WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2020 WAIRC 00307
CORAM	**:**	INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD	**:**	THURSDAY, 23 APRIL 2020
DELIVERED	**:**	THURSDAY, 4 JUNE 2020
FILE NO.	**:**	M 86 OF 2019
BETWEEN	**:**	DINI YUSDIANINGSIH **CLAIMANT** AND ASHANI HOLDINGS PTY LTD **RESPONDENT**

CatchWords	**:**	INDUSTRIAL LAW – Small Claim under the *Fair Work Act 2009* (Cth) – Contravention of modern award – Claim for unpaid wages alleged to be owed under *Children's Services Award 2010* (Cth) – Construction of a term of an award – Deduction of one week's wages
Legislation	**:**	*Fair Work Act 2009* (Cth) *Corporation Act 2001* (Cth) *Taxation Administration Act 1953* (Cth) *Industrial Relations Act 1979* (WA)
Instruments	**:**	*Children's Services Award 2010* (Cth)
Case(s) referred to in reasons:	**:**	***City of Wanneroo v Australian Municipal, Administrative, Clerical Services Union*** (2006) 153 IR 426 ***Kucks v CSR Ltd*** (1996) 66 IR 182 ***Amcor Ltd v CFMEU*** [2005] HCA 10 ***Mildren v Gabbusch*** [2014] SAIRC 15 ***Miller v Minister of Pensions*** [1947] 2 All ER 372 ***Briginshaw v Briginshaw*** [1938] HCA 34
Result	**:**	Claim is proven
Representation:		
Claimant	**:**	Self-represented
Respondent	**:**	Ms D. Parbat on behalf of the Respondent (as a director)

REASONS FOR DECISION

1 The Claimant, Ms Dini Yusdiantingshi, was employed as a Child Educator (Certificate III) by the Respondent, Ashani Holdings Pty Ltd, from 10 September 2018 to 8 November 2018 and she worked at the Ellenbrook Montessori Childcare Centre.

2 Both parties agree that the *Children's Services Award 2010* (Cth) (the Award) applies to the Claimant's employment by the Respondent.

3 The Claimant alleges the Respondent contravened the *Fair Work Act 2009* (Cth) (FWA) and the Award in failing to pay her ordinary wages from 22 October 2018 to 8 November 2018 contrary to the terms of the Award and the Claimant claims $954.99 in unpaid wages.

4 The Claimant elected the small claims procedure under s 548 of the FWA.

5 Schedule 1 of these reasons for decision outline the jurisdiction, practice and procedure of the Industrial Magistrates Court of Western Australia (IMC).

Background

6 The Respondent is an Australian proprietary company limited by shares registered pursuant to the *Corporations Act 2001* (Cth) and operates a childcare business known as Ellenbrook Montessori Childcare Centre. The Respondent is a '***constitutional corporation***' within the meaning of that term in s 12 of the FWA, and is a '***national system employer***' within the meaning of that term in s 14(1)(a) of the FWA. The Claimant is an individual who was employed by the Respondent and is a '***national system employee***' within the meaning of that term in s 13 of the FWA.

7 The Claimant commenced employment with the Respondent on or around 10 September 2018 pursuant to a contract of employment[1] and the Award applied to her employment. I note the Claimant's first day of employment was 19 September 2018.[2]

8 Relevant to the Claimant's claim the contract of employment contained the following terms:

- the salary she was paid was at the rate of $22.04 per hour set under the Award and was to be paid fortnightly on a Friday week proceeding that fortnight; and
- the Respondent could terminate the Claimant's employment by giving notice or payment in lieu of notice of one week, where the Claimant was employed for less than one year, and the Claimant could be summarily dismissed if she was guilty of serious misconduct, violation of privacy or confidentiality.

9 The Claimant's employment was terminated on 8 November 2018. The Claimant was paid wages as follows:[3]

- for the week ending 21 September 2018 – $573.04 at $22.04 per hour;
- for the fortnight ending 5 October 2018 – $961.38 at $22.04 per hour; and
- for the fortnight ending 19 October 2018 – $1,206.69 at $22.04 per hour.

10 The Claimant worked the following hours and says that she was not paid wages for the work undertaken:[4]

- for the week ending 28 October 2018 – 10.75 hours;
- for the week ending 2 November 2018 – 17 hours; and

- for the week ending 9 November 2018 – 14.2 hours.

11 The Respondent did not provide a final pay slip upon the Claimant's termination of employment and only did so when it was ordered by the IMC.[5]

12 The Respondent agrees that it did not pay the Claimant for the hours worked between 22 October 2018 and 8 November 2018, but says that it was entitled to withhold $826.50 (and other amounts) in wages because the Claimant failed to give one week's notice prior to the termination of her employment in accordance with the FWA and cl 11 of the Award.

13 The Claimant denies that she failed to give notice of termination of employment, but says that upon her indicating to the Respondent that she intended to leave her employment with two weeks' notice, Ms Dhana Parbat (Ms Parbat), the director of the Respondent, terminated her employment on 8 November 2018.

Did The Claimant Give Notice Of Termination Of Employment?

14 The most significant factual issue in dispute is the circumstances surrounding the termination of the Claimant's employment on 8 November 2018.

Evidence

15 The Claimant states she indicated to Ms Parbat on 7 November 2018 that she wished to leave her employment after Ms Parbat was upset with her when a child broke a toy. She was supervising 12 children at the time. The Claimant said she told Ms Parbat that she would provide two weeks' notice and Ms Parbat told her to '*think about it*'. However, the Claimant says that Ms Parbat agreed the Claimant would provide a letter of resignation on 9 November 2018, as the Claimant was unable to get to a library to use a printer to print off the letter of resignation.[6]

16 On 8 November 2018, the Claimant attended work as rostered and at the completion of the day's work she was asked to attend Ms Parbat's office along with a supervisor, Ms Vimla Patel (Ms Patel). Ms Parbat was unhappy because the Claimant had told other staff members that she was leaving work, and Ms Parbat told her that they did not need her to work the next day. The Claimant says Ms Parbat forced her to sign a blue book to say that she was not giving notice.[7]

17 The Claimant says that she felt intimidated by Ms Parbat and Ms Patel to sign the blue book, because at the time they were standing either side of her and she was crying. Ms Parbat said to her that if she wanted to quit, then she was to go now and write this in the blue book. The Claimant says that she still thought she would be paid her salary. Ms Parbat said to her '*you need to be strong to be in childcare*' and Ms Patel said to her '*childcare not good for you*'.

18 The Claimant said the next day, 9 November 2018, was pay day and she believes that she was terminated at the end of her shift on 8 November 2018 because the Respondent never intended to pay her for the work she did. She understands that other employees were paid on 9 November 2018. Further, on 9 November 2018, she returned to the Respondent uniforms and a hat she paid for as a gesture of goodwill.

19 The Claimant says she made several attempts to demand payment of her wages, but Ms Parbat told her that because she did not provide notice of termination of employment her wages would not be paid. In addition, the Claimant says that she never received a final payslip and did not receive a copy of the contract of employment until she commenced the claim.

20 The Claimant posed the question of why would she walk out when she was due to be paid the following day and had not been paid for the previous fortnight's work.

21 The Claimant relied upon evidence of Ms Ruby Choudhary (Ms Choudhary) in support of the termination of her employment by the Respondent on 8 November 2018.[8]

22 The relevance of Ms Choudhary's evidence is that, consistent with the Claimant's evidence, the Respondent was late paying the staff for time worked from 22 October 2018 to 2 November 2018. Further, on 8 November 2018, Ms Choudhary worked with the Claimant in the kindy room of the childcare centre, and she said the Claimant was in a happy mood at work during the shift.

23 At about 4.30 pm on 8 November 2018, Ms Choudhary said she saw the Claimant in the Claimant's car in the carpark and the Claimant looked upset. Later that day she telephoned the Claimant and the Claimant told her what happened. Ms Choudhary maintained that she could see the Claimant from the small window in the nursery and maintained the Claimant looked upset.

24 The Claimant also relied upon a series a text messages between her and other work colleagues.[9] As explained during the hearing, the relevance of these text messages was the timing of the text messages rather than the truth of their content. That is, the timing of the text messages demonstrates shortly after the termination of her employment, the Claimant sent text messages to her work colleagues saying that her employment had been terminated.

25 Ms Parbat says the Claimant came to her on 7 November 2018 and said that she was going to quit, and she was not going to work her notice period. On 8 November 2018, the Claimant said the same thing and that was when Ms Parbat asked the Claimant to sign the blue book stating:[10]

> *To Ellenbrook Montessori,*
>
> *Today, 8 November 2018 It's My Last day today as I am not giving notice.*

26 Ms Parbat says the Claimant was given the chance to work her notice period, but she did not and she had no intention of doing so. Ms Parbat clarified that on 7 November 2018 the Claimant told Ms Parbat she was quitting and was not going to work her notice period and Ms Parbat said she told the Claimant to think about it. Ms Parbat says that she does not want to keep employees who do not want to work at the childcare centre, so she asked the Claimant to write it on paper.

27 Ms Parbat said that if an employee leaves without notice, the Respondent is entitled to withhold one week's pay and did so in the Claimant's case. Ms Parbat agreed the Respondent did not provide a final payslip until ordered by the IMC to do so,[11] and the Respondent withheld $826.50 in wages.

28 Ms Parbat said the Respondent did not pay the Claimant because she left without notice. Ms Parbat said she had no idea why the Claimant came to work on 8 November 2018, because the Claimant was determined to quit, and she did not want to work her notice period. Ms Parbat said the Claimant came to her on 8 November 2018, but then agreed she asked the Claimant to come to her office on the same day because the Claimant was saying that she was quitting.

29 In response to the question why Ms Parbat asked the Claimant to come to her office at the end of the shift, Ms Parbat said it was because the Claimant did not come to see her in the morning on 8 November 2018, so she waited. Ms Parbat denied waiting until the end of the shift to, in essence, extract a further day's unpaid work from the Claimant.

Determination

30 In terms of my assessment of the witness evidence, I do not consider Ms Parbat's evidence credible or truthful. Her evidence lacked consistency, and additionally I found it incredible that

having had a conversation with the Claimant on 7 November 2018 about the Claimant leaving her employment that she would wait for the Claimant to come to her on 8 November 2018. Further to that, Ms Parbat conveniently waited until the end of the shift on 8 November 2018 when, on her evidence, the Claimant was determined to leave and leave without notice.

31 Further, the Respondent having not paid the Claimant for three weeks' work, on Ms Parbat's evidence, proceeds to deduct the whole of the Claimant's wages purportedly for one week's notice period. Thereafter, when the final payslip is produced it shows the amount sought by the Claimant, but varies the amount owed and claims other amounts, which when various deductions are made results in a zero-net balance to the Claimant. I have grave doubts about the authenticity of the final payslip.

32 Contrary to this, I consider the Claimant's evidence credible and truthful. While limited weight can be given to the content of the text messages and Ms Choudhary's evidence, this evidence is consistent with the Claimant's evidence that something happened at the end of the shift on 8 November 2018, which greatly upset the Claimant.

33 In addition, the Claimant's evidence concerning the Respondent's failure to pay her wages for the preceding period, unrelated to any notice period, and Ms Parbat waiting until the day before usual payment was due before invoking the termination of the Claimant's employment is compelling. In my view, it demonstrates questionable intent on the part of Ms Parbat on behalf of the Respondent.

34 Accordingly, I find Ms Parbat, on behalf of the Respondent, terminated the Claimant's employment on 8 November 2018 after the Claimant finished her shift, and after the Claimant had informed her on 7 November 2018 that she *intended* to resign by giving two weeks' notice with the resignation to take effect from 9 November 2018. I do not accept that on 8 November 2018 the Claimant terminated her employment with the Respondent.

35 Further, I find that the Claimant felt compelled to write a prejudicial note in Ms Parbat's blue book,[12] but the content of the note did not reflect the circumstances of her termination of employment and was written at the behest of Ms Parbat.

The Award

36 Ms Parbat stated the Respondent was entitled to withhold the Claimant's wages pursuant to cl 11 of the Award.

37 Relevant to the Claimant, cl 11.1(b) of the Award provides that an employee whose period of continuous service is less than one year, is to give one week's notice of termination of employment. Clause 11.1(d) of the Award provides that if an employee aged 18 years and over does not give the notice period required under cl 11.1(b), '*the employer may deduct from wages due to the employee under* [the Award] *an amount that is no more than one week's wages for the employee*'. Clause 11.1(e) of the Award provides that if the employer agrees to a short period of notice, '*then no deduction can be made*' under cl 11.1(d), and any deduction made under cl 11.1(d) '*must not be unreasonable in the circumstances*': cl 11.1(f) of the Award.

38 On the found facts, the Claimant did not terminate her employment with the Respondent, but Ms Parbat, on behalf of the Respondent, terminated the Claimant's employment on 8 November 2018. Prior to that the Claimant did no more than evince an intention to terminate her employment and did so intending to provide two weeks' notice to the Respondent from 9 November 2018 (which from the Claimant's perspective was a logical date given the fortnightly pay cycle).

39 Therefore, cl 11.1 of the Award has no application in the Claimant's circumstances.

40 However, had I found the Claimant terminated her employment on 8 November 2018, what would this mean in terms of the deduction made by the Respondent in the Claimant's final payslip?

41 Answering this question involves consideration of cl 11.1 of the Award.

42 The interpretation of an award begins with consideration of the natural and ordinary meaning of the words used.[13] An award is to be interpreted in light of its industrial context and purpose, and must not be interpreted in a vacuum divorced from industrial realities.[14] An award must make sense according to the basic conventions of English language.[15] Narrow and pedantic approaches to the interpretation of an award are misplaced.[16]

43 The deduction of wages by an employer provided in cl 11.1(d) of the Award is discretionary and must not be unreasonable, but even then it is limited to '*one week's wages for the employee*' (emphasis added). That is, to the extent that wages are deducted, the deduction is referrable to the particular employee, rather than to an average week's wage over a number of employees or to the minimum or maximum wage attributable to a class of employees of which the particular employee is a member.

44 As previously identified, the Claimant's final payslip purported to deduct $826.50 from the Claimant's wages where Ms Parbat said this was one week's wages for the Claimant. Yet, Ms Parbat agreed the Claimant had not been paid for three week's work, from 22 October 2018 to 9 November 2018 and the amount reflected in the final payslip was $927.44 for that time.

45 Therefore, on any view, and leaving aside the disingenuous attempt to conflate the final payslip, the amount of $826.50 deducted by the Respondent was in excess of one week's pay for the Claimant.

46 At best, having regard to the fortnightly pay cycle from 29 October 2018 to 9 November 2018, the Respondent, if it was entitled to do so, may have deducted $343.82[17] (15.6 hours at $22.04 per hour) or $312.97[18] (14.2 hours at $22.04 per hour) from wages due to the Claimant under the Award. Instead, the Respondent, in what can only be described as an egregious act of creative accounting, deducted all of the unpaid wages owed to the Claimant.

Outcome

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

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

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

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

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

(i) under [the FWA] *or a fair work instrument; or*

(ii) because of a safety net contractual entitlement; or

(iii) because of an entitlement of the employee arising under subsection 542(1)' of the FWA.

50 Pursuant to cl 19.3(a) of the Award the Respondent was required to pay to the Claimant '*no later than 7 days after the day on which the employee's employment terminates:*

(i) the employee's wages under [the Award] *for any complete or incomplete pay period up to the end of the day of termination*'.

51 I note the Claimant has forgone any other entitlements she may have otherwise been entitled to under the Award, where she was most concerned about being paid for work undertaken.

52 Having regard to the findings of fact made and to the application of those facts to the law, I am satisfied the Claimant has proven to the requisite standard the following:

- the Respondent failed to pay the Claimant for work undertaken from 22 October 2018 to the end of the day of termination, 8 November 2018, seven days after termination, and I am satisfied the amount owed remains outstanding;
- the Claimant worked 41.95 hours during this same period and the Respondent is required to pay to the Claimant the amount of $924.58 pursuant to cl 19.3(a) of the Award, and the Respondent contravened cl 19.3(a) of the Award in failing to pay this amount no later than seven days after the day of termination; and
- in contravening cl 19.3(a) of the Award, the Respondent has contravened a term of a modern award: s 45 of the FWA. Contravening a term of a modern award is a civil remedy provision: s 539(2) of the FWA, pt 2-1 item 1.

Result

53 I make the following order:

- Pursuant to s 545(3) of the FWA and subject to any liability to the Commissioner of Taxation under the *Taxation Administration Act 1953* (Cth), the Respondent is to pay to the Claimant the amount of $924.58 within 30 days of the date of this order.

D. SCADDAN
INDUSTRIAL MAGISTRATE

[1] Exhibit 8 – Contract of employment.
[2] Exhibit 10 – Claimant's roster.
[3] Exhibit 3 – Payslips.
[4] Exhibit 10 and Claimant's evidence.
[5] Exhibit 7 – Final payslip.
[6] Exhibit 2 – Claimant's Chronology of Events and the Claimant's oral evidence.
[7] Exhibit 11 – Handwritten note date 8 November 2018.
[8] Exhibit 6 – Witness Statement of Ruby Choudhary dated 4 March 2020 and oral evidence.
[9] Exhibit 5 – Series of text messages on 8 November 2018.
[10] Exhibit 11.
[11] Exhibit 7.
[12] Exhibit 11.
[13] ***City of Wanneroo v Australian Municipal, Administrative, Clerical Services Union*** (2006) 153 IR 426, 438.
[14] ***City of Wanneroo***, 438 and 440.
[15] ***City of Wanneroo***, 440.
[16] ***Kucks v CSR Ltd*** (1996) 66 IR 182; ***Amcor Ltd v CFMEU*** [2005] HCA 10.
[17] The Claimant worked 17 hours in the week 29 October 2018 to 2 November 2018 and 14.2 hours in the week 5 to 9 November 2018. This methodology averages the hours worked over two weeks.
[18] This methodology uses the hours worked from 5 to 9 November 2018.

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

Jurisdiction

[1] An employee, an employee organization or an inspector may apply to an eligible state or territory Court for orders regarding a contravention of the civil penalty provisions identified in s 539(2) of the FWA.

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

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

[4] The civil penalty provisions identified in s 539 of the FWA include contravening a term of a modern award: FWA, s 44(1).

[5] An obligation upon an '***employer'*** is an obligation upon a '***national system employer***' and that term, relevantly, is defined to include '*a corporation to which paragraph 51(xx) of the Constitution applies*': FWA, s 12, s 14, s 42 and s 47. A National Employment Standard entitlement of an employee is an entitlement of an '***employee'*** who is a '***national system employee***' and that term, relevantly, is defined to include '*an individual so far as he or she is employed by a national system employer*': FWA, s 13, s 42 and s 47.

Contravention

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

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

- The Core Provisions (including a Modern Award) set out in pt 2-1 of the FWA: FWA, s 61(2) and s 539.
- An '***employer'*** has the statutory obligations noted above if the employer is a '***national system employer***' and that term, relevantly, is defined to include '*a corporation to which paragraph 51(xx) of the Constitution applies*': FWA, s 12 and s 14. The obligation is to an '***employee'*** who is a '***national system employee***' and that term, relevantly, is defined to include '*an individual so far as he or she is employed … by a national system employer*': FWA, s 13.

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

- An employer to pay to an employee an amount that the employer was required to pay under the FWA: FWA, s 545(3).

[9] In contrast to the powers of the Federal Court and the Federal Circuit Court, an eligible state or territory court has no power to order payment by an entity other than the employer of amounts that the employer was required to pay under the FWA. For example, the IMC has

no power to order that the director of an employer company make payments of amounts payable under the FWA: ***Mildren v Gabbusch*** [2014] SAIRC 15.

Burden and standard of proof

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

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

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

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