WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2020 WAIRC 00360
CORAM	**:**	INDUSTRIAL MAGISTRATE M. FLYNN
HEARD	**:**	WEDNESDAY, 4 MARCH 2020
DELIVERED	**:**	THURSDAY, 25 JUNE 2020
FILE NO.	**:**	M 91 OF 2019
BETWEEN	**:**	COMMUNITY AND PUBLIC SECTOR UNION **CLAIMANT** AND RACING AND WAGERING WESTERN AUSTRALIA **RESPONDENT**

CatchWords	**:**	INDUSTRIAL LAW – Redundancy – alleged breach of *Fair Work Act 2009* (Cth) and Enterprise Agreement – Construction of Redundancy Clause
Legislation	**:**	*Fair Work Act 2009* (Cth) *Industrial Relations Act 1979* (WA) *Workplace Relations Act 1996* (Cth) *Racing and Wagering Western Australia Act 2003* (WA)
Instruments	**:**	*RWWA General Staff Agreement 2015* (Cth) *RWWA General Staff Agreement 2009* (Cth) *RWWA General Staff Agreement 2012* (Cth)
Case(s) referred to in reasons:	**:**	***Gayle Balding, Workplace Ombudsman v Liquid Engineering 2003 Pty Ltd (ACN 104 341 657)*** [2008] WAIRComm 350 ***Cuzzin Pty Ltd v Grnja*** [2014] SAIRC 36 ***Qube Ports Pty Ltd v Maritime Union of Australia*** [2018] FCAFC 72 ***Stagnitta v Bechtel Construction (Australia) Pty Ltd*** [2018] WAIRC 00886 ***Re Harrison; Ex parte Hames*** [2015] WASC 247 ***Polan v Goulburn Valley Health*** [2016] FCA 440 ***City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union*** [2006] FCA 813; (2006) 153 IR 426 ***Australasian Meat Industry Employees Union v Golden Cockerel Pty Limited*** [2014] FWCFB 7447

Workpac Pty Ltd v Skene [2018] FCAFC 131
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Skilled Engineering Ltd [2003] FCA 260; (2003) 53 AILR 100-013; [2003] FCA 260
B P Refinery (Westernport) Pty Ltd v Shire of Hastings Council (1977) 180 CLR 267
Codelfa Construction Pty Ltd v State Rail Authority of New South Wales [1982] HCA 24; (1982) 149 CLR 337
Hospital Products Ltd v United States Surgical Corporation [1984] HCA 64; (1984) 156 CLR 41
Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234

Result **:** The claim is dismissed

Representation:

Claimant **:** Ms D. Larson (of counsel)
Respondent **:** Ms R. Cosentino (of counsel) as instructed by MinterEllison

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REASONS FOR DECISION

1 Mr Lam Tam (Mr Tam) and Mr Warren Wishart (Mr Wishart) were employed by the respondent, Racing and Wagering Western Australia (RWWA), for 30 years and 23 years, respectively, until their positions were made redundant on 30 November 2018.[1] They are each entitled to a redundancy payment in accordance with cl 28 of the *RWWA General Staff Agreement 2015* (Cth)[2] (the 2015 Agreement), an enterprise agreement made under the *Fair Work Act 2009* (Cth) (FW Act). Clause 28[3] of the 2015 Agreement states that employees who had commenced service before 1 September 2009 (pre-September 2009 Employees, for example Mr Tam and Mr Wishart) are entitled to redundancy pay for service up to 1 September 2012, calculated on the basis of 3 weeks per year of service with a maximum of 52 weeks pay. The result is that Mr Tam is entitled to *at least* 52 weeks pay as a redundancy payment and Mr Wishart is entitled to *at least* 51 weeks pay as a redundancy payment.

2 The parties are in dispute on whether cl 28 results in *additional* redundancy pay for service *after* 1 September 2012. Clause 28(4)(b) states that, for pre-September 2009 Employees, *additional* redundancy pay for the period after 1 September 2012 is based on cl 28(2)(a). The full text of cl 28(2)(a) appears below under the heading, 'Clause 28: The Text'.

3 The claimant, Community and Public Sector Union (CPSU), contends that the result of the application of cl 28(2)(a) to pre-September 2009 Employees is for *additional* redundancy pay to be calculated for the portion of service after 1 September 2012 as if service *commenced on 1 September 2012* and ended on the date of redundancy. The result is that Mr Tam and Mr Wishart are each entitled to *additional* redundancy pay of 11 weeks for their 6 years of service between 2012 and 2018.

4 The RWWA argue for a different result of the application of cl 28(2)(a). It contends that *additional* redundancy pay is calculated for the *portion* of the *whole period of service* that occurs after 1 September 2012, where the whole period of service is 30 years in the case of Mr Tam and 23 years in the case of Mr Wishart. A consequence is that the maximum entitlement to

redundancy pay is reached nine years after the commencement of the *actual date* of service and any further service, including service *after* 1 September 2012 does not, under cl 28(2)(a), attract any further redundancy pay. On this view, because Mr Tam and Mr Wishart reached a maximum of 9 years or over service *before* 1 September 2012, cl 28(2)(a) did not provide for *any* additional redundancy pay for service after that date.

5 My view is that, for the reasons set out below, the construction of cl 28 advanced by RWWA is to be preferred.

Jurisdiction, Practice And Procedure Of This Court

6 This claim will be determined according to the law governing the jurisdiction, practice and procedure of Industrial Magistrates Court of Western Australia. The relevant law is identified in an endnote.[4] Relevant to the determination of this case:

(a) I am satisfied that the 2015 Agreement:

i. is an enterprise agreement made under the FW Act and in operation at all relevant times;

ii. covers and applies to RWWA, employees of RWWA including Mr Tam and Mr Wishart and the CPSU;[5] and

iii. imposes obligations upon the RWWA, a national system employer by reason of being a trading corporation, to employees of RWWA, national system employees by reason of being employees of RWWA.

(b) A contravention of the 2015 Agreement is also a contravention of *civil remedy provision* of the FW Act.

(c) The CPSU, an employee organisation, has standing to bring this claim.

(d) The Court may order RWWA to pay an amount to, or on behalf of, an employee if the Court is satisfied that RWWA was required to pay the amount under the 2015 Agreement.

(e) If the CPSU prove that RWWA has contravened the 2015 Agreement, this Court may order RWWA to pay a pecuniary penalty in an amount that the Court considers appropriate.

Principles To Be Applied When Interpreting The 2015 Agreement

7 The resolution of this case will require a finding on the meaning and effect of the 2015 Agreement. The law to be applied when resolving a disputed interpretation of an enterprise agreement is identified and summarised in an endnote.[6] Of particular relevance to the circumstances of this case are the following principles:

(a) The meaning of the 2015 Agreement is determined by the objectively ascertained intention of the parties, as it is expressed in the ordinary meaning of the text of the instrument; the subjective intentions of the parties are irrelevant.

(b) When construing the text of the 2015 Agreement, it will be relevant to consider the purpose, objective and context of the part of the agreement being construed as well as the purpose, objective and context of the whole agreement. A construction that makes the various parts of the 2015 Agreement harmonious is to be preferred.

(c) Ascertaining the 'purpose, objective and context' of the 2015 Agreement may require examining:

i. the history of the instrument;

ii. facts known to all parties when the agreement was made; and

iii. matters in the common contemplation or common assumption of the parties.

(d) The parties may presume to have intended that the 2015 Agreement: reflect a practical frame of mind; result in a sensible industrial practice; and avoid inconvenient or nonsensical outcomes. However, it must be borne in mind that the parties may legitimately disagree on whether a particular outcome is sensible.

Clause 28: The Text

8 Clause 28 of the 2015 Agreement is entitled 'Redundancy and Retrenchment'.

9 Clause 28(1) provides that RWWA will 'work with the employee to explore options' where the employee's position has been 'identified as surplus to … requirements'.

10 Clause 28(2) sets out the 'entitlements' of 'an employee whose role is redundant'. The entitlement to a severance payment is determined in cl 28(2)(a) by a table setting out the number of weeks salary applicable to each year of the '[e]mployee's period of continuous service with RWWA on termination' (the cl 28(2) Table or 16 Week Max Table). It should be noted that cl 28(2)(a) is stated to be subject to cl 28(4). Subsequent sub-clauses provide for an additional entitlement to a 12 week period of notice of termination (cl 28(2)(b), cl 28(2)(c) and cl 28(2)(d)) and an employee entitlement to a 'statement of employment' (cl 28(2)(e)). The full text of cl 28(2)(a) including the cl 28(2) Table in the same format that it appears in the 2015 Agreement is as follows:

28. REDUNDANCY AND RETRENCHMENT

…

(2) Should RWWA determine that an employee's role is redundant the following entitlements will apply:

(a) Subject to subclause 4 of this clause Preservation of Severance Payment Entitlement, should the employee's employment be terminated due to redundancy, the employee will receive a severance payment on the following basis:

Redundancy pay period	
Employee's period of continuous service with RWWA on termination	**Redundancy pay period**
At least 1 year but less than 2 years	4 weeks
At least 2 years but less than 3 years	6 weeks
At least 3 years but less than 4 years	7 weeks
At least 4 years but less than 5 years	8 weeks
At least 5 years but less than 6 years	10 weeks
At least 6 years but less than 7 years	11 weeks
At least 7 years but less than 8 years	13 weeks
At least 8 years but less than 9 years	14 weeks
At least 9 years and over	16 weeks

11 Clause 28(3) provides for 'exemptions' to a severance payment for specified reasons including 'serious misconduct'.

12 Clause 28(4) concerns the calculation of severance payments of pre-September 2009 Employees, referred to the clause as 'eligible employees'. Pre-September 2009 Employees receive severance pay calculated in accordance with cl 28(4) and not in accordance with cl 28(2). The full text of clause 28(4) is as follows:

PRESERVATION OF SEVERANCE PAYMENT ENTITLEMENTS

(4) RWWA employees employed prior to 1 September 2009 will continue to be eligible on retrenchment for severance payments until 31 August 2012 as follows:

(a)

Employee status	**Preserved Redundancy Entitlement**
Full time and part time employees	Employment Relocation and Redundancy Provisions Policy which provides: **Period of Continuous Service** — **Severance** Less than 1 Year — Nil 1 year and less than 2 years — 4 weeks' ordinary salary 2 years and over — 3 weeks' ordinary salary for each completed year of continuous service, to a maximum of 52 weeks.
Casual employees engaged under this agreement	As per subclause 3(d) of this clause Casual employees are not entitled to Redundancy payments.

(b) Eligible employees' severance entitlement calculations will be frozen as at 1 September 2012. Employees will be advised by letter of the calculation at that time. If employment subsequently ends due to redundancy eligible employees will receive severance pay based on either the preserved calculation up to 31 August 2012 and subclause 2(a) for the period thereafter, or subclause 2(a) for the entire period - whichever is the greater.

(c) Other than as specified in sub-clauses 4(a) and (b) above, entitlements on redundancy for current employees will be as set out in subclauses 1 to 3 above.

13 It will be convenient to refer to the table in cl 28(4)(a) as the cl 28(4) Table or the 52 Week Max Table.

Interpretation Of Clause 28: CPSU's Submission

14 Mr Tam was employed from 24 April 1989 until he was made redundant on 30 November 2018. As at 1 September 2012 he had completed 23 years of service. Between 1 September 2012 and 30 November 2018 he completed a further period of 6 years' service, a total of 29 years' service.

15 The CPSU submit that Mr Tam, a pre-September 2009 Employee, is entitled to a severance payment of 63 weeks. This calculation is based on the following construction of cl 28:

(a) **Fifty-two weeks** is the result of the application of the words of cl 28(4)(b) underlined: '*the preserved calculation up to 31 August 2012 and subclause 2(a) for the period thereafter*'. I will refer to the result of this calculation as 'the Preserved Amount' and it is the product of the 52 Week Max Table. The formula includes redundancy pay of

three weeks for each year of service up until 1 September 2012 with a maximum redundancy pay of 52 weeks of pay. Mr Tam's 23 years of service before 1 September 2012 requires a calculation of three (weeks) multiplied by 23 (years) giving a result of 69 weeks. Sixty-nine weeks exceeds the 52 week maximum limitation. RWWA do not disagree with the CPSU's calculation of the Preserved Amount of 52 weeks of pay and the fact that Mr Tam is entitled to this amount.

(b) The word 'and' in cl 28(4)(b) is given its ordinary conjunctive meaning of 'plus': '*the preserved calculation up to 31 August 2012 and subclause 2(a) for the period thereafter*'.

(c) **Eleven weeks** is the result of the application of the words of cl 28(4)(b) underlined: '*the preserved calculation up to 31 August 2012 and subclause 2(a) for the period thereafter*'. The CPSU submits that the reference to 'subclause 2(a)' is a reference to the 16 Week Max Table. The phrase, 'for the period thereafter', is said to be construed as meaning the period of Mr Tam's service *commencing* on 1 September 2012. Mr Tam's service between 1 September 2012 and 30 November 2018 is 6 years. The 16 Week Max Table states that for an '[e]mployee's period of continuous service' of at least six years the redundancy period is 11 weeks.

16 The CPSU's submission regarding Mr Wishart illustrates the same approach to the construction of cl 28. Mr Wishart was employed from 3 May 1995 until he was made redundant on 30 November 2018. As at 1 September 2012 he had completed 17 years of service and between 1 September 2012 and 30 November 2018 he completed a further six years of service, a total of 23 years' service. The CPSU's submission is that Mr Wishart is entitled to a severance payment of 62 weeks pay. This is the sum of the Preserved Amount of 51 weeks (three weeks for each of 17 years of service (per the 52 Week Max Table) and, 11 weeks (per the 16 Week Max Table for at least six years' service). Again, it is convenient to note that RWWA do not disagree with the CPSU's submission on the calculation of the Preserved Amount of 51 weeks.

Interpretation Of Clause 28: RWWA's Submission

17 RWWA submit that Mr Tam is entitled to a severance payment of 52 weeks of pay, i.e. the Preserved Amount only. RWWA submit that the correct approach to cl 28(4) requires calculation of the difference between severance pay under the 16 Week Max Table for:

(1) the *whole* period of service, i.e. the *whole* period of service before redundancy; and

(2) the portion of Mr Tam's service that occurred *before* 1 September 2012.

18 The difference (if any) between these calculations is said to be the correct measure of severance pay for the period after 1 September 2012. Applied to Mr Tam, his severance pay under the 16 Week Max Table for:

(1) the *whole* period of service is 16 weeks of pay based on 29 years of service (i.e. the maximum); and

(2) the *part* of his service before 1 September 2012 is 16 weeks based on 23 years of service (i.e. the maximum).

19 The difference is zero.

20 The RWWA submission regarding Mr Wishart illustrates the same approach to the construction of cl 28(4). His entitlement is calculated as 51 weeks pay i.e. the Preserved Amount only. Recalling that Mr Wishart had completed a total of 23 years of service when made redundant

and had competed 17 years' service as at 1 September 2012, his severance pay under the 16 Week Max Table for:

(1) the *whole* period of service is 16 weeks pay based on 23 years of service (i.e the maximum); and

(2) the *part* of his service before 1 September 2012 is 16 weeks based on 17 years of service (i.e. the maximum).

21 The difference is, again, zero.

Clause 28 Is Ambiguous

22 The CPSU and RWWA both submit that the severance pay of Mr Tam and Mr Wishart each comprise the sum of two components. The first component, the Preserved Amount, is not in dispute.

23 The point of departure between the parties is the effect of the words underlined in cl 28(4)(b) when applied to the 16 Week Max Table:

> *If employment subsequently ends due to redundancy eligible employees will receive severance pay based on either the preserved calculation up to 31 August 2012 and subclause 2(a) for the period thereafter, or subclause 2(a) for the entire period - whichever is the greater.*

24 I have noted that the CPSU contend that the underlined words require the use of the 16 Week Max Table to calculate severance pay attributable to the employee's period of service *commencing* on 1 September 2012. On this approach, pre-September 2009 Employees, in addition to the Preserved Amount,[7] are entitled to an additional payment as set out in the row of the 16 Week Max Table corresponding to the years of service between 31 August 2012 and the date of redundancy. The additional payment will be a minimum of four weeks (for one year of service after 31 August 2012), and a maximum of 16 weeks (for nine years and over of service after 31 August 2012).

25 I have noted that the RWWA contend that the same underlined words require that additional redundancy pay is calculated for the *portion of the whole period of service that occurs after 1 September 2012*. On this approach, pre-September 2009 Employees, in addition to the Preserved Amount, *may* become entitled to an additional payment. The quantum of the additional payment, if any, will be a function of the proportion of the whole period of service that occurs *after* 1 September 2012. The greater the proportion of service that occurs after 1 September 2012, the higher the quantum of the payment. However, no additional payment will ever be payable to a pre-September 2009 Employee who has nine years or more of service before 1 September 2012. This is because the maximum of 16 weeks having already been reached under the 16 Week Max Table for service of nine years, service for the period after 1 September 2012 does *not* result in any additional entitlement.

26 Both parties use the 16 Week Max Table to calculate an additional payment. Both parties incorporate the period of service of the employee after 1 September 2012 in their calculation. In that respect, *both* parties calculate the additional payment based upon 'subclause 2(a) for the period' after 1 September 2012. The difference between the parties is the *manner* in which use is made of the period of service after 1 September 2012 when applying the 16 Week Max Table.

27 The CPSU argue that the period of service after 1 September 2012 is to be used in the 16 Week Max Table as if the employee *commenced* service on that day. The CPSU submission is cogent and plausible. The references in cl 28(4)(b) to the 'period thereafter' and '31 August 2012' and 'subclause 2(a)', instinctively takes a reader of the agreement to the row of the 16 Week Max

Table that corresponds with a length of service *commencing* from 31 August 2012. The resulting calculation is attractive in its simplicity. The row of the 16 Week Max Table that corresponds with the years of employee's service *commencing* from 31 August 2012 is the additional payment.

28 RWWA draw upon the same textual references as the CPSU in cl 28(4)(b) ('period thereafter', '31 August 2012', 'subclause 2(a)') to argue for a calculation of a portion of the whole period of service. The RWWA approach has less intuitive appeal than the CPSU approach. However, a moment's reflection reveals that both views draw upon cl 28(4)(a) to calculate the Preserved Amount for service to 1 September 2012 and both views draw upon the 16 Week Max Table to calculate an additional redundancy payment taking account of service after 1 September 2012. RWWA place emphasis upon the references in cl 28 to a '*frozen*' amount (cl 28(4)(b)), a '*maximum* of 52 weeks' (cl 28(4)(a)) and the 16 week maximum after nine years' service (cl 28(2)(a)). It contends that these references (among other matters) mean that it is open to construe cl 28(4)(b) so as to achieve a purpose of providing for the transition of pre-September 2009 Employees who had not yet reached nine years or over of service at 1 September 2012. I agree that this construction is open, given the text of cl 28(4) and cl 28(2)(a). The 16 Week Max Table, drafted to (also) set out the redundancy pay of post-September 2009 Employees, is capable of being used in the manner suggested by RWWA so as to result in a calculation based on the *whole* period of service.

29 In the result, I accept that cl 28(4)(b) is ambiguous as to whether severance pay is to be calculated:

(1) with a service period *commencing* on 31 August 2012 (per CPSU); or

(2) with a service period *including* the service period commencing on 31 August 2012 and the whole of the service period (per RWWA).

30 My task is to choose between the interpretations urged by each party (or another interpretation) that best conforms to the objectively ascertained intention of the parties to the 2015 Agreement.

31 In concluding that the meaning of the clause is ambiguous, I have been careful to consider only the ordinary meaning of the text of cl 28. Matters advanced by RWWA that seek to *create* ambiguity in opposition to the apparent meaning of the text have been ignored. For example, I give no weight to a submission that the purpose of the clause, inferred from the evidence of Mr Matthew Thomas (Mr Thomas) on the circumstances of the *RWWA General Staff Agreement 2009* (2009 Agreement), *RWWA General Staff Agreement 2012* (2012 Agreement) and the 2015 Agreement, revealed an ambiguity in the text.[8]

Meaning Of Clause 28(4)

32 One author has identified the purpose of redundancy pay, historically, as being 'to compensate an employee for the trauma associated with the termination of employment, the loss of non-transferable credits, the loss of seniority, and the diminished security of a dismissed employee in any new employment'.[9]

33 It is apparent from the almost identical text of each provision that cl 28 of the 2015 Agreement is derived from cl 28 of the 2012 Agreement which, in turn, is derived from cl 25 of the 2009 Agreement. The 2009 Agreement marked the transition from a number of agreements and awards governed by the *Industrial Relations Act 1979* (WA) to a single agreement governed by the *Workplace Relations Act 1996* (Cth) (WR Act).[10]

34 The nearly identical text found in cl 28 of the 2015 Agreement, cl 28 of the 2012 Agreement and cl 25 of the 2009 Agreement, compel a conclusion that each be given the same interpretation absent compelling evidence to the contrary. There is no such evidence. The parties did not suggest otherwise.

35 The heading and text of the whole of cl 25 of the 2009 Agreement reveals that the clause serves two purposes.

36 First, the clause identifies the circumstances when RWWA may characterise an employee's position as 'redundant'. The first sub-clause (cl 25(1)) states that redundancy occurs upon RWWA determining that 'an employee's position … [is] surplus to RWWA's requirements and no suitable alternative position is available'.

37 Secondly, the clause proscribes the entitlements of an employee in the event of redundancy. This purpose is achieved by the text of the remaining sub-clauses (cl 25(2) to cl 25(4)). The remaining sub-clauses include the creation of the distinction between the redundancy entitlements of post-September 2009 Employees and pre-September 2009 Employees. The distinction is relevant to calculations of redundancy entitlements comprising weeks of pay based on years of service.

38 Under the 2009 Agreement, *post*-September 2009 Employees look to cl 25(2) to calculate their weeks of pay redundancy entitlements. Those entitlements are in the same terms as the 16 Week Max Table in the 2015 Agreement. There is an entitlement to four weeks pay in the case of redundancy after one year of continuous service, rising in increments of one to two weeks for each year of subsequent service and a maximum entitlement of 16 weeks pay in the case of redundancy after nine years (or more) of continuous service.

39 Under the 2009 Agreement, *pre*-September 2009 Employees look to cl 25(4) to calculate redundancy entitlements. Of obvious interest to RWWA and its' employees when making the 2009 Agreement was whether, compared to redundancy entitlements *before* the 2009 Agreement, the (new) redundancy entitlement was reduced, enhanced or unchanged? Put bluntly, *pre*-September 2009 Employees might be concerned if the 2009 Agreement resulted in a *reduced* redundancy entitlement.

40 Clause 25(4) of the 2009 Agreement provides a clear answer as to the weeks of pay redundancy entitlements of *pre*-September 2009 Employees *for the life of the 2009 Agreement.*

41 Clause 25(4) of the 2009 Agreement opens with a statement to the effect that *pre*-September 2009 Employees are entitled to redundancy pay 'in accordance with their existing arrangements' until the end of the 2009 Agreement and proceeds to set out those arrangements in a tabular form. The existing arrangements set out are in the same terms as the 52 Week Max Table found in the 2015 Agreement. There is an entitlement to four weeks pay in the case of redundancy after one year of continuous service, and three weeks pay for each of two or more years of service, to a maximum of 52 weeks pay.

42 The calculation of redundancy entitlements of *pre*-September 2009 Employees *after* the end of the 2009 Agreement is at the heart of the dispute in this case. The issue is addressed in cl 25(4)(b) of the 2009 Agreement and, in relevantly identical terms, in cl 28(4)(b) of each of the 2012 Agreement and the 2015 Agreement. Clause 25(4)(b) of the 2009 Agreement must be construed in an environment where it applies to pre-September 2009 Employees with *varying* lengths of service (before the agreement commenced).

43 An employee who commenced employment on 30 August 2009, one day before the 2009 Agreement commenced, would have three years of service at 31 August 2012 resulting in a 'preserved calculation' of nine weeks pay at 31 August 2012 (one-day Employee).

44 On the RWWA's view, the redundancy entitlement of the one-day Employee would increase on the anniversary of each year of service in accordance with the 16 Week Max Table. On the fourth anniversary of service (on 30 August 2013), the entitlement becomes 10 weeks pay (nine weeks preserved plus one week extra). The 'extra' one week is attributable to the period after 31 August 2012, being the difference between the 16 Week Max Table entitlement based on four years service of eight weeks and the 16 Week Max Table entitlement based on three years service of seven weeks i.e. the difference between eight weeks and seven weeks is one week. On the ninth anniversary of service on 30 August 2019, the maximum entitlement is reached of 18 weeks pay (nine weeks preserved plus nine weeks extra). The 'extra' nine weeks is attributable to the period after 31 August 2012, being the difference between the 16 Week Max Table entitlement based on nine years service of 16 weeks pay and the 16 Week Max Table entitlement based on three years service of seven weeks pay i.e. the difference between 16 weeks and seven weeks is nine weeks.

45 On the CPSU's view, the redundancy entitlement of the one-day Employee would increase annually after 31 August 2012, in accordance with the 16 Week Max Table. The one-day Employee would become entitled to 13 weeks pay on 31 August 2013 (nine weeks preserved plus four weeks) and increased each year until a maximum of 25 weeks pay (nine weeks plus 16 weeks) which would be reached on 31 August 2021, nine years after 31 August 2012.

46 An employee who commenced employment on 30 August 1991 (18-years Employee), 18 years before the 2009 Agreement commenced, would have 21 years of service at 31 August 2012, resulting in a 'preserved calculation' of 52 weeks.

47 On the RWWA's view, the 18-years Employee's redundancy entitlement would remain at 52 weeks pay for as long as the 18-years Employee continued to work. The redundancy pay entitlement attributable to the period after 31 August 2012 (being the difference between the 16 Week Max Table entitlement based on 21 years service i.e. 16 weeks and the 16 Week Max Table entitlement based on 18 years service i.e. also 16 weeks) is zero weeks.

48 On the CPSU's view, the redundancy entitlement of the 18-years Employee would increase annually after 31 August 2012, in accordance with the 16 Week Max Table. The 18-years Employee became entitled to 56 weeks pay on 31 August 2013 (52 weeks preserved plus four weeks) and increased each year until a maximum of 68 weeks pay (52 weeks preserved plus 16 weeks) which would be reached on 31 August 2021, nine years after 31 August 2012.

49 The (extreme) examples serve to highlight a number of features of the competing interpretations. At risk of repetition, the relevant text states that pre-September 2009 Employees 'will receive severance pay based on either the preserved calculation up to [the end of the 2009 Agreement on 31 August 2012] and subclause 2(a) for the period thereafter, or subclause 2(a) for the entire period - whichever is the greater'.

50 Neither interpretation admits of a situation where the last phrase of cl 25(4)(b) may have application. The relevant text - 'subclause 2(a) for the entire period - whichever is the greater' - would have application if the 16 Week Max Table alone resulted in a higher redundancy entitlement compared to the combined sum of the preserved calculation and the application of the 16 Week Max Table to the period of employment after 31 August 2012. In oral submissions,

RWWA postulated examples where, on its suggested interpretation, the 16 Week Max Table alone resulted in a higher redundancy pay entitlement. However, on scrutiny, the examples are contrived.[11]

51 The CPSU's view may produce an incongruous result demonstrated by the pattern of redundancy pay entitlements of the 18-years Employee. This employee's redundancy pay entitlement of 52 weeks pay did not increase at all for each year of the nineteenth, twentieth, twenty-first, and twenty-second year of service ending 30 August 2013. However, commencing 31 August 2013, the employee's entitlement commenced to increase, receiving between 56 weeks pay and 68 weeks pay if made redundant over the subsequent nine years (or later). I would not characterise this outcome as nonsensical. Nevertheless, the rationale for the insertion of a period of 'zero increase' in redundancy pay is not apparent.

52 The methodological difference between the RWWA's view and the CPSU's view is the manner in which the period of service after 31 August 2012 is brought to account. On the RWWA's view, the 16 Week Max Table is the source of data necessary to calculate the *marginal* benefit payable, if any, attributable to up to nine years (or more) of service after 31 August 2012. On the CPSU's view, the 16 Week Max Table sets out the *absolute* benefit payable for each of the nine years (or more) of service completed after 31 August 2012.

53 The RWWA's view results in redundancy pay that is *directly* proportionate to the years of employee service compared to the CPSU's view that results in redundancy pay that is *indirectly* proportionate to the years of employee service. The point may be made by calculation of redundancy pay for an employee whose fourth year of anniversary of service occurs in the period 1 September 2012 to 30 August 2013. On the RWWA's view, calculations are made by reference to the anniversary of service and the employee became entitled to 10 weeks pay on the fourth anniversary of service whenever that occurred in the period 1 September 2012 to 30 August 2013 (nine weeks preserved plus one week extra). On the CPSU's view, the employee was entitled to nine weeks only pay (the preserved calculation only) until 31 August 2013, notwithstanding that the fourth year anniversary of service had passed. On 31 August 2013, the employee commenced to become entitled to 13 weeks pay (nine weeks preserved plus four weeks).

54 Compared to the CPSU's view, the methodology of the RWWA's view engages with the text of the heading row of the 16 Week Max Table which makes reference to an '[e]mployee's period of continuous service'. This text encourages a calculation of redundancy entitlements that is *directly* proportionate to the years of employee service. Nothing in cl 25 of the 2009 Agreement suggests that the service of pre-September 2009 Employees *before* 31 August 2012 (and used in calculations of the Preserved Amount), thereby became irrelevant for the purpose of calculations of entitlements for the period after the 2009 Agreement. The references in the last sentence of cl 25(4)(b) to the period after 31 August 2012 and to 'the entire period' are consistent with each of the RWWA's view and the CPSU's views.

55 Compared to the CPSU's view, the RWWA's view better reflects the transitional purpose of cl 25(4) evident from the heading and text of the sub-clause itself. The heading speaks of the *preservation* of entitlements. The first two sentences of cl 25(4)(b) of the 2009 Agreement, by use of explicit language ('at the end of this agreement … calculations will be *frozen*' (emphasis added)) and adoption of a specified process ('advised by letter'), serve to unambiguously mark the conclusion, at the end of the 2009 Agreement, of redundancy entitlements by reference to 'existing arrangements'. The RWWA's view results in the redundancy payments of pre-September 2009 Employees *and* post-September 2009 Employees being comparably

remunerated for years of service after 31 August 2012. It may also be observed that cl 25(4)(c) provides that, in all respects other than as provided in cl 25(4)(a) and cl 25(4)(b), no distinction is to be made between the redundancy entitlements of pre-September 2009 Employees and post-September 2009 Employees. *All* employees must receive a 12 week period of notice of termination in accordance with cl 25(2)(b). *All* employees are subject to the exemptions from payment set out in cl 25(3).

56 When regard is had to the history, text and purpose of cl 28, my view is that the interpretation advanced by RWWA is the meaning that best conforms to the intention of the parties. In reaching this conclusion it has not been necessary to accede to a submission made by RWWA that 'the Court have regard to circumstances known to both parties … to glean the objective purpose' of cl 28.[12] RWWA refers to the same circumstances to contend that the construction advanced by the CPSU, 'lacks sense, and is at complete odds with the industrial context and objectives of the agreement'.[13] I wish to record that I have not given weight to 'circumstances known to both parties' matters relied upon by RWWA.

57 The circumstances relied upon by RWWA to advance its submission included:

(a) RWWA was created in 2003 by the *Racing and Wagering Western Australia Act 2003* (WA) which provides that RWWA must 'act in accordance with prudent commercial principles' and 'endeavour to make a profit': s 29(1).

(b) RWWA issued a memorandum to employees dated 10 February 2009 in anticipation of the commencement of negotiations that resulted in the 2009 Agreement.[14] The memorandum states that: the impetus for the agreement is a 'legal requirement' to 'shift … employment agreements from the state to the federal industrial jurisdiction'; the goals of the new agreement include consolidation of multiple agreements into one agreement and simplification by deletion of inapplicable sections of the existing agreements; '[t]*here is no intent to reduce the overall conditions and benefits of*' employees*; 'employees will be no worse off in terms of overall entitlements'* (emphasis added).

(c) RWWA issued a further memorandum to employees dated 18 February 2009. The memorandum informs employees that the executive were engaged in 'planning and evaluation' prompted by the recently experienced negative effect of market and economic factors upon financial returns. As a result, 'recruitment and discretionary expenditure' was placed on hold. (RWWA observe that the 'market and economic factors' identified in the memorandum are consistent with the same or similar factors set out at length in the parts of the 2008/2009 annual report of RWWA identifying trends and challenges facing RWWA).

(d) The process of approval of the 2009 Agreement under the WR Act included an employee vote in June 2009 and it being lodged with the Workplace Authority on 26 June 2009. The 2009 Agreement was made 'in the shadow' of the FW Act which commenced on 1 July 2009. The FW Act includes s 119 on redundancy pay.

(e) No dispute arose when employees were made redundant in October 2009 and in February 2012 when employee entitlements on redundancy were identified in communications with the CPSU in terms that reflected the table in cl 25(2)(a) of the 2009 Agreement.[15]

(f) The predecessor to cl 28 of the 2015 Agreement is cl 28 of the 2012 Agreement, made under pt 2 - 4 of the FW Act whose objects include to provide a framework for bargaining for agreements that deliver productivity benefits.

58 The RWWA has satisfied me that each of the matters set out in (a) - (e) of the previous paragraph were known to RWWA and to many employees at the time of making each of the 2009 Agreement. However, to accept those matters as being within the common contemplation of the parties is to say no more than that both parties knew that:

- RWWA claimed that the business model of RWWA was under significant financial pressure;
- there was a distinct possibility of employee redundancies in the future;
- the redundancy entitlements of post-September 2009 Employees would resemble the statutory minimum under the FW Act; and
- the *overall entitlements* of pre-September 2009 Employees would not be reduced as a result of the 2009 Agreement.

59 So expressed, those matters simply set the stage for a negotiation that was concluded by June 2009. They shed no light on a purpose or objective the 2009 Agreement as a whole, or of cl 25 in particular, that advances any particular construction of cl 25(4).

60 Put simply, it was open for the competing interests of employer and employee, with knowledge of the matters in (a) - (e) above, to negotiate an agreement that resulted in the 2009 Agreement, including an interpretation of cl 25 as advanced by the CPSU.

61 To be sure, on the construction of cl 25 advanced by the CPSU, the result was a generous redundancy entitlement for pre-September 2009 Employees. However, given the pre-existing entitlement of pre-September 2009 Employees, the result was not so generous as to be nonsensical.

62 The *preservation* of redundancy entitlements as at 31 August 2012 (by cl 25(4) of the 2009 Agreement) is undoubtedly consistent with the common assumption of the parties that *overall* entitlements of employees would not be reduced. However, to *increase* redundancy entitlements for future service (on the CPSU's view) is *not* inconsistent with the same assumption. First, the assumption admits of the possibility of an increase in entitlements. Secondly, the assumption applies to *overall* entitlements.

63 The RWWA has also satisfied me that, when employees were made redundant in October 2009 and in February 2012, no dispute arose when redundancy entitlements were calculated in a manner that reflected the RWWA view. The fact that both parties conduct was consistent with the interpretation of the portion of cl 25 of the 2009 Agreement that was not contentious (i.e. cl 25 of the 2009 Agreement on redundancy *before* 31 August 2012), says nothing about the interpretation of the portion of a clause that is contentious (i.e. cl 25 of the 2009 Agreement on redundancy *after* 31 August 2012).

64 RWWA also introduced evidence of documents said to be drafted by RWWA at the time of the making of the 2009 Agreement for the purpose of providing employees with 'a high level explanation' of effect of the 2009 Agreement.[16] There is no evidence of the documents being communicated to any employees. In any event, the documents reflect RWWA's subject views on the effect of the 2009 Agreement. Those subjective views are not relevant to the task of construing the agreement.

65 RWWA also lead evidence of the content of negotiations leading to the 2009 Agreement[17] and the 2012 Agreement.[18] The evidence was not relevant. First, in so far as Mr Thomas gives opinion evidence of the beliefs of representatives of the CPSU as to the terms of the

2009 Agreement, he does not identify the basis for his opinion. Secondly, the evidence does not reveal any matters in the common contemplation of the parties that bears upon the construction of cl 25 of the 2009 Agreement or cl 28 of the 2012 Agreement.

Implied Terms

66 Although the claim will be dismissed and the submission of RWWA on implied terms becomes otiose, I will make some brief observations. I will assume that it is appropriate, on the question of construction of a document, to apply the common law principles of contract to the issue of whether the 2015 Agreement is subject to an implied terms.[19] The assumption does not assist RWWA. The common law criteria for implication are not satisfied. An ambiguity in a term of an instrument is not to be resolved by implication of a new term.

67 The construction of cl 28 advanced by CPSU was defensible. This finding is inconsistent with a finding that the term sought to be implied was necessary to give business efficacy to the contract. It is also inconsistent with a finding that the implied term is so obvious that 'it goes without saying'.[20]

Conclusion

68 My view is that, for the reasons set out above, the meaning of cl 28 advanced by RWWA is to be preferred over the meaning advanced by the CPSU and is to be preferred over any other meaning. The redundancy entitlements paid to Mr Tam and Mr Wishart were not less than required by cl 28. The claim will be dismissed.

M. FLYNN
INDUSTRIAL MAGISTRATE

[1] The following facts are agreed:

> Mr Tam was employed from 24 April 1989 until he was made redundant on 30 November 2018. As at 1 September 2012 he had completed 23 years of service. Between 1 September 2012 and 30 November 2018 he completed a further period of six years service, a total of 29 years service.

[2] *RWWA General Staff Agreement 2015*. The 2015 Agreement, approved on 18 March 2016, commenced operation on 25 March 2016.

[3] All references to 'Clause 28' or 'cl 28' alone are references to Clause 28 of the 2015 Agreement.

[4]

a) Civil remedy provisions of the FW Act cast obligations upon national system employers to national system employees as set out in enterprise agreements (s 50 of the FW Act and pt 2- 4, pt 4 - 1).

b) A national system employer includes a 'constitutional corporation' i.e. a corporation to which paragraph 51(xx) of the Constitution applies (for example, trading or financial corporations formed within the limits of the Commonwealth) so far as it employs or usually employs an individual (s 14 and s 12 of the FW Act). A national system employee is an individual so far as he or she is employed by a national system employer (s 13 FW Act).

c) An enterprise agreement does not impose obligations unless the agreement applies to the parties (see s 51 and s 52) and the agreement is expressed to cover the parties (s 53).

d) The jurisdiction of this court under the FW Act is primarily defined by three provisions:

   a. Section 539 of the FW Act which identifies: (in Columns 1 and 3) the civil remedy provisions of the FW Act which may be the subject of an application to an eligible state or territory court; (in Column 2) the person with standing to apply to the court for orders in relation to a contravention of the provision.

   b. Section 545(3) of the FW Act which describe the criteria for an eligible state or territory court to make an order for an employer to pay an amount to an employee upon the contravention of civil remedy provision. It provides that the court may order an employer to pay an amount to, or on behalf of, an employee of the employer if the court is satisfied that: (a) an employer was required to pay the amount under the Act or under a fair work instrument; and (b) the employer has contravened a a civil remedy provision by failing to pay the amount.

   c. Section 546(1) of the FW Act which concerns the making of pecuniary penalty orders upon the contravention of a civil remedy provision. It provides that an '***eligible State or Territory court***' may order a person who has contravened a civil remedy provision to pay a pecuniary penalty that the court considers appropriate.

e) The jurisdiction of this court, circumscribed as noted above, may be contrasted with the jurisdiction of the Federal Court and the Federal Circuit Court to 'make any order the court considers appropriate if the court is satisfied that a person has contravened … a civil remedy provision' (s 545(1) of the FW Act).

f) Section 551 of the FW Act provides that a 'court must apply the rules of evidence and procedure for civil matters when hearing proceedings relating to a contravention'. There is authority for

the proposition that the effect of the provision is that an '***eligible State or Territory court***' is required to apply the rules of evidence found in the common law and relevant state legislation when a claim concerns the contravention of a civil remedy provision of the FW Act: ***Gayle Balding, Workplace Ombudsman v Liquid Engineering 2003 Pty Ltd*** (ACN 104 341 657) [2008] WAIRComm 350; ***Cuzzin Pty Ltd v Grnja*** [2014] SAIRC 36 [14]. In ***Qube Ports Pty Ltd v Maritime Union of Australia*** [2018] FCAFC 72 [94] - [108] White J (with whom Mortimer and Bromwich JJ agreed) undertook a comprehensive analysis of the issue in the context of contravention proceedings before a state court of South Australia, the former Industrial Relations Court of South Australia. In a schedule to the judgment in ***Stagnitta v Bechtel Construction (Australia) Pty Ltd*** [2018] WAIRC 00886, I gave reasons for concluding that the law of evidence applied by a state court of general jurisdiction when exercising jurisdiction in non-criminal matters including the *Evidence Act* 1906 (WA), was to be applied by this court when hearing a proceeding relating to a contravention of a civil remedy provision of the FW Act.

g) The onus of proving a claim is on the claimant and the standard of proof required to discharge this onus is proof 'on the balance of probabilities. When, in these reasons, I state that 'I am satisfied of fact or matter', I am saying that I am satisfied on the balance of probabilities of that fact or matter.

[5] Clause 1 of the 2015 Agreement provides that the agreement applies and covers RWWA, CPSU and employees whose classifications are listed in cl 35. Mr Tam and Mr Wishart worked in those classifications.

[6] Construction of an Enterprise Agreement

a) The general principles that apply to the construction of legal instruments, including instruments of the nature of the Enterprise Agreement were identified in ***Re Harrison; Ex parte Hames*** [2015] WASC 247, where Beech J said at [50] - [51]:

> *(1) the primary duty of the court in construing an instrument is to endeavour to discover the intention of the parties as embodied in the words they have used in the instrument;*
>
> *(2) it is the objectively ascertained intention of the parties, as it is expressed in the instrument, that matters; not the parties' subjective intentions. The meaning of the terms of an instrument is to be determined by what a reasonable person would have understood the terms to mean;*
>
> *(3) the objectively ascertained purpose and objective of the transaction that is the subject of a commercial instrument may be taken into account in construing that instrument. This may invite attention to the genesis of the transaction, its background and context;*
>
> *(4) the apparent purpose or object of the relevant transaction can be inferred from the express and implied terms of the instrument, and from any admissible evidence of surrounding circumstances;*
>
> *(5) an instrument should be construed so as to avoid it making commercial nonsense or giving rise to commercial inconvenience. However, it must be borne in mind that business common sense may be a topic on which minds may differ; and*
>
> *(6) an instrument should be construed as a whole. A construction that makes the various parts of an instrument harmonious is preferable.*

b) Particular principles, applying to the construction of legal instruments that were created in an industrial context, have been stated:

In relation to industrial instruments, considerations of context include the wider industrial circumstances in which a particular agreement has been negotiated and concluded, taking particular account of the 'practical frame of mind' that might often be brought to its drafting and of the 'industrial realities' in which such instruments are drafted. Examination of the history of industrial instruments is as justified as examination of legislative history. It is critical that construction of industrial instruments should contribute to a sensible industrial outcome such as should be attributed to the parties who negotiated and executed the industrial instrument … [A] *purposive approach to the construction of the terms of an industrial instrument is required just as much as it is required in construing a statute:* ***Polan v Goulburn Valley Health*** [2016] FCA 440 [34] (Mortimer J) (citations omitted).

There is a long tradition of generous construction over a strictly literal approach where industrial awards are concerned. It may be that this means no more than that courts and tribunals will not make too much of infelicitous expression in the drafting of an award nor be astute to discern absurdity or illogicality or apparent inconsistencies. But while fractured and illogical prose may be met by a generous and liberal approach to construction … Awards, whether made by consent or otherwise, should make sense according to the basic conventions of the English language. They bind the parties on pain of pecuniary penalties: ***City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union*** [2006] FCA 813; (2006) 153 IR 426 at 440 [57] (citations omitted).

c) Particular principles, applying to the construction of instruments made under the FW Act, including an enterprise agreement, have been stated:

(1) The *Acts Interpretation Act 1901* (Cth) does not apply to the construction of an enterprise agreement made under the FW Act.

(2) In construing an enterprise agreement it is first necessary to determine whether an agreement has a plain meaning or contains an ambiguity.

(3) Regard may be had to evidence of surrounding circumstances to assist in determining whether an ambiguity exists.

(4) If the agreement has a plain meaning, evidence of the surrounding circumstances will not be admitted to contradict the plain language of the agreement.

(5) If the language of the agreement is ambiguous or susceptible to more than one meaning then evidence of the surrounding circumstance will be admissible to aide the interpretation of the agreement.

(6) Admissible evidence of the surrounding circumstances is evidence of the objective framework of fact and will include: (a) evidence of prior negotiations to the extent that the negotiations tend to establish objective background facts known to all parties and the subject matter of the agreement; (b) notorious facts of which knowledge is to be presumed; (c) evidence of matters in common contemplation and constituting a common assumption.

(7) The resolution of a disputed construction of an agreement will turn on the language of the Agreement understood having regard to its context and purpose.

(8) Context might appear from: (a) the text of the agreement viewed as a whole; (b) the disputed provision's place and arrangement in the agreement; (c) the legislative context under which the agreement was made and in which it operates.

(9) Where the common intention of the parties is sought to be identified, regard is not to be had to the subjective intentions or expectations of the parties. A common intention is

identified objectively, that is by reference to that which a reasonable person would understand by the language the parties have used to express their agreement.

(10) The task of interpreting an agreement does not involve rewriting the agreement to achieve what might be regarded as a fair or just outcome. The task is always one of interpreting the agreement produced by parties: ***Australasian Meat Industry Employees Union v Golden Cockerel Pty Limited*** [2014] FWCFB 7447 [41].

d) A recent of summary of principles applicable to the construction of enterprise agreements made under the FW Act, consistent with the above, was made by the Full Federal Court in ***Workpac Pty Ltd v Skene*** [2018] FCAFC 131 [197] (citations omitted):

> *The starting point for interpretation of an enterprise agreement is the ordinary meaning of the words, read as a whole and in context. The interpretation '… turns on the language of the particular agreement, understood in the light of its industrial context and purpose …'.The words are not to be interpreted in a vacuum divorced from industrial realities; rather, industrial agreements are made for various industries in the light of the customs and working conditions of each, and they are frequently couched in terms intelligible to the parties but without the careful attention to form and draftsmanship that one expects to find in an Act of Parliament. To similar effect, it has been said that the framers of such documents were likely of a 'practical bent of mind' and may well have been more concerned with expressing an intention in a way likely to be understood in the relevant industry rather than with legal niceties and jargon, so that a purposive approach to interpretation is appropriate and a narrow or pedantic approach is misplaced.*

[7] The Preserved Amount was 'frozen' on 31 August 2012; it was between nine weeks (for an employee who commenced on 31 August 2009 and consequently had three years service when the 2015 Agreement commenced) and 52 weeks (an employee who had completed at least 17 years service at 31 August 2012).

[8] See the Respondent's Outline of Submissions [30], under the heading 'Ambiguity in clause 28(4)'.

[9] Andrew Stewart et al, *Creighton and Stewart's Labour Law* (Federation Press, 2016) [22.54].

[10] Mr Thomas Witness Statement [14].

[11] The examples offered were six and seven years' service comprising one year of pre 1 September 2012 service. However, an employee with one year only of pre 1 September 2012 service is a post-September 2009 Employee whose entitlements are *not* governed by cl 25(4).

[12] Respondents Outline of Submissions [36].

[13] Respondents Outline of Submissions [54].

[14] Mr Thomas Witness Statement, MT1.

[15] See Mr Thomas Witness Statement at MT3 and MT7.

[16] Mr Thomas Witness Statement at MT8, MT9. '[Redundancy entitlement] Unchanged for the life of the agreement for current employees at the time of agreement being approved. At expiry of agreement, current entitlements to be preserved and employees moved to standard legislated Federal entitlements. Hence there is a "grandfathering" subclause'.

[17] Mr Thomas Witness Statement [44] - [46].

[18] Mr Thomas Witness Statement [51].

[19] Finkelstein J in ***Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Skilled Engineering Ltd*** [2003] FCA 260; (2003) 53 AILR 100-013; [2003] FCA 260.

[20] ***B P Refinery (Westernport) Pty Ltd v Shire of Hastings Council*** (1977) 180 CLR 267; ***Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*** [1982] HCA 24; (1982) 149 CLR 337; ***Hospital Products Ltd v United States Surgical Corporation*** [1984] HCA 64; (1984) 156 CLR 41. As Priestley JA noted in ***Renard Constructions (ME) Pty Ltd v Minister for Public Works*** (1992) 26 NSWLR 234, 256:

> [T]*he implied term must be reasonable and equitable; necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; so obvious that 'it goes without saying'; capable of clear expression; and must not contradict any express term of the contract.*