Ms Buchanan. The Default Judgment and the facts reproduced at paragraph 7 above have the consequence that the Company's failure to pay the Unpaid Wages Entitlement in March 2016 was a contravention of s 323 of the FW Act; the Court may fix a penalty.

15 There is authority for the proposition that amounts payable to employees for accrued long service leave, including amounts payable by reason of a statute, fall within the meaning of 'an amount payable … in relation to the performance of work' under s 323 of the FW Act.[14] On this basis, the Default Judgment and the facts reproduced at paragraph 7 above have the consequence that the Company's failure to pay the LSL Entitlement in March 2016 was a contravention of s 323 of the FW Act; the Court may fix a penalty.

16 A summary of the principles relevant to determining an appropriate pecuniary penalty is contained in ***Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)*** [2017] FCA 557 (Katzmann J) (***Grouped Property Services***) [387] - [390]. I have reproduced that summary below (omitting citations). I have included in this summary two further references concerning: the significance of the principle of parity; and the relationship between costs and penalties.

- 'Civil penalties … are fixed by a process of "instinctive synthesis" … [A]fter taking "due account" of all the relevant factors (which may pull in opposite directions), a court will conclude that a particular penalty should be imposed': ***Grouped Property Services*** [387].
- 'Careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick': ***Grouped Property Services*** [390].
- Factors relevant to fixing a penalty 'include: the nature and extent of the contravening conduct and the circumstances in which it took place, whether the conduct was deliberate, whether senior management was involved … the nature and extent of loss or damage, whether the contravener has previously engaged in similar conduct, the size of the business enterprise, and the existence and extent of any contrition, and corrective action': ***Grouped Property Services*** [387].
- '[T]he primary, if not the only, purpose of a civil penalty is to promote the public interest in compliance with the law. This is achieved by imposing penalties that are sufficiently high to deter the wrongdoer from engaging in similar conduct in the future (specific deterrence) and to deter others who might be tempted to contravene (general deterrence). The penalty for each contravention or course of conduct is to be no more and no less than is necessary for that purpose': ***Grouped Property Services*** [388].
- 'Where multiple contraventions are being penalised, it is necessary to ensure that the aggregate penalty is "not unjust or out of proportion to the circumstances of the case" …If the aggregate of the individual penalties is unjust or disproportionate to the overall culpability of the respondent, then adjustments will need to be made to some of the penalties for the individual contraventions. A … penalty fixer must, as an initial step, impose a penalty appropriate for each contravention and then as a check, at the end of the process, consider whether the aggregate is appropriate for the total contravening conduct involved': ***Grouped Property Services*** [389].
- For there to be 'equality before the law … similar contraventions … [ought attract] similar penalties'. All other things being equal, corporations guilty of similar contraventions should incur similar penalties. 'There should not be such an inequality as would suggest that the treatment meted out has not been even-handed … However, other things are rarely equal … [and] complicate any attempt to compare the penalties

imposed on … other corporations': ***Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith*** [2008] FCAFC 8; (2008) 165 FCR 560 [56] (Graham J) citing with approval ***NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission*** [1996] FCA 1134; (1996) 71 FCR 285, 295 (citations omitted).

- Section 546(3) of the FW Act confers a discretion on the court to order that a 'penalty, or part of penalty, be paid to the Commonwealth; or a particular organisation; or a particular person'. The making of an order for a penalty is 'not be seen as a backdoor method of securing costs which are not normally recoverable under the [FW Act]. However, penalties may be paid to [a claimant] to reflect the time, expense (apart from legal costs) and trouble that must have been incurred in pursuing a civil penalty application under the [FW Act]': ***Jones v Human Synergistics Australia Limited*** [2016] FCCA 368 [61] (Barnes J) citations omitted to: ***Murrihy v Betezy.com.au Pty Ltd (No 2)*** [2013] FCA 1146 [118]; ***Gibbs v Mayor, Councillors and Citizens of City of Altona*** (1992) 37 FCR 216 [64] - [65] and [39] - [45].

17 Although, the facts recorded in the pleadings (identified in paragraph 7 above) are taken to be the relevant facts for determining an appropriate penalty, it is open to each party to rely upon additional facts that are relevant to the task of fixing a penalty. At the Penalty Hearing, Ms Buchanan and the Company drew my attention to evidence that, it was respectively submitted, aggravated and mitigated the contraventions. I address those submissions below when considering the factors relevant to fixing a penalty. I note the principles to be observed when assessing those submissions:[15]

- The facts implicit in the finding (by judgment) of a contravention cannot be controverted during the process of fixing a penalty.
- A fact or circumstance that is likely to result in a 'more severe' or 'less severe' penalty than would otherwise be the case will determine whether the fact or circumstance is, respectively, 'aggravating' or 'mitigating'.
- If the claimant seeks to have the court take a matter into account as an aggravating circumstance, it will be for the claimant to bring that matter to the court's attention and, if necessary, call evidence about it.
- If the respondent seeks to have the court take a matter into account as a mitigating circumstance, it will be for the respondent to bring that matter to the court's attention and, if necessary, call evidence about it.
- It will only be necessary for a party to call evidence about an aggravating or mitigating circumstance, as the case may be, if the asserted matter is controverted by the other party or if the court is not prepared to act on the assertion, even though it is not controverted by the other party.
- If required to prove an aggravating circumstance, the claimant must establish the aggravating circumstance on the balance of probabilities. In assessing whether the claimant has discharged this standard, it will be necessary to have regard to 'the seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, [and] the gravity of the consequences flowing from a particular finding'.[16]
- If required to prove a mitigating circumstance, the claimant must establish the mitigating circumstance on the balance of probabilities.

- The court is obliged to give notice to the respondent if the court is not prepared to act on an alleged mitigating circumstance which is asserted by the respondent and not controverted by the claimant.
- If the court is not persuaded of the existence of a particular matter, whether mitigating or aggravating, the absence of that fact does not prove the converse fact, adverse to or in favour of the respondent, as the case may be. Where the court is not persuaded of the existence of a fact, the fact does not exist for the purposes of determining a penalty.

18 ***Maximum Penalty.*** The maximum penalty with respect to each contravention of s 323 of the FW Act, in the case of the Company, is 300 penalty units. At the date of the contraventions in 2016, the value of a penalty unit was $180 resulting in a maximum penalty of $54,000 for each contravention.[17] Counsel for Ms Buchanan argued that the maximum penalty should be fixed by reference to the present value of a penalty unit, being $210. For the reasons identified by Katzmann J in ***Grouped Property Services*** at [393] to [394], the argument is without merit.

19 ***Nature and extent of the contravening conduct and the circumstances in which it took place.*** A feature of this case is the failure of the Company to pay a relative large entitlement (long service leave) and a relatively small entitlement (unpaid wages) in circumstances where, subject to what is said below about the allegations of serious misconduct by Ms Buchanan, the obligation to make those payments was obvious.

20 Ms Buchanan was a well remunerated senior employee in a small firm who resigned in February 2016 after working for 19 years and three months. I infer from the length of her employment, the size of Ms Buchanan's remuneration and the small number of employees in the firm that for significant periods of her employment, Ms Buchanan contributed to the profitability of the Company. The Company was required by law to have made provision for her accrued long service leave and to pay for her wages until the end of the agreed term of her employment. There is no room for ambiguity or claims of ignorance as to the existence or size of these entitlements.

21 For reasons that are not apparent on the evidence, by the middle of March 2016, Ms Buchanan's working relationship with the managing director (and sole director) of the Company, Mr Rossen, had completely broken down. This fact was irrelevant to the obligation of the Company, found in s 323 of the FW Act, to pay to Ms Buchanan the LSL Entitlement and the Unpaid Wages Entitlement.

22 At the Penalty Hearing, Mr Rossen submitted it was of significance that the Company's allegations of serious misconduct, relied upon as the reason for not paying the LSL Entitlement, have never been tested. He also asserted, in mitigation, that the Company was not pursuing the allegations of serious misconduct because of the costs of litigation. Each submission must be rejected. An unproven allegation of serious misconduct is *not* a mitigating factor. Similarly, the fact that costs may be incurred in proving an allegation of serious misconduct is *not* a mitigating factor. The fact that the allegation of serious misconduct has not been tested and the fact that proof of the allegation may involve significant costs are matters that are irrelevant to my task of fixing an appropriate penalty.

23 Mr Rossen also made allegations going to the (discreditable) character of Ms Buchanan and her counsel, Mr Philip Brunner, regarding their conduct at the Supreme Court Proceedings and particularly concerning discovery obligations in those proceedings.[18] The conduct of an employee (much less the employee's counsel) *after* the end of the employment relationship has no bearing upon the issues of prime significance when fixing a penalty, namely, the conduct of

each party *during* the employment relationship. In any event, the allegations made by Mr Rossen remain unproven.

24 ***Whether the conduct was deliberate.*** Not paying Ms Buchanan her accrued long service leave and not paying her wages for the last days of her employment was a conscious decision of Mr Rossen, on behalf of the Company. The Company must be taken to be aware of the existence of statutory obligations with respect to long service leave and paying wages. In the case of long service leave, there is evidence of the Company taking legal advice that, I infer, alerted the Company to existence of a 'serious misconduct' exception to the statutory entitlement. By its Response, the Company alleged various matters said to constitute 'serious misconduct'. In the case of unpaid wages, the Company took the view (evident from the Response) that Ms Buchanan's entitlement to pay wages ended on her last day of work on 23 March 2016 and not on the agreed date of the end of her employment of 31 March 2016 (evident from the Originating Claim).

25 At the Penalty Hearing, Ms Buchanan adduced evidence which was said to support a submission that, in March 2016, Mr Rossen *knew* that Ms Buchanan had not engaged in serious misconduct, supporting an inference that the Company disingenuously chose not to pay the LSL Entitlement and then defend her claim in this Court.

26 The evidence relied upon by Ms Buchanan is an admission by Mr Rossen that in late 2015 he engaged a Ms Jackie Crank (Ms Crank) to perform the task of re-signing 'expired' property management clients.[19] This fact is said to be inconsistent with the allegation of serious misconduct relied upon by the Company for not paying accrued long service leave in March 2016. There are two difficulties with Ms Buchanan's submission.

27 First, *one* allegation by the Company of serious misconduct by Ms Buchanan concerns the re-signing of expired property management clients in October 2015 (the Client Re-sign Allegation). However, as noted in the Chronology, the Company makes *other* (unproven) allegations of serious misconduct: Ms Buchanan is said to have failed to carry out an instruction to delegate work to a Ms Trudy Hoad (the Hoad allegation); and contrary to an alleged instruction from Mr Rossen, Ms Buchanan is said to have 'continued to solicit business from' clients of the Company (the Solicit Business Allegation).

28 Secondly, Mr Rossen's admission is not *wholly* inconsistent with the Client Re-sign Allegation. The Company's Client Re-sign Allegation, as framed in paragraphs 20 and 27 of the Response, may be viewed as an allegation that Ms Buchanan failed to co-operate with Ms Crank in October 2015 to arrange for re-signing clients and that she breached a continuing obligation to personally arrange for re-signing clients. So expressed, Mr Rossen's admission is not *compelling* evidence that the Company knew Ms Buchanan had not engaged in serious misconduct when it chose not to pay her in March 2016.

29 It is accepted that Ms Buchanan strongly denies each of the Client Re-sign Allegation, the Hoad Allegation and the Solicit Business Allegation. The case did not reach the stage where those allegations were determined. However, given the two difficulties identified above, Ms Buchanan has fallen well short of proving that, in March 2016, Mr Rossen (or any agent of the Company) *knew* that it could not sustain the Client Re-sign Allegation or any of the other allegations of serious misconduct by Ms Buchanan.

30 ***Whether senior management was involved.*** Mr Rossen admits that, as managing director, he was intimately involved in decisions concerning the payment of entitlements to Ms Buchanan. It may also be noted that at or shortly after the time for making those payments, Mr Rossen

obtained legal advice from senior counsel on behalf of the Company. It is not possible to draw *any* inference as to the content of the advice given that, properly (absent a waiver of privilege), that legal advice is not before the Court.

31 ***The nature and extent of loss or damage***, ***the existence and extent of any contrition, and corrective action.*** Ms Buchanan's long service leave entitlement is $51,848. The quantum is a reflection of the length of her period of continuous employment by the Company. This amount and the unpaid wages entitlement of $1,885.41 must also be assessed in the context of Ms Buchanan's relatively high income of $3,150 per week. Ms Buchanan was denied access to those entitlements for four years. The Court also made an order for the payment of pre-judgment interest and the payment on this amount (as discussed below) is be taken into account when assessing the significance of delay in payment of Ms Buchanan's entitlements.

32 The effect of cl 16 to cl 20 of Schedule 1 of the *Taxation Administration Act 1953* (Cth) (Taxation Act) is that an employer is discharged from liability to an employee for an amount paid to the Commissioner of Taxation as required by the same Act. In respect of the judgment against it, the Company claims to have paid Ms Buchanan the sum of $42,130.45 and paid the Commissioner the sum of $24,058 as required by the Taxation Act in respect of Ms Buchanan's employment with the result that it has discharged the judgment debt.

33 Ms Buchanan admits receipt of the sum of $42,130.45. Ms Buchanan disputes that the Company has remitted any amounts to the Commissioner of Taxation in discharge of its obligations under the Taxation Act.

34 The Company relies upon recent Australian Taxation Office (ATO) records referring to $24,058 standing to the credit of the Company. It also relies upon a letter from the accountants of the Company stating that, in accordance with Mr Rossen's instructions, payments had been made to Ms Buchanan and to the ATO. The letter explains that, upon a PAYG Payment Summary issuing from the Company to Ms Buchanan after 1 July, Ms Buchanan will be in a position make a claim to the ATO (through her tax return). Mr Rossen gave oral evidence that was consistent with the letter.

35 Ms Buchanan relies upon recent ATO records referring to zero dollars standing to her credit as suggesting that the moneys remitted to the ATO may not be available to her.

36 I am satisfied that, consistent with his evidence and the letter from the Company accountants, Mr Rossen instructed the Company's accountants to pay the judgment debt by payments to Ms Buchanan and the ATO as required by law. This is a mitigating factor. There is no evidence that enables me to make any findings on the implications of the content of ATO records before me. It may be that the Company has discharged the judgment debt to Ms Buchanan by remittance of the $24,058. However, it may also be that those funds may be applied by the ATO against taxation obligations of the Company. For present purposes, it is also relevant to assessing a penalty that there is a possibility that funds standing to the credit of the Company in the ATO records will be the subject of further dispute between the parties.

37 ***Whether the Company has previously engaged in similar conduct.*** There is no evidence of any previous allegations of a similar nature against the Company.

38 ***The size of the Company.*** The Company is contracting in size. Mr Rossen gave evidence of the Company having four employees in March 2016 and that it currently operates through only himself and his daughter. He spoke of the Company recently disposing of a significant asset, namely, one half of the rent roll of the business. The fact that the Company operates a small business and that it may be subject to financial constraints is relevant to fixing a penalty.

However, '[n]o less than large corporate employers, small businesses have an obligation to meet minimum employment standards and their employees, rightly, have an expectation that this will occur.[20]

39 In summary, the dominant considerations in fixing a penalty on the LSL Penalty Claim are four-fold.

40 First, the maximum penalty prescribed is $54,000.

41 Secondly, the relatively large size of the entitlement and the length of delay in payment are aggravating factors.

42 Thirdly, the fact that approximately two thirds of the entitlement has been paid to Ms Buchanan and an amount equating to the balance has been remitted to the ATO in circumstances discussed above is a mitigating factor.

43 Fourthly, it is necessary to set the penalty at a level that deters other employers from engaging in similar conduct (general deterrence). I have not identified any similar cases.[21]

44 Weighing these four considerations and *all* of the other considerations discussed above, my view is that a penalty fixed in the sum of $13,500 (25% of the maximum penalty) is a proportionate reflection of the gravity of the contravening conduct by the Company with respect to the LSL Entitlement.

45 The considerations relevant to fixing a penalty on the LSL Penalty Claim are the same when fixing a penalty on the Unpaid Wages Penalty Claim, save that the latter entitlement is relatively small ($1,885.41). My view is that a penalty fixed in the sum of $1,000 is a proportionate reflection of the gravity of the contravening conduct by the Company with respect to the Unpaid Wages Entitlement.

46 The aggregate of those two penalties, $14,500, is not disproportionate to the overall culpability of the Company.

47 Having regard to the time and expense (apart from legal costs) of Ms Buchanan in pursuing her claim, there will be an order pursuant to s 546(3)(c) of the FW Act that the penalties be paid to her.

No Pecuniary Penalties Against Mr Rossen

48 In her written outline of submissions on penalty filed in April 2018 (and during the Penalty Hearing), Ms Buchanan contended that the Court should make pecuniary penalty orders against the Company *and* Mr Rossen, the managing director of the Company. The Originating Claim filed in the Court on 20 May 2016 names one respondent, the Company. The prayer for relief in the same document seeks orders against one entity, the Company.[22]

49 Ms Buchanan contends that s 550 of the FW Act, in providing that a 'person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision', empowers the Court to make an order against Mr Rossen, notwithstanding no application has been made for him to be joined as a party to the case.

50 It may also be observed that there is no evidence of any notice being given to Mr Rossen of an intention to apply for the order against him other than the fact of Ms Buchanan's written outline of submissions having been served on the Company and Mr Rossen subsequently appearing on behalf of the Company (with leave) on the Penalty Hearing.

51 Section 550(1) of the FW Act *creates* a statutory liability for any 'person who is involved in a contravention of civil remedy provision'. Section 546(1) of the FW Act proscribes the *means* of enforcing that statutory liability, namely, 'on application' to the court. It was observed in ***Mildren v Gabbusch*** [2014] SAIRC 15 [45] - [46] (Hannon J) that this provision means that a court has no power to make a pecuniary penalty order against a director (in that case) unless the director is named as a party in the initiating process. Similarly, it has been said that 'it is especially important that those accused of a contravention know with some precision the case to be made against them'.[23] Mr Rossen was not to know of the risk of an order against him until he read Ms Buchanan's written outline of submissions filed for the purpose of a Penalty Hearing involving the Company.

52 No application has been made to join Mr Rossen as a party to the case. No (satisfactory) alternative process has been suggested for properly bringing an application against him. Mr Rossen may or may not have been involved in the Company's contraventions of s 323 of the FW Act. The question has not been determined. Absent an application in the manner required by s 546(1) of the FW Act, any question of his involvement and liability under s 550(1) of the FW Act is not properly before the Court.

53 I am puzzled by Ms Buchanan's reliance upon ***Ezy Accounting 123 Pty Ltd v Fair Work Ombudsman*** [2018] FCAFC 134 in support of an order against Mr Rossen. In that case, the claimant commenced proceedings against two parties: the employer; and, relying upon s 550(1) of the FW Act, a firm of accountants. The employer admitted contraventions. The firm of accountants denied that it had been 'involved in' contraventions. At issue was whether matters known by the firm of accountants resulted in the firm being 'involved in' the contraventions by the employer. The resolution of that issue has no bearing on whether Mr Rossen, a non-party, is amenable to an order against him in this case.

Reasons For Making A Costs Order Against The Company

54 Section 570(1) of the FW Act provides that, absent one of the conditions in s 570(2), the Court may not make an order that a party to a proceeding 'pay the costs incurred by another party to the proceedings'. Relevantly, s 570(2) of the FW Act provides that a pay may be ordered to pay costs only if the party 'instituted proceedings vexatiously or without reasonable cause' (s 570(2)(a) of the FW Act) or 'the party's unreasonable act or omission caused the other party to incur the costs' (s 570(2)(b) of the FW Act).

55 In respect to an application for costs against a *respondent* to a claim, the following principles emerge from the authorities:

- Section 570 of the FW Act is 'to be understood as reflecting a legislative policy of protecting parties to proceedings under the Act from costs orders so that a party with a genuine grievance will not be discouraged from pursuing a remedy to which they may be entitled, or from pursuing litigation in the manner which they deem best, for fear of an adverse costs order … Consequently, it is usually only in exceptional circumstances that costs will be awarded under s 570': ***Pettit v Evolution Mining Ltd*** [2016] FCA 1304 [62].

- The focus of s 570(2)(a) of the FW Act is upon the 'institution of proceedings' by the respondent to an application for costs. The focus of s 570(2)(b) of the FW Act is upon the 'unreasonable act or omission' of the respondent to an application for costs. Section 570(2)(b) of the FW Act alone is relevant to an application for costs against an

employer who has unsuccessfully defended a claim: ***Fair Work Ombudsman, Kearns & Schmidt v Atkins Freight Services Pty Ltd*** [2016] SAIRC 19 [81].

- Section 570(2)(b) of the FW Act applies when two criteria are satisfied. 'The first criterion is that one party must have engaged in "an unreasonable act or omission" … [W]hether a party has conducted itself or its litigation in such a way as to cross this threshold will depend on the particular circumstances of the case. The second criterion is that the act or omission of one party must have "caused another party to the proceeding to incur costs in connection with the proceeding". Once both criteria are satisfied, then the Court "may" in its discretion order the party which has engaged in the unreasonable act or omission to pay some or all of the costs of the other party': ***Construction, Forestry, Mining and Energy Union v Hail Creek Coal Pty Ltd*** [2016] FCA 1526 [4].
- '[T]here is a danger of the exceptions in s 570(2) [of the FW Act] being used in circumstances in which the most that one can say is that the losing party had a self-evidently weak case … [T]hat is not the kind of situation to which s 570(2) [of the FW Act] is addressed. There must be a higher level of criticism or disapprobation which the court is able to express about a losing party's case if the bars in paras (a) and (b) of s 570(2) [of the FW Act] are to be crossed by a party which succeeds on the application concerned': ***Clarke v Dixie Cummings Enterprises Pty Ltd*** [2013] FCA 987 [14].
- Section 570(2)(b) of the FW Act 'is not necessarily engaged because: (a) a party does not conduct litigation efficiently; (b) a concession is made late; (c) a party may have acted in a different or timelier fashion; or (d) a party has adopted a genuine but misguided approach: ***Suda Ltd v Sims (No.3)*** [2014] FCCA 2127 [72].

56 Five matters of significance emerge from the Chronology.

57 First, the Solicit Business Allegation of the Company was at the heart of the dispute between the parties in this case and in the Supreme Court Proceedings. Ms Buchanan was a long-term senior employee of a small firm. The success of the firm was linked to maintaining good ongoing relationships with clients of the Company. Ms Buchanan was leaving the employ of the firm in circumstances of mutual acrimony. It is understandable that the Company would be concerned as to the consequences of any breach of the duty of good faith that is owed by an employee to his or her employer. If a breach of the duty was proven by the Company, it had reasonable prospects of defending Ms Buchanan's claim.

58 Secondly, on 3 May 2018, the Company successfully applied for a stay of the case, pending the determination of the Supreme Court Proceedings. In support of the application, the Company argued that if it succeeded in the Supreme Court Proceedings then the 'serious misconduct' defence to the long service leave claim 'would [necessarily] be made out' and, conversely, if the Company was not successful in the Supreme Court Proceedings then 'the issue of serious misconduct would [necessarily] be determined in favour of Ms Buchanan'.[24]

59 Thirdly, on 20 November 2019, the Supreme Court Proceedings were determined when the Company was granted leave to discontinue the proceedings and a costs order was made in favour of Ms Buchanan.

60 Fourthly, on 6 February 2020, on the application of Ms Buchanan, the stay of the case was lifted. The Company did not argue against the making of directions for the filing of witness outlines by each party with a view to setting a date for trial.

61 Fifthly, the Company did not comply with the directions for the filing of witness outlines and on the eve of the directions hearing of 18 March 2020, it made an offer to Ms Buchanan to pay the LSL Entitlement, the Unpaid Wages Entitlement and pre-judgment interest.

62 Ms Buchanan has failed to satisfy me that the Company's conduct in defending the claim before 20 November 2019 was an 'unreasonable act or omission'. I note my findings above that Ms Buchanan has failed to prove that Mr Rossen *knew* that Ms Buchanan had not engaged in serious misconduct when the Company chose to defend the claim. The Client Re-sign Allegation and the Hoad Allegation, self-evidently, are relatively weak arguments when faced with the burden of proving 'serious misconduct'. However, the strength or weakness of the Solicit Business Allegation hinged upon the ability of the Company to gather evidence of Ms Buchanan's conduct in the last months of her employment. Within reasonable limits, the Company was entitled to defend Ms Buchanan's claim while assembling that evidence. However, those reasonable limits were reached by 20 November 2019.

63 The only reasonable inference to be drawn from the decision of the Company to discontinue the Supreme Court Proceedings on 20 November 2019 is that the Company had reached the point where it was either unable to prove the allegation of serious misconduct *or* that it was unwilling to bear the cost of proving that allegation. For present purposes, it does not matter which of those alternatives is correct. The act or omission by the Company after 20 November 2019 in failing to indicate a willingness to consent to an order for payment of the LSL Entitlement and the Unpaid Wages Entitlement was unreasonable *and* caused Ms Buchanan to incur costs in continuing to prosecute the proceedings.

64 It was not reasonable, having regard to the determination of the Supreme Court Proceedings, to put Ms Buchanan to the costs after 20 November 2019 of preparing for trial in this Court. I am not satisfied that any act or omission of the Company in the conduct of this litigation before that point in time was unreasonable. I am also satisfied that the same unreasonable act or omission of the Company caused Ms Buchanan to incur costs associated with the Penalty Hearing. If, soon after 20 November 2019, the Company indicated a willingness to consent to payment of entitlements, it was probable that one relatively brief hearing would have been necessary in late 2019 or early 2020 to make those orders (by consent) and to hear oral submissions on penalty. I am cognisant that, during the directions hearing on 18 March 2018, the Company pressed for oral submissions on penalty on that day. However, that submission was made in circumstances where the Company liability had been established by the Default Judgment. A further date for the Penalty Hearing became necessary.

65 An order for costs is ordinarily an order that the costs be paid on a party and party basis. Ms Buchanan made application for an order that the costs be paid on an indemnity basis. I will assume, in favour of Ms Buchanan, that s 570 of the FW Act empowers this Court to make an order for costs on an indemnity basis.

66 The criteria for making an indemnity costs order have been variously expressed:[25]

- when the justice of the case might so require;
- where there exists some special or unusual feature in the case to justify the Court in departing from the ordinary practice;
- where a party has by its conduct unnecessarily increased the cost of litigation, for example, where a party persists in what should on proper consideration be seen to be a hopeless case; and

- where an appropriate sanction marking the disapproval of improper or unreasonable conduct is necessary.

67 It must be said that one unusual feature of this case is that it was unreasonable of the Company not to offer to consent to an order for payment of the LSL Entitlement and the Unpaid Wages Entitlement after the determination of the Supreme Court Proceedings. This was my finding made for the purposes of determining the application for costs under s 570 of the FW Act. This factor favours making an indemnity costs order. However, it is not a determinative factor in favour of an indemnity costs order.[26]

68 Two factors weigh against an indemnity costs order and, for those reasons, I decline to make the Costs Order on an indemnity basis. First, the Company ought to have acted soon after 20 November 2019. However, the stay of Ms Buchanan's claim was not discharged until an order of the Court on 8 February 2020. A relatively short time elapsed after this date and, on eve of the directions hearing on 18 March 2020, the Company made an offer to pay the LSL Entitlement and the Unpaid Wages Entitlement. Secondly, it is not appropriate for the Company to pay Ms Buchanan's indemnity costs associated with the Penalty Hearing. So long as Ms Buchanan made a claim for penalties, a hearing on that issue was necessary. The conduct of each party associated with the Penalty Hearing was unremarkable. There is no reason for an indemnity order against the Company in connection with the Penalty Hearing.

Mr Rossen Jointly And Severally Liable For Costs?

69 Ms Buchanan seeks an order that Mr Rossen, together with the Company, be jointly and severally liable for payment of the Costs Order. Reliance is placed upon the decision ***Knight v FP Special Assets Ltd*** [1992] HCA 28; (1992) 174 CLR 178 as the source of the power of this Court to make a costs order against a non-party. The case concerned the power of a superior court, the Supreme Court of New South Wales, to make such an order. It is clear that the power of an inferior court to award costs, including this Court, must be grounded in statute.[27] There are two potential sources of power to make the order sought by Ms Buchanan.

70 First, s 570 of the FW Act provides that this court may make an order for costs in the circumstances proscribed. However, s 570(1) of the FW Act expressly limits the power to make an order against '*a party to a proceedings*' (emphasis added). It is not a source of power for the order sought by Ms Buchanan. However, it has been held that, if *another* statutory source of power exists, s 570 of the FW Act does not prevent a non-party from being subject to a costs order.[28]

71 Secondly, the effect of s 79(1) of the *Judiciary Act 1903* (Cth) (JA) is that 'the laws [of Western Australia] relating to procedure … shall, except as otherwise provided by … the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction' in Western Australia. Ms Buchanan's claim, invoking the FW Act, result in this Court exercising federal jurisdiction. Section 83C and s 83E of the *Industrial Relations Act 1979* (WA) (IR Act) confer a power on this Court to make an order for costs. However, those provisions are *not* 'picked up' by s 79 of the JA. This is because the power conferred upon this Court by those provisions of the IR Act is expressed to be a power to make a costs order that is ancillary to an order made under s 83, s 83A or s 83B of the IR Act. The last-mentioned sections regulate the determination of disputes under certain instruments made under the IR Act including a (State) award; an industrial agreement; a (State) employer-employee agreement; and an order made by the (State) Commission. Section 79 of the JA renders State procedure law binding only in cases to which the State law is capable of application. The costs powers of the IR Act is couched in terms so as to be inextricably

linked to orders made concerning State instruments and the costs power is not 'picked up' for the purposes of exercising federal jurisdiction under the FW Act.[29]

72 If I am wrong, and this Court does have the power to make a costs order against Mr Rossen, I would not make such an order. The discretion to order costs against a non-party must be exercised judicially, having regard to the circumstances of the case. It is necessary for the non-party to have a connection with the unsuccessful party and the litigation, material to the question of costs, sufficient to warrant an adverse costs order.[30]

73 The following factors, where present, favour the exercise of the discretion:[31]

- where the unsuccessful party commenced the claim;
- where the non-party played an active part in the conduct of the litigation;
- where the non-party had a direct or indirect interest in the subject of the litigation;
- where the source of funds for the litigation was the non-party;
- where the conduct of the litigation was unreasonable or improper; and
- where the party to the litigation is an insolvent entity.

74 Mr Rossen played an active part in the litigation and, I infer, has an interest in the outcome of the litigation as a result of his interest as a director and shareholder of the Company. I have made a finding that defending the claim after 20 November 2019 was unreasonable. However, there is no basis for making *any* finding as to the source of the funds for the Company to defend the claim. Significantly, the Company did not commence the claim and the payments made by the Company consequent upon the orders of 8 May 2020 suggest that the Company is not insolvent. Having regard to these factors, I would not be persuaded that it is appropriate to make a costs order against Mr Rossen.

Fixing Costs

75 In fixing the party and party costs of Ms Buchanan after 20 November 2019 I have had the advantage of the written submissions of:

- Ms Buchanan filed 25 May 2020 (Ms Buchanan's Costs Submission);
- the Company filed 8 June 2020 (Company's Costs Submission); and
- Ms Buchanan filed 17 June 2020 (Reply Costs Submission).

76 The costs are to be assessed in accordance with the *Legal Profession (Magistrates Court) (Civil) Determination* 2018 (WA) (the Costs Determination). The assessment of costs involves an evaluation of the legal services for which a claim is made. Discretionary decisions are required as to *whether* those services should be allowed *and* the *amount* which is to be allowed for those services. The principles relevant to the fixing of costs are well known and it is convenient to reproduce the following summary from ***Bray v Ryan*** [1999] WADC 66:

> *… The starting point of the taxation in any particular case is to determine what services needed to be done. It is only after the necessary services have been identified that a judgment can be made on the complexity or varying complexities of the services, the appropriate level or levels of seniority of the person or persons required to deliver the services and the reasonable hourly rate or rates for such services. The party whose bill is being taxed would most likely have calculated the sum claimed on taxation for getting up*

case for trial by reference to the time taken by a particular person or persons to provide the services at an hourly rate or rates for such person or persons [35].

The issue of what is a reasonable allowance is not determined by the mere fact that a practitioner claims that a particular number of hours were taken up in delivering the services [36].

In the final analysis it is necessary to first, identify what services were necessary in the particular case and secondly, objectively assess a reasonable allowance for such services by applying the Rules, the Determination and the underlying principles thereof and thirdly, measure the amount actually claimed in the bill for the services against the objective assessment in order to determine whether or not the amount claimed is reasonable and what adjustment, if any, should be made [37].

77 Four significant events, necessitating legal services for Ms Buchanan, occurred after 20 November 2019.

78 First, it was necessary for Ms Buchanan's counsel to apply for the lifting of the stay order made on 3 May 2018. It was appropriate to also consider and apply for the directions necessary for the case to proceed to trial. Ms Buchanan's application for the lifting of the stay and for directions was heard by the Court on 5 February 2020 and 6 February 2020. The total time spent in court on 5 February 2020 was one hour and on 6 February 2020 was half an hour. Ms Buchanan's Costs Submission contains claims for 4.5 hours of a senior practitioner and 7.5 hours of a junior practitioner and includes time spent on (ultimately) an unsuccessful application for discovery and access to premises. The costs involved in the unsuccessful application are not allowed. Noting item 10(d) of the Costs Determination, I will allow for 1.5 hours of a senior practitioner (attending the hearing) and 2 hours of a junior practitioner (in preparation).

79 Secondly, it was necessary for Ms Buchanan's lawyers to comply with the directions made on 6 February 2020, to respond as necessary to the Company's compliance (or non-compliance) with the same directions and to attend upon the next directions hearing on 18 March 2020.

80 The directions of 6 February 2020 required each party to lodge and serve witness outlines. Ms Buchanan's Cost Submission contains claims for 2.7 hours of a senior practitioner and 20.8 hours of a junior practitioner in preparation of eleven witness outlines. The Company submits that this time represents an unnecessary duplication of time already spent on preparation of similar documents for the same witness (except Ms Alison Ruland (Ms Ruland)) already undertaken for the purpose of the Supreme Court Proceedings.[32] Ms Buchanan counters in the Reply Costs Submission that the Supreme Court Proceedings involved 'different issues of fact and law' and that a 'careful consideration' of the each of the fourteen proposed witness in the Supreme Court Proceedings was required in order to determine that four of those witness were not necessary for the claim in this Court. It is also observed that the witness outlines of Ms Buchanan and of Ms Ruland were 'new'.

81 I have compared the witness outlines filed by Ms Buchanan in this Court and in the Supreme Court Proceedings.

- The following witness outlines are identical: Mr Richard Buchanan; Ms Jackie Crank; Mr Nicholas Petrelis; Ms Jessica Wake; and Mr Peter Seaman.
- Small differences exist in the following witness outlines: Ms Freya Keogh (witness outline in this Court omits one paragraph that is included in the witness outline in the

Supreme Court Proceeding); Ms Maria Blohm; (omits one paragraph); and Ms Eleanor Koay (omits one paragraph).

- Significant differences exist in the following witness outlines: Ms Angela Chew (omits a number of paragraphs); and Ms Buchanan (omits a number of paragraphs and includes some additional paragraphs).

82 My view is that it was necessary to review the witness outlines prepared for the Supreme Court Proceedings in order to assess whether those witness outlines were sufficient for this case or whether (upon instruction of the witness) revision was required. However, it is also apparent that the work done in the Supreme Court Proceeding resulted (or ought to have resulted) in considerably less time than would otherwise have been involved in preparing witness outlines for this case. I will allow one hour of a senior practitioner and four hours of a junior practitioner.

83 Ms Buchanan's Costs Submission also claims for: 1.9 hours of a senior practitioner for work done in connection with an offer of settlement before the directions hearing of 18 March 2020; and 6.4 hours of a senior practitioner and 1.2 hours of a junior practitioner in connection with preparation and attending the directions hearing of 18 March 2020. The total time spent in Court on 18 March 2020 was less than one hour. Noting item 10(d) of the Costs Determination, I will allow for three hours of a senior practitioner in dealing with communications from the Company, obtaining instructions and attending upon the hearing.

84 Thirdly, it was necessary for Ms Buchanan's counsel to prepare and attend upon the Penalty Hearing on 8 May 2020. Ms Buchanan's Costs Submission claims for 7.3 hours of a senior practitioner and 11.6 hours of a junior practitioner by reference to item 10(a) of the Costs Determination. The total time spent in Court on 8 May 2020 was just over two hours. Ms Buchanan's counsel prepared a written outline of submission on penalty and costs comprising of 42 paragraphs. The time spent on submissions in Court and the time spent on the written outline included time spent on the (ultimately) unsuccessful applications for: a pecuniary penalty order against Mr Rossen; an indemnity costs order; and an order that Mr Rossen be jointly and severally liable for costs. The costs of the unsuccessful applications will not be allowed. It was necessary for Ms Buchanan's counsel to consider the Company's written 'submissions on penalty and costs and supporting documents' which comprised at least 13 pages. I will allow 2.5 hours of a senior practitioner and four hours of a junior practitioner for the costs associated with the Penalty Hearing.

85 Fourthly, it was necessary for Ms Buchanan's lawyers to: prepare written submissions with respect to costs as directed; attend upon the publication of these reasons; and attend to associated tasks. Ms Buchanan's Costs Submission claims for 3.1 hours of a senior practitioner, 2.2 hours of a junior practitioner, and an additional amount for attending upon the publication of these reasons. Having regard to the low level of complexity I will allow for one hour of a senior practitioner and two hours of a junior practitioner for these tasks.

86 In summary, I have allowed:

- Senior Practitioner: $3,762.
- Junior Practitioner: $2,772.
- Total of $6,534.

Senior Practitioner	
Hour(s)	**$418 per hour**
1.5	627
1	418
3	1,254
2.5	1,045
1	418
	$3,762

Junior Practitioner	
Hours	**$231 per hour**
2	462
4	924
4	924
2	462
	$2,772

Conclusion

87 In the result, I will make the following orders:

1. In respect of the contravention of s 323(1) of the FW Act by reason of a failure to pay accrued long service leave, a pecuniary penalty is payable by the Company to Ms Buchanan of $13,500.
2. In respect of the contravention of s 323(1) of the FW Act by reason of a failure to pay wages, a pecuniary penalty is payable by the Company to Ms Buchanan of $1,000.
3. Pursuant to the order made on 8 May 2020, the Company must pay Ms Buchanan's costs fixed in the sum of $6,534.

M. FLYNN
INDUSTRIAL MAGISTRATE

[1] A claim for accrued annual leave, not quantified in the claim, was subsequently not pursued.

[2] The full text of the orders made on 8 May 2020 was as follows:

1. For reasons to be published on 2 July 2020, the Respondent must pay the costs of the Claimant incurred after 20 November 2019 calculated on a party and party basis in accordance with the appropriate legal costs determination in respect of the Magistrates Court, to be fixed by the Court.

2. On or before 22 May 2020, the Claimant must lodge and serve (by email) a written submission of not more than 3 pages containing an estimate of the costs to which it is entitled in accordance with Order 1.

3. On or before 5 June 2020, the Respondent has leave to lodge and serve (by email) a written submission of not more than 3 pages in response to the Claimant's submission referred to in the previous order.

4. The case is adjourned to 2 July 2020 for the publication of reasons and the making of orders on the issues of: pecuniary penalty orders; and costs (including the joint and several liability (if any) of a non-party, Mr Rossen, as to costs).

[3] **Chronology**

20 May 2016. Originating Claim

- Alleges: an employment relationship that ended on 31 March 2016; an entitlement to: long service leave per s 8 of the LSL Act (WA) ($51,848.76); and 'annual leave and wages ($1,885.41)' per s 90 and s 323 FW Act and a failure to pay accrued 'long service leave, annual leave and wages'.

- Request for orders: the Respondent pay long service leave entitlements and wages; the Respondent pay pecuniary penalties to the Claimant in relation to the Respondent's breaches of: s 44(1) in relation to s 323(1); that the Respondent pay the Claimant's legal costs.

31 May 2016 Company commences a case against Ms Buchanan in the Supreme Court (the Supreme Court Proceedings)

- The Response (see below) records that by a 'by a writ of summons and statement of claim in 1898 of 2016', the Company commences a claim against Ms Buchanan in the Supreme Court for 'breach of her contract of employment and breach of her fiduciary duties during the period of her employment' and seeks 'damages or alternatively an account of profits/equitable compensation'.

9 June 2016: Company files a Response

- Alleges an employment contract between the parties that commenced in December 1996 and ended on 23 March 2016 with a base salary of $163,402.14.

- Denies: Ms Buchanan is entitled to long service leave because 'termination was due to serious misconduct in accordance with s 8(2)(c) LSL Act'. The serious misconduct alleged is:

    1) in October 2015 and March 2016, Ms Buchanan failed to carry out an instruction to her to renew management agreements of clients of the Company;

    2) on 14 March 2016, failed to carry out an instruction to delegate work to Ms Trudy Hoad; and

    3) around 16 March 2016, contrary to an instruction from Mr Rossen, Ms Buchanan 'continued to solicit business from' clients of the Company.

- Denies that Ms Buchanan is entitled to unpaid wages. Alleges that payments on the 23 March 2016 and 30 March 2016 resulted in an overpayment of $3,141.35.

6 September 2017: Directions made by Industrial Magistrate Cicchini

- Orders for both parties to give discovery and for the filing of witness statements.

- An order is made that the claim not to be listed for trial before mediation in the Supreme Court Proceedings, subject to application to be made not earlier than 6 December 2017.

8 February 2018: Application for Stay Refused; Orders made by Industrial Magistrate Flynn

- The Company application for a stay pending the determination of the Supreme Court Proceedings is dismissed.

- Orders made in anticipation of a trial date of 3 May 2018.

3 May 2018: Application for Stay Granted; Orders made by Industrial Magistrate Flynn

- The Company application for a stay pending the determination of the Supreme Court Proceedings is granted.
- The material filed on the application includes an affidavit of the solicitor for the Company (Tully Carmady) filed 7 February 2018 and includes statements at [25] - [26] to the effect that if the Company succeeds in the Supreme Court Proceedings then he believes that the claim of serious misconduct relevant to the defence of the long service leave claim 'would be made out' and, conversely, if the Company was not successful in the Supreme Court Proceedings then he believes that 'the issue of serious misconduct would be determined in favour of Ms Buchanan'.

20 November 2019: Orders made in Supreme Court Proceedings

- The material filed on the application of 6 February 2020 records that 'the Company was granted leave to discontinue the Supreme Court Proceedings and an order made that the Company and Mr Rossen pay the costs of the Supreme Court Proceedings.

6 February 2020: Directions Hearing; Orders made by Industrial Magistrate Flynn

- The order for the stay of the case made on 3 May 2018 is discharged.
- Orders are made in anticipation of setting a trial date, including for the filing of witness Outlines by Ms Buchanan (by 28 February 2020) and by the Company (by 13 March 2020).

18 March 2020: Directions Hearing; Judgment entered for the Claimant

- Judgment is entered for the claimant.
- Orders made that the respondent pay to the claimant the sum of $53,734.17 on account of the claim together with pre-judgment interest fixed in the sum of $12,348.68.
- The transcript of the proceedings records at pages 10 - 11:

  FLYNN IM:. .. I've reached the view that it's appropriate to make orders for judgment for the claimant, and to dismiss the counter claim, and to make orders for the payment of sums of money on account of the claim and on account of pre-judgment interest. The basis for making those orders is that there has been default in compliance with the directions order that was made by the Court on 19 February by the - or the 20 February* by the respondent. However, as part of the examining that default, it's come to light that the respondent has indicated a willingness to pay the amounts, which I'm proposing to order. What's also apparent is that the case is not settled because there are two issues in dispute, and I propose making some directions with a view to those issues being resolved. Against that background, the orders that I will make - will propose to make, subject to hearing from the parties, is there'll be judgment for the claimant and any counter claim shall be dismissed. There'll be an order that the respondent pay the claimant the sum of $53,734.17 on account of the claim, and interest fixed in the sum of $12,189.56. There'll be an order that the case is adjourned to a date to be fixed by the clerk for a hearing on a) the fixing of a penalty for a contravention of the Fair Work Act; and b) the issue of costs.*

  * The references to 19 February or 20 February are incorrect. The directions order was made on 6 February 2020.

[4] ***Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd (ACN 075 400 529)*** [2006] FCA 1427 [45]; ***Fair Work Ombudsman v Al Hilfi*** [2015] FCA 313 [19] - [23].
[5] By inference from her claim for $51,848.76 on account of 16.5 weeks accrued long service leave and consistent with paragraph 19 of the Response stating an annual salary of $163,402.
[6] See [13] of the 'Points of Claim' annexed to the Originating Claim.
[7] See [7] and [8] of the 'Points of Claim.
[8] FW Act, s 12.
[9] FW Act, s 539(2).
[10] FW Act, s 546(1).
[11] FW Act, s 323(1) and s 322.
[12] FW Act, s 12 and s 14.
[13] FW Act, s 13.

[14] See ***Association of Professional Engineers, Scientists and Managers Australia v Bulga Underground Operations Pty Ltd*** [2019] FCA 1960; Contrast: ***Blight v Integrity Estates Pty Ltd & Nikou*** [2019] SAET 39 [6].
[15] What follows is an adaption of observations of the Court of Appeal in the context of a sentencing hearing for a criminal offence: ***Pas v State of Western Australia*** [2009] WASCA 210 [91] - [98] (per Buss JA; Owen JA and Wheeler JA concurring).
[16] ***Briginshaw v Briginshaw*** [1938] HCA 34; (1938) 60 CLR 336, 362 cited in ***Liquor Hospitality and Miscellaneous Union v Arnotts Biscuits Ltd*** [2010] FCA 770; (2010) 188 FCR 221 [13].
[17] 'Penalty unit' has the meaning given by s 4AA(1) of the *Crimes Act 1914* (Cth): FW Act, s 12.
[18] See [18] - [22] of the Affidavit of Mr Rossen of 7 May 2020.
[19] I reserved the question of whether to admit the admission into evidence. The evidence, in [14] of Ms Buchanan's Outline of Submissions, will be admitted.
[20] ***Kelly v Fitzpatrick*** [2007] FCA 1080 [28]
[21] A dissimilar case concerning long service is ***Textile Clothing Footwear Union Of Australia v Icon Print Innovations Pty Ltd*** [2018] FCCA 1135.
[22] Originating Claim [13].
[23] ***Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd*** [2015] FCAFC 25 [62].
[24] Affidavit of Tully Carmady filed 7 February 2018 at [25] - [26].
[25] ***Australian and International Pilots Association v Qantas Airways Ltd (No.3)*** [2007] FCA 879 [39]; ***Swansdale Pty Ltd v Whitcrest Pty Ltd*** [2010] WASCA 129 (S) [10].
[26] ***Construction Forestry Mining and Energy Union v North Goonyella Coal Mine Pty Ltd*** [2013] FCA 1444 [78] - [79]:

> *It is certainly possible to envisage cases where an unreasonable act or omission such as would permit the awarding as a matter of discretion indemnity costs. It does not, in my view, axiomatically follow that because one is satisfied for the purposes of s 570(2)(b) that one must exercise the discretion given under s 570(1) always to order indemnity costs. Each case must be considered on its individual merits.*

[27] ***Rodwell v Hutchinson*** [2010] WASCA 197 [13]; ***Smoothy Resource Logistics Pty Ltd v Kimberley Shayne McAullay [No 2]*** [2016] WADC 48 (Gething DCJ).
[28] ***Yirra Pty Ltd (t/as Richmond Demolition and Salvage) v Summerton*** [2009] FCAFC 50.
[29] ***Solomons v District Court (NSW)*** [2002] HCA 47; (2002) 211 CLR 119, 134 [24].
[30] ***Dunghutti Elders Council (Aboriginal Corporation) RNTBC v Registrar of Aboriginal and Torres Strait Islander Corporations (No 4)*** [2012] FCAFC 50 [89].
[31] ***FPM Constructions Pty Ltd v Council of the City of Blue Mountain***s [2005] NSWCA 340 [210] (Bastan JA).
[32] Company's Costs Submission.