WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2020 WAIRC 00118
CORAM	**:**	INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD	**:**	FRIDAY, 17 JANUARY 2020
DELIVERED	**:**	WEDNESDAY, 26 FEBRUARY 2020
FILE NO.	**:**	M 94 OF 2019
BETWEEN	**:**	DAVID JONES **CLAIMANT** AND ODYSSEY MARINE PTY LTD **RESPONDENT**

CatchWords	**:**	INDUSTRIAL LAW – *Fair Work Act 2009* (Cth) – Claim for unpaid annual leave allegedly owed – Application by respondent for summary judgment or, in the alternative, strike out of the amended statement of claim – Construction of annual leave clauses in enterprise agreements – Consideration of even time rostering – Whether there is a real issue of fact or law to be tried
Legislation	**:**	*Fair Work Act 2009* (Cth) *Industrial Relations Act 1979* (WA) *Industrial Magistrates Court (General Jurisdiction) Regulations 2005* (WA)
Instruments	**:**	*Go Inshore Port Hedland Agreement 2009* (Cth) *Go Inshore Port Hedland Enterprise Agreement 2013* (Cth) *Go Inshore Port Hedland Enterprise Agreement 2016* (Cth) *Seagoing Industry Award 2009* (Cth) *Curtis Island Services Pty Ltd Enterprise Agreement 2014* (Cth)
Case(s) referred to in reasons:	**:**	***The Australian Maritime Officers' Union v Curtis Island Services Pty Ltd*** [2015] FWC 1836 ***The Australian Institute of Marine and Power Engineers v Curtis Island Services Pty Ltd*** [2015] FWCFB 6093 ***United Voice WA v The Minister for Health*** [2011] WAIRC 01065 ***Fancourt v Mercantile Credits Ltd*** (1983) 154 CLR 87 ***Mary v Schon*** [2015] WADC 92

Edenham Pty Ltd v Meares (No 2) [2016] WASC 302
Lewkowski v Bergalin Pty Ltd (Unreported, WASCA, Library No 7675, 26 May 1989)
Whitehall Holdings Pty Ltd v Ravi Nominees Pty Ltd (Unreported, WASCA, Library No 9189, 13 December 1991)
Dey v Victorian Railways Cmrs (1949) 78 CLR 62
Theseus Exploration NL v Foyster (1972) 126 CLR
Burton v Shire of Bairnsdale (1908) 7 CLR 76
Shilkin v Taylor [2011] WASCA 255
ALDI Foods Pty Ltd v Shop, Distributive & Allied Employees Association [2017] HCA 53
Armacell Australia Pty Ltd and others [2010] FWAFB 9985
Aldo Becherelli v Mediterraneus Pty Ltd trading as Lucioli [2017] WAIRC 65
Linkhill Pty Ltd v Director, Office of the Fair Work Building Industry Inspectorate [2015] FCAFC 99
James Turner Roofing Pty Ltd v Peters [2003] WASCA 28
Barclay Mowlem Construction Ltd v Dampier Port Authority [2006] WASC 281
Youlden Enterprises Pty Ltd v Health Solutions (WA) Pty Ltd [2006] WASC 161
Chappell v Goldspan Investments Pty Ltd [No 3] [2015] WASC 277
Heseltine v Investment Planners Australia Pty Ltd [2007] WADC 14
Mildren v Gabbusch [2014] SAIRC 15
Miller v Minister of Pensions [1947] 2 All ER 372
Briginshaw v Briginshaw [1938] HCA 34
Fedec v The Minister for Corrective Services [2017] WAIRC 00828
City of Wanneroo v Australian Municipal, Administrative, Clerical And Services Union [2006] FCA 813
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Excelior Pty Ltd [2013] FCA 638

Result	**:**	The Application granted in part

Representation:

Claimant	**:**	Mr P. Mullally (agent) from Workclaims Australia
Respondent	**:**	Mr A. Pollock (of counsel) as instructed by Mills Oakley

REASONS FOR DECISION

1 David Jones (Mr Jones) was employed by Odyssey Marine Pty Ltd (Odyssey) as a Master on an even time roster of 28 days on and 28 days off where the parties were covered by the *Go Inshore Port Hedland Agreement 2009* (Cth), *Go Inshore Port Hedland Enterprise Agreement 2013* (Cth) and *Go Inshore Port Hedland Enterprise Agreement 2016* (Cth) (2009 Agreement, 2013 Agreement and 2016 Agreement or collectively the Agreements) (the Even Time Roster).

2 Mr Jones has withdrawn two alleged entitlements (long service leave and notice period) sought in his claim with the remaining alleged entitlement limited to an amount for untaken annual leave.

3 Mr Jones claims Odyssey:

- failed to provide him with paid annual leave during his employment by incorrectly describing part of the 28 days off (on the Even Time Roster) as being paid annual leave; and
- therefore, failed to pay him untaken paid annual leave of 37.90 weeks upon termination of his employment contrary to s 90(2) of the *Fair Work Act 2009* (Cth) (FWA).

4 Odyssey denies the claim and lodged an amended Application filed on 11 December 2019 seeking for:

- summary dismissal on the ground that the claim has no real prospect of success; and
- in the alternative, that the amended Statement of Claim and Further and Better Particulars of Case Outline be struck out (and re-pleaded).

5 In support of the Application, Odyssey has lodged:

- two Affidavits of Wesley John Van Der Spuy (Mr Van Der Spuy), a Chief Executive Officer of Odyssey, sworn on 18 October 2019 and 11 December 2019;
- an affidavit of Daniel Leigh White (Mr White) sworn on 11 December 2019;
- Mr Jones' pay slips for the period 17 May 2012 to 16 August 2018; and
- submissions regarding the appropriate construction to be given to the annual leave clauses in the Agreements.

6 In response to the Application, Mr Jones relies upon submissions regarding an alternative construction to be given to the annual leave clauses in the Agreements.

7 Schedule I outlines the jurisdiction and practice and procedure relevant to the Industrial Magistrates Court of Western Australia (IMC).

8 Schedule II outlines the principles relevant to construction of an industrial instrument.

Background Facts

9 Mr Jones was employed by Odyssey as a casual Deckhand from 5 January 2011 to 9 December 2011 and as a permanent full time Master from 6 May 2012 to 15 August 2018.

10 While Mr Jones' original claim referred to the *Seagoing Industry Award 2009* (Cth), it appears the parties now agree that the Agreements apply to and cover Mr Jones' employment.

11 The dispute between the parties is the application of the clauses of the Agreements applicable to annual leave in the context of the Even Time Roster.

12 Odyssey paid annual leave as it accrued with the taking and payment of annual leave occurring during the 28 days off period. The effect of Odyssey's payment of accrued annual leave during the off roster period is that annual leave did not accrue beyond the immediately preceding on duty roster period. In that sense it was a zero-sum balance with, on Odyssey's view, there being no (or little) accrued entitlement to paid annual leave or remaining unpaid annual leave at the time of Mr Jones' employment termination. Odyssey says this is entirely consistent with the application of the relevant clauses of the Agreements on the Even Time Roster.

13 Mr Jones maintains that he never took annual leave and that the 28 days off cannot be, and was not, taken as annual leave.

14 Schedule III is a table of two sample periods from a review of Mr Jones' payslips for the periods 30 April 2012 to 10 June 2012 and 23 May 2016 to 31 July 2016. The sample periods reflect the position with respect to the entirety of Mr Jones' employment. This demonstrates that from Odyssey's perspective all annual leave was taken and paid on an ongoing basis.

15 The Agreements contain clauses relevant to annual leave as follows:

2009 Agreement

> *15.3.1. Annual leave will accrue in accordance with the National Employment Standards but will be taken during the rostered off duty periods and incorporated into the paid off duty time with the net effect being that no annual leave will be taken during duty periods and there being no impact from the accrual and utilisation of annual leave on the Company as result of the operation of an equal time roster.*

2013 Agreement

> *22.0 Annual leave will accrue in accordance with the National Employment Standards but will be taken during the rostered off duty periods and incorporated into the paid off duty time with the net effect being that no annual leave will be taken during duty periods and there being no impact from the accrual and utilisation of annual leave on the Company as a result of the operation of the equal time roster. Therefore, there shall effectively be no accruals or payment of annual leave as these provisions are included in the rates of pay set out in clause 14.0.*

2016 Agreement

> *24.1 Full-time Employees are entitled to paid annual leave … under the NES.*
>
> *24.2 For each year of service the NES entitles Full-time Employees to:*
>
> *24.2.1 4 weeks of paid annual leave; or*
>
> *24.2.2 5 weeks of paid annual leave if the Full-time Employee is a "continuous shiftworker" as defined in clause 11.4 of this Agreement.*
>
> *24.3 Annual leave entitlements accrue on the basis of 38 ordinary hours of work per week and are paid at the Base Hourly Rate of Pay. Full-time Employees are not entitled to annual leave loading.*
>
> *24.4 Full-Time Employees are entitled to paid annual leave in accordance with the FW Act. It is acknowledged and agreed that accrued paid annual leave is taken during off duty periods not at work as part of the Even Time Roster.*
>
> *24.5 The Company and Full-Time Employees shall work together to ensure annual leave balances are maintained at reasonable levels to alleviate staffing disruptions and the need for additional resources.*

24.6 An Employee may cash out any portion of accrued annual leave that is in excess of four (4) weeks.

16 The Agreements were approved pursuant to s 186 of the FWA.

Issues For Determination

17 The following issues require determination:

(a) What is the effect of the Even Time Roster as it relates to annual leave?

(b) What is the proper construction of the annual leave clauses in the Agreements?

(c) Should summary judgment be applied to Mr Jones' claim?

(d) If the answer to (c) is no, should Mr Jones' claim be struck out with liberty to re-plead?

Odyssey's Contentions

18 Odyssey contends that:

(a) Mr Jones' claim assumes he did not take annual leave during the course of his permanent full-time employment, when the Agreements deemed him to have taken his annual leave during the off duty periods of the Even Time Roster. That is, annual leave accrued and was taken in the same ratio;

(b) the requirement to take annual leave during off duty periods as part of the Even Time Roster was reasonable and, therefore, consistent with s 88(1) and s 93(3) of the FWA;

(c) consideration of the Agreements as a whole in the context of the particular industry demonstrates that annual leave was to be taken and paid during the off duty periods;

(d) therefore, there can be no claim for unpaid annual leave under the Agreements;

(e) taking Mr Jones' case at its highest, he has been paid an amount referrable to his annual leave balance entitling Odyssey to 'set off' the same balance if he was successful. Even on this case, the application for summary judgment should be granted where to pursue the claim to a hearing would not result in an award to Mr Jones; and

(f) alternatively, Mr Jones' claim, as it relates to the entitlement to annual leave, should be struck out (with leave to re-plead) where it fails to disclose a reasonable cause of action or the foundation upon which any cause of action can be reasonably supported.

Mr Jones' Contentions

19 Mr Jones contends that:

(a) his right to annual leave arises under the National Employment Standards (NES) contained in the FWA or in the Agreements;

(b) while the relevant clauses in the Agreements provide that annual leave will be taken during the rostered off duty periods, this does not mean he will be deemed to be on annual leave during those same periods;

(c) had the Agreements intended to deem paid annual leave during the off duty periods, then it should have been expressly stated. Odyssey's argument can only succeed if the Court accepts that the relevant clauses intends there to be a deemed accrual and payment of annual leave in the off duty periods;

(d) the off duty period in the Even Time Roster cannot be classified as leave in the NES context and, at the very least, the relevant clauses in the Agreements are ambiguous and capable of more than one meaning. Therefore, Mr Jones is entitled to a hearing to introduce evidence going to the formation and negotiation of the Agreements and information provided to employees prior to the Agreements being approved by the Fair Work Commission (FWC); and

(e) he was paid no more than an annualised salary under the Agreements and he cannot be paid both annual leave and off duty time. Therefore, unless he applied for and took annual leave during the off duty period, annual leave has continued to accrue and was not taken during the off duty period.

How Is The Even Time Roster Intended To Apply?

20 Odyssey refers to the FWC decision ***The Australian Maritime Officers' Union v Curtis Island Services Pty Ltd*** [2015] FWC 1836 (***Curtis Island***). The dispute in this case concerned the payment or other entitlement applicable to an employee recalled to duty on a day that an employee would not have been rostered to work in accordance with the relevant even time roster.[1]

21 Similar to the Even Time Roster (in Mr Jones' claim), Commissioner Cambridge noted in ***Curtis Island*** that an even time roster provides considerably more time off duty than would be the case for the majority of working arrangements described as ordinary day work or rotating shift work rostering arrangements. Importantly, Commissioner Cambridge noted at [41] '[a]*s a logical consequence of the significant periods of absence from duty which are generated by the even time rostering arrangement, other periods of leave which would usually apply, are deemed to be included in the non-duty or off-roster periods of the even time rostering*'.

22 Commissioner Cambridge acknowledged that the ordinary concepts of leave, including annual leave, do not easily translate to an even time roster, but that it is a mistake to equate the days off on an even time roster with paid leave (including annual leave). Further, the days off on the even time roster cannot properly be construed as days of leave, as ordinary understood, notwithstanding these periods are deemed to satisfy requirements in respect of the provision of leave.[2]

23 However, these statements needs to be seen in the context of cl 22.2 of the relevant agreement in ***Curtis Island***, and in the context of that agreement as a whole, where it was clearly intended to deem that the non-duty or off-roster periods satisfy the taking of all leave that would otherwise apply.[3] Following on from this, Commissioner Cambridge concluded that the work arrangements created by the even time roster included all leave in the non-duty or off roster periods.[4]

24 Clause 22.2 of the *Curtis Island Services Pty Ltd Enterprise Agreement 2014* (Cth) (Curtis Island Agreement) states:

> *Full-time or part-time Employees shall be entitled to a period of leave at the rate of one (1) day's leave for each day of duty, such leave to be taken in lieu of five weeks annual leave, public holidays and weekends worked (while working the roster defined in clause 11.2* [12.2]*, all Employees are deemed shiftworkers for the purposes of the NES), with the first 5 weeks of non-duty period in any 12 month period being deemed to have satisfied and* [sic] *Employees' entitlement to annual leave in accordance with the NES.*

25 On appeal to the Full Bench of the FWC,[5] it was concluded that the construction given of the even time roster was correct and, further, '[t]*he 21 day off duty period is not leave in the National Employment Standards context … a day in this period is not "…a day of paid leave which is*

preserved or otherwise incapable of being extinguished by virtue of payment being made for the time worked"'.[6]

26 As there are three Agreements covering the span of Mr Jones' employment, it is necessary to look at the terms of each Agreement separately so as to:

(1) determine the effect of the Even Time Roster in each case; and

(2) construe the intended meaning of the particular clauses relevant to annual leave.

2009 Agreement

27 Clause 7 of the 2009 Agreement provides the annual wage for Masters and Deckhands. From 1 July 2012, the aggregate wage for a Master was $132,135.

28 Notably, cl 7 states that incorporated into the aggregate wage are '*payments for shift work, weekend work, public holiday work, meal allowances, telephone allowances, travel in Hedland, water subsidy, clothing allowance (other than that supplied) and private medical insurance. As such, the aggregated wage listed above represents the total of remuneration payable to the employee'*.

29 Odyssey, in oral submissions, suggested that cl 7 of the 2009 Agreement accounted for all payments to be made to Mr Jones. However, it is clear from what cl 7 expressly incorporates into the aggregate wage and that the Agreement otherwise makes provision for other types of leave, the aggregate wage does not incorporate annual leave, personal leave, compassionate leave, parental leave and long service leave. These categories of leave are separately provided for under the 2009 Agreement,[7] as are other subsidies such as a living subsidy for residing in Port Hedland.[8] The aggregate wage appears to incorporate certain allowances which might otherwise give rise to other entitlements under other industry agreements.

30 The standard hours of work are 12 with core hours specified.[9] The standard roster is 28 days on and 28 days off.[10]

31 Planned medical absences and annual leave are required to be taken during the rostered off duty periods in recognition of the operation of the Even Time Roster.[11]

32 However, Odyssey relies on the words '*incorporated into the paid off duty time*' and '*there being no impact from the accrual and utilisation of annual leave on the Company as result of the … equal time roster*' in cl 15.3.1 of the 2009 Agreement, which it says operates in a similar way to that referred to by Commissioner Cambridge in ***Curtis Island***. That is, these words operate to deem annual leave accrued and taken in the 28 days off duty period.

33 Clause 22.2 of the Curtis Island Agreement expressly states that the first five weeks of off-duty time is taken to satisfy any annual leave entitlements. Therefore, under the terms of Curtis Island Agreement, annual leave accrues in total and is taken in the first five weeks of off duty in any 12 month period.

34 Clause 15.3.1 of the 2009 Agreement is not couched in exactly the same terms as cl 22.2 of the Curtis Island Agreement. However, when regard is had to the words used in the context of the Agreement and the Even Time Roster, the question is whether the effect of cl 15.3.1 is the same as that expressed in cl 22.2 of the Curtis Island Agreement.

35 For the following reasons, I conclude that the intention and the effect of cl 15.3.1 of the 2009 Agreement is to provide work arrangements created by the Even Time Roster, which includes all annual leave, accrued and taken, in the off duty roster periods:

- the 2009 Agreement is designed to operate with minimum impact upon Odyssey's business. To that end, certain leave entitlements, including annual leave, are required to be taken during the off duty roster period consequential on there being greater than ordinary periods of extended time off duty;
- however, the inclusion of the words *and incorporated into the paid off duty time* in cl 15.3.1 of the 2009 Agreement must have relevance and work to do in the context of the accrual of annual leave and the taking of the annual leave in the off duty time;
- the work that these words have to do is associated with the stated intended effect of any annual leave arrangement on Odyssey and its business, which is that:
    - no annual leave is to be taken during the on duty period; and
    - there is no impact upon Odyssey from the accrual and taking of annual leave, as a result of the Even Time Roster; and
- the words used and the meaning and purpose intended by the words are not ambiguous.

36 Therefore, the effect of cl 15.3.1 of the 2009 Agreement and the Even Time Roster, it is not limited to an employee taking annual leave only during the off duty period, but extends to the accrual and taking of annual leave having no impact on Odyssey. The stated way in which this is done is by *incorporating* annual leave into the paid off duty time. The practical way in which this was done by Odyssey was to incorporate into each off duty pay period the payment of annual leave that had accrued in the preceding period.

2013 Agreement

37 Clause 14 of the 2013 Agreement provides the annual wage for Masters and Deckhands from 1 January 2013 to 1 July 2014.

38 The ordinary hours of work are 38 hours per week over a defined eight week roster cycle.[12] The working hours are up to and including 12 hours per day.[13] The standard roster is 28 days on and 28 days off.[14]

39 The 2013 Agreement is otherwise in similar terms to the 2009 Agreement, although, relevantly, cl 14.3 of the 2013 Agreement includes the incorporation of *annual leave* in the aggregate rate of pay and cl 22 of the 2013 Agreement includes the additional words [t]*herefore, there shall effectively be no accruals or payment of annual leave as these provisions are included in the rates of pay set out in clause 14.0*' after the otherwise same words contained in cl 15.3.1 of the 2009 Agreement.

40 Therefore, to the extent that it was required, cl 22 of the 2013 Agreement reinforces the annual leave position in the 2009 Agreement by the incorporation of annual leave into the paid off duty time where the practical way this was done was to pay any accrued annual leave in the off duty period. The effect of this was no impact upon Odyssey.

2016 Agreement

41 While many of the terms in the 2016 Agreement are similar to the 2009 and 2013 Agreements, there are a number of significant differences, including:

- clause 17.2 as it relates to the payment of annual salary; and
- clause 24 as it relates to annual leave.

42 Clause 24 of the 2016 Agreement demonstrates a substantial re-drafting of the annual leave clause to that in cl 15.3.1 of the 2009 Agreement and cl 22 of the 2013 Agreement.

43 As a result, and notwithstanding that accrued paid annual leave is to be taken during the off duty periods, cl 24 of the 2016 Agreement appears to anticipate two possible scenarios:

(1) there may be annual leave balances requiring Odyssey and full-time employees to maintain them at reasonable levels for business reasons;[15] and

(2) employees may have accrued annual leave in excess of four weeks capable of being cashed out.[16]

44 One possible effect of the combination of cl 24.5 and cl 24.6 of the 2016 Agreement is that paid annual leave is an entirely separate consideration to off duty time, albeit to be taken during off duty time.

45 Further to this, there is no reference, express or otherwise, to annual leave being incorporated into the off duty periods or for there to be no impact of the accrual and taking of annual leave on Odyssey.

46 This represents a significant departure from the annual leave position adopted in the 2009 and 2013 Agreements.

47 Additionally, while an annualised salary is paid, the annual salary does not include entitlements otherwise specifically included in the 2016 Agreement,[17] but is inclusive of all notional allowances, overtime and penalty rates other than those specifically included in the 2016 Agreement.[18]

48 There may be two potential reasons for the amendment to the annual leave clause in the 2016 Agreement from the 2009 and 2013 Agreements:

(1) clarify any ambiguity (if it existed); or

(2) the purpose and intention of the effect of the clause changed for some other reason.

Outcome

Principles relevant to summary judgment applications

49 The IMC has the power to summarily dispose of a claim on the basis that there is no reasonable prospect of success.[19] The IMC's duties in dealing with cases are set out in r 5 of the *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* (WA) (the Regulations).[20] Regulation 7 of the Regulations sets out what the IMC may do for the purpose of controlling and managing cases and trials, including, at r 7(1)(h) '*order that an issue not be tried*', and at r 7(1)(r) '*take any other action or make any other order for the purpose of complying with regulation 5*'.

50 Therefore, the IMC has the power to make the orders sought by Odyssey if it concludes that Mr Jones' claim is so clearly untenable that it could not possibly succeed and, if that circumstance exists, to dismiss the claim so as to deal with the case efficiently, economically and expeditiously and to ensure that the IMC's resources are used as efficiently as possible.[21]

51 The power to order summary judgment is one that should be exercised with great care.[22] An application for summary judgment should be determined on the material before the Court, not based on the prospect that, given the opportunity, the other party might be able to remedy a deficiency.[23] The persuasive onus rests on the applicant for judgment, but the respondent to the application bears an evidentiary onus.[24] The claim or defence put forward should not contain bare allegations unsupported by material facts.[25]

52 The other party has an obligation to provide particulars of an arguable defence or claim (as the case may be) and to provide a statement of facts which go to show that it is arguable.[26] The summary judgement procedure is not confined to cases which are immediately plain and obvious.[27]

53 While the Court may determine a difficult question of law on a summary judgment application, usually it is appropriate to leave the determination of such a question for trial.[28]

54 Disposal of a claim or a defence summarily '*will never be exercised unless the* [party's claim or defence] *is so obviously untenable that it cannot possibly succeed*'.[29]

Should summary judgment apply to the 2009 Agreement and 2013 Agreement?

55 The dispute between the parties concerned the construction of the annual leave terms in the Agreements. To that end, Odyssey relies upon Mr Van Der Spuy's affidavit, Mr White's affidavit, the tendered pay slips and on submissions made in respect of the appropriate interpretation of the clauses. Mr Jones did not adduce any evidence (including by reference to any extrinsic materials) in response and relied upon submissions made in respect of an alternate interpretation of the clauses.

56 In my view, the proper construction of cl 15.3.1 of the 2009 Agreement and cl 22 of the 2013 Agreement is that they operated not only to require paid annual leave to be taken during the off duty period, but deemed any annual leave to be included in the off duty periods of the Even Time Roster such that Odyssey had no ongoing annual leave liability.

57 The effect of this is that there is no outstanding unpaid annual leave owing to Mr Jones during the operation of the 2009 Agreement and 2013 Agreement, where accrued annual leave was taken and paid on the same ratio as and when it accrued.

58 That one party considers the operation of these clauses to be unfair, or wishes that a different bargain had been struck, is not the point. An enterprise agreement comes into operation in the sense of creating rights and obligations between an employer and employees in relation to the work performed under it only after it has been approved by the FWC. After that time the agreement applies to the employers and employees who are covered by it.[30]

59 In terms of the assessment of 'better off overall test', it may be that if the same assessment was applied by a differently constituted forum a different conclusion may result.[31] It is not for the IMC to reassess what might have been, had a different bargain been struck or if different action had been taken concerning the approval of the 2009 Agreement and 2013 Agreement. The IMC's jurisdiction is limited by the FWA, relevant to Mr Jones' claim.

60 Given the dispute concerned the construction of cl 15.3.1 of the 2009 Agreement and cl 22 of the 2013 Agreement, and in light of the interpretation given, notwithstanding that questions of law are usually left to trial, Odyssey has satisfied the persuasive onus that there is no issue or question in dispute which ought to be tried or that there ought for some other reason be a trial of Mr Jones' claim for unpaid annual leave for the period covered by the 2009 Agreement and 2013 Agreement. Where Mr Jones' interpretation is not accepted and there is no other evidence (such as material that may manifest a different intention to that borne out by the words of the 2009 and 2013 Agreements) upon which to assess the evidentiary burden he now has, I am satisfied that Mr Jones' claim relevant to the 2009 and 2013 Agreements has no reasonable prospect of success.

61 Therefore, judgment will be entered against Mr Jones relevant to that part of Mr Jones's claim covered by the 2009 Agreement and 2013 Agreement as it relates to the claim for unpaid annual leave.

62 The period of time of operation of the 2009 Agreement and 2013 Agreement was from on or around 6 April 2010 to 16 May 2016 (the operation date of the 2016 Agreement).

Should summary judgment apply to the 2016 Agreement?

63 Unlike the annual leave clauses in the 2009 Agreement and the 2013 Agreement, cl 24 of the 2016 Agreement raises the possibility of the ongoing accrual of annual leave. In these circumstances, it is, for the purposes of summary judgement, arguable that, notwithstanding annual leave was to be taken during the off roster period, annual leave was not incorporated into the off duty period. This then at least suggests it may have been intended that annual leave be applied for and taken.

64 Bearing in mind Mr Jones need only demonstrate an evidentiary basis to resist summary judgment and where the application for summary judgment is grounded in the construction of a term of an agreement, Odyssey has not satisfied the persuasive onus that there is no issue or question in dispute which ought to be tried of Mr Jones' claim for unpaid annual leave for the period covered by the 2016 Agreement.

65 Therefore, the application for summary judgment as it relates to Mr Jones's claim covered by the 2016 Agreement is unsuccessful and will be dismissed.

66 The period of operation of the 2016 Agreement was from 16 May 2016 until Mr Jones' termination of employment on 15 August 2018.

Odyssey's alternative argument concerning set-off

67 If the Application is unsuccessful as it relates to summary judgment on the construction of the Agreements, Odyssey says that any amounts paid in annual leave is capable of being set off against the amount sought by Mr Jones. Accordingly, the effect of any successful set off argument is that there will be no award to Mr Jones and a trial would be contrary to the economical use of the Court's time and resources and incur unnecessary costs for the parties.

68 In a recent decision (***Aldo Becherelli v Mediterraneus Pty Ltd trading as Lucioli*** [2017] WAIRC 65 [23]) Industrial Magistrate Flynn noted that in ***Linkhill Pty Ltd v Director, Office of the Fair Work Building Industry Inspectorate*** [2015] FCAFC 99 (***Linkhill Pty Ltd***), the Full Court of the Federal Court reviewed the law on this issue. The review included an assessment of the decision of the Western Australian Industrial Appeal Court (Anderson, Scott and Parker JJ) in ***James Turner Roofing Pty Ltd v Peters*** [2003] WASCA 28 (***James Turner Roofing***). The judgment of North and Bromberg JJ placed emphasis on the following passage of the judgement of Anderson J from ***James Turner Roofing***:

> *The payment of an amount as wages for hours worked in a period can be relied on by the employer in satisfaction of an award obligation to pay wages for that period whether in relation to wages for ordinary time, overtime, weekend penalty rates, holidays worked or any other like monetary entitlement under the award. This is so, whether the payment of the wages is made in contemplation of the obligations arising under the award or without regard for the award. However, if a payment is made expressly or impliedly to cover a particular obligation (whether for ordinary time, overtime, weekend penalty rates, fares, clothing or any other entitlement whether arising under the award or pursuant to the contract of employment) the payment cannot be claimed as a set off against monies payable to cover some other incident of employment. A payment made on account of say ordinary time worked cannot be used in discharge of an obligation arising on some other account such as a*

> *claim for overtime. Whether or not the payment was for a particular incident of employment will be a question of fact in every case* [45].

69 In ***Linkhill Pty Ltd*** the joint judgment proceed to state:

> [W]*hat is required is a close correlation between the award obligation and the contractual obligation in respect of which the payment was made. It is not the monetary nature of the payment made under the contract that must correlate with the award. It is the subject matter of the contractual obligations for which the payment was made that must be examined and be found to closely correlate with the obligations in the award said to be discharged by the payment.* … [98].

70 Applied to the known facts of this case, the claim is for alleged unpaid annual leave where Odyssey says that it has, in fact, paid accrued annual leave on an ongoing basis and where the pay slips for the period covered by the 2016 Agreement shows that payments were made for annual leave. In terms of set off, I am satisfied that the payments made to Mr Jones may be capable of setting off any agreements entitlements, although this is predicated on a determination as to whether there are, in fact, any unpaid annual leave entitlements and the status of the purported annual leave entitlements already made.

71 These issues go to the heart of Mr Jones' claim as it relates to the period covered by the 2016 Agreement and it is appropriate that they be the subject of a trial.

Odyssey's application for strike out

72 Further, if the Application as it relates to summary judgment is unsuccessful, Odyssey says Mr Jones' amended Statement of Claim should be struck out with liberty to re-plead.

73 In part, the Application, as it relates to the striking out of the amended Statement of Claim, is no longer applicable as Mr Jones has abandoned part of his claim and summary judgment has been granted in favour of Odyssey for the period of Mr Jones' claim covered by the 2009 Agreement and 2013 Agreement.

74 However, the Application striking out the amended Statement of Claim as it relates to the period of Mr Jones' claim covered by the 2016 Agreement still requires consideration and determination.

75 As already stated, the broad power in r 7(1)(r) of the Regulations would enable an order of this type to be made.

76 Caution is required in considering applications of this type and should be considered '*only where the criticisms of a pleading significantly impact upon the proper preparation of the case and its presentation at trial*'[32] and '*if the time and expense involved in their resolution is proportionate to the significance of the dispute to the just and effective resolution of the case*'.[33]

77 These comments are particularly pertinent in the IMC where the Court's duties include ensuring that cases are dealt with efficiently, economically and expeditiously and that the Court's judicial and administrative resources are used as efficiently as possible.[34] Further, the FWA limits an award of costs.[35]

78 ***Chappell v Goldspan Investments Pty Ltd [No 3]*** [2015] WASC 277, at [10] to [16], summarises the principles to be applied in strike out applications:

- where it is contended that the pleading does not disclose a reasonable cause of action, 'reasonable' means reasonable according to law. If the facts pleaded conceivably give rise to relief, then the cause of action should be held to be reasonable;
- the Court will only strike out in a clear case;

- while there is a need for a Statement of Claim to state the material facts to support the claim for relief, and for the pleadings to define with clarity and precision the issues or questions which are in dispute between the parties and are to be determined by the Court, it is also necessary to consider the role of pleadings in the context of case management, including the pre-trial exchange of witness statements;
- what is needed to satisfy the requirement for a clear statement of case will depend upon the nature of the allegation and the statement of case must be sufficiently clear to allow the other party a fair opportunity to meet it; and
- provided a pleading fulfils its basic function by identifying the issues, disclosing an arguable cause of action, and apprising the other party of the case it has to meet at trial, then the action should proceed.

79 Further and relevant to the IMC, the IMC is not a superior Court of record and while the parties are entitled to know the case put against them, the applicable Court rules do not require the rules of pleading to be followed.[36]

80 Relevant to the period covered by the 2016 Agreement, Odyssey contends that the amended Statement of Claim fails to:

- disclose the terms of an alleged oral contract of employment that Mr Jones says gives rise to an entitlement to annual leave;
- properly distinguish what industrial instrument applies to Mr Jones' employment giving rise to an alleged entitlement of unpaid or untaken annual leave; and
- plead the elements of award coverage and application or enterprise agreement coverage and application necessary to establish the relevant obligations and entitlements said to underpin Mr Jones' purported cause of action.

81 Mr Jones' amended Statement of Claim (or Further and Better Particulars of Claim) lodged on 11 September 2019 states the following relevant to the period covered by the 2016 Agreement:

- Odyssey is a National Systems Employer and employed Mr Jones as a Master between 13 January 2011 and 12 August 2018 on the Even Time Roster;
- Mr Jones' annual salary at the time of the termination of his employment was $148,016.18;
- the employment relationship was subject to the FWA, the NES and the 2016 Agreement;
- Mr Jones alleges Odyssey has not complied with obligations which existed for it to pay him untaken annual leave at the time of the termination of employment;
- Mr Jones refers to cl 24 of the 2016 Agreement and to the statutory obligation arising from s 90(2) of the FWA;
- Mr Jones alleges Odyssey did not provide him with paid annual leave during the period of employment and says it incorrectly described part of the off-time roster as being paid annual leave; and
- Mr Jones claims total untaken annual leave of 37.9 weeks (noting this amount was for the entire period covered by the Agreements).

82 Therefore, while the amended Statement of Claim could be drafted more precisely, the gravamen of Mr Jones' claim for the period covered by the 2016 Agreement is that Odyssey has an obligation under cl 24 of the 2016 Agreement to pay annual leave in accordance with the NES. Upon termination of employment, Odyssey failed to pay accrued and untaken annual leave entitlements contrary to s 90(2) of the FWA.

83 Taking into account the determination with respect to the 2009 Agreement and 2013 Agreement, and rather than ordering the strike out of the remaining amended Statement of Claim with liberty to re-plead, the remedy to cure this lack of precision in drafting is to require Mr Jones to lodge an amended Further and Better Particulars of Case Outline identifying the following with respect to the period 16 May 2016 to 15 August 2018:[37]

- the identity and nature of any relevant statutory instrument such as an award, industrial agreement or statute applying to the employment relationship between Mr Jones and Odyssey;
- the basis upon which it is asserted that the relevant statutory instrument applies;
- the identity and nature of the provisions of the statutory instrument alleged to have been not complied with; and
- the particular circumstances occurring at the time of the alleged failure to comply.

Proposed Orders

84 Subject to hearing further from the parties, I intend to make the following orders:

1 Pursuant to r 5 and r 7(1)(r) of the Regulations, for the period 6 May 2012 to 15 May 2016, the respondent's application for summary judgment is granted and the claimant's claim for unpaid annual leave as it relates to this period is dismissed.

2 The respondent's application for summary judgment is otherwise dismissed.

3 The respondent's application to strike out the claimant's claim for the period 16 May 2016 to 15 August 2018 is dismissed.

4 Pursuant to r 5 and r 18(2) of the Regulations, within 28 days of the date of this order, the claimant is to lodge and serve an amended Further and Better Particulars of Case Outline for the period 16 May 2016 to 15 August 2018 identifying the following:

- the identity and nature of any relevant statutory instrument such as an award, industrial agreement or statute apply to the employment relationship between Mr Jones and Odyssey;
- the basis upon which it is asserted that the relevant statutory instrument applies;
- the identity and nature of the provisions of the statutory instrument alleged to have been not complied with; and
- the particular circumstances occurring at the time of the alleged failure to comply.

D SCADDAN
INDUSTRIAL MAGISTRATE

[1] The even time roster in ***Curtis Island*** was 21 days on and 21 days off.
[2] ***Curtis Island*** [supra] [50] - [51].
[3] ***Curtis Island*** [supra] [42].
[4] ***Curtis Island*** [supra] [43].
[5] ***The Australian Institute of Marine and Power Engineers v Curtis Island Services Pty Ltd*** [2015] FWCFB 6093.
[6] ***Australian Institute of Marine and Power Engineers*** [supra] [14].
[7] Clause 15 of the 2009 Agreement.
[8] Clause 14 of the 2009 Agreement.
[9] Clause 12.2 of the 2009 Agreement.
[10] Clause 13.1 of the 2009 Agreement.
[11] Clause 15.1.6 and cl 15.3.1 of the 2009 Agreement.
[12] Clause 12.1 of the 2013 Agreement.
[13] Clause 12.2 of the 2013 Agreement.
[14] Clause 12.3 of the 2013 Agreement.
[15] Clause 24.5 of the 2016 Agreement.
[16] Clause 24.6 of the 2016 Agreement.
[17] Clause 17.2 of the 2016 Agreement.
[18] Schedule 1 of the 2016 Agreement.
[19] ***United Voice WA v The Minister for Health*** [2011] WAIRC 01065.
[20] The IMC is exercising federal jurisdiction in respect of Mr Jones' claim and the Regulations apply to govern the practice and procedure of the IMC in this regard.
[21] Regulation 5(2)(a) and (c) of the Regulations.
[22] ***Fancourt v Mercantile Credits Ltd*** (1983) 154 CLR 87.
[23] ***Mary v Schon*** [2015] WADC 92 [43] - [44].
[24] ***Edenham Pty Ltd v Meares*** (No 2) [2016] WASC 302 [18].
[25] ***Lewkowski v Bergalin Pty Ltd*** (Unreported, WASCA, Library No 7675, 26 May 1989).
[26] ***Whitehall Holdings Pty Ltd v Ravi Nominees Pty Ltd*** (Unreported, WASCA, Library No 9189, 13 December 1991).
[27] ***Dey v Victorian Railways Cmrs*** (1949) 78 CLR 62, 91.
[28] ***Theseus Exploration NL v Foyster*** (1972) 126 CLR 507, 514 - 515.
[29] ***Burton v Shire of Bairnsdale*** (1908) 7 CLR 76, 92 (see also ***Shilkin v Taylor*** [2011] WASCA 255, 29).
[30] ***ALDI Foods Pty Ltd v Shop, Distributive & Allied Employees Association*** [2017] HCA 53 [34].
[31] ***Armacell Australia Pty Ltd and others*** [2010] FWAFB 9985 [41].
[32] ***Barclay Mowlem Construction Ltd v Dampier Port Authority*** [2006] WASC 281 [8] (Martin CJ).
[33] ***Youlden Enterprises Pty Ltd v Health Solutions (WA) Pty Ltd*** [2006] WASC 161 [2] (Martin CJ).
[34] Regulation 5 of the Regulations.
[35] Section 570(1) and s 570(2) of the FWA.
[36] ***Heseltine & Anor v Investment Planners Australia Pty Ltd*** [2007] WADC 14 [36] per Commissioner Ellis.
[37] Consistent with the IMC's Practice Direction No 1 of 2017 – Case Outlines/Further and Better Particulars of Case Outline.

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

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 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), sections 81 and 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 the terms of an enterprise agreement where the agreement *applies* to give an entitlement to a person and to impose an obligation upon a respondent employer: FWA, s 51(2). The agreement *applies* if it *covers* the employee or the employee organisation and the employer, the agreement is in operation and no other provision of the FWA provides that the agreement does not apply: FWA, s 52(1) (when read with s 53 of the FWA).

[5] An obligation upon an '***employer***' covered by an agreement 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 42, s 53, s 14 and s 12. An entitlement of an employee covered by an agreement 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 42, s 53 and s 13.

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:

- Contravening a term of an enterprise agreement: FWA, s 539 and s 50.
- Contravening a NES.

[8] 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 14 and s 12. 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

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

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

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, 362:

> *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.*

[12] Where in this decision I state that 'I am satisfied' of a fact or matter I am saying that 'I am satisfied on the balance of probabilities' of that fact or matter. Where I state that 'I am not satisfied' of a fact or matter I am saying that 'I am not satisfied on the balance of probabilities' of that fact or matter.

Schedule II – Relevant Principles Of Construction

[1] This case involves construing industrial agreements and statutes. Similar principles apply to both. The relevant principles to be applied when interpreting an industrial instrument are set out by the Full Bench of the Western Australian Industrial Relations Commission in ***Fedec v The Minister for Corrective Services*** [2017] WAIRC 00828 [21] - [23]. In summary (omitting citations), the Full Bench stated:

a. 'The general principles that apply to the construction of contracts and other instruments also apply to the construction of an industrial agreement';

b. '[T]he 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. [I]t 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';

c. '[T]he 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. [T]he 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';

d. '[A]n 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';

e. '[A]n instrument should be construed as a whole. A construction that makes the various parts of an instrument harmonious is preferable. If possible, each part of an instrument should be construed so as to have some operation'; and

f. 'Industrial agreements are usually not drafted with careful attention to form by persons who are experienced in drafting documents that have legal effect'.

The following is also relevant:

g. Ascertaining the intention of the parties begins with a consideration of the ordinary meaning of the words of the instrument. Ascertaining the ordinary meaning of the words requires attention to the context and purpose of the clause being construed. ***City of Wanneroo v Australian Municipal, Administrative, Clerical And Services Union*** [2006] FCA 813 [53] - [57] (French J) (***City of Wanneroo***).

h. Context may appear from the text of the instrument taken as a whole, its arrangement and the place of the provision under construction. The context includes the history of the instrument and the legal background against which the instrument was made and in which it was to operate. ***City of Wanneroo*** [53] - [57] (French J); ***Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Excelior Pty Ltd*** [2013] FCA 638 [28] - [30] (Katzmann J).

Schedule III – Table of Sample Weeks from Pay Slips

	On duty	**Annual Leave (A/L)**	**Off Duty**	**Balance**
	Days	*Days*	*Days*	*Days*
30/04/12-13/05/12	8			Paid time off – 7.1208 A/L - .8792
14/05/12-27/05/12	14			Paid time off – 19.5822 A/L 2.4178
28/05/12-10/06/12	7	3.1871	3.8129	Paid time off – 22 s A/L - 0
23/05/16-05/06/16	4	3.0772	6.9228	Paid time off – 18 A/L - 0
06/06/16-23/06/16			14	Paid time off – 4 A/L - 0
20/06/16-03/07/16	10		4	Paid time off – 8.9010 A/L – 1.0990
04/07/16 – 17/07/16	14			Paid time off – 21.36 A/L – 2.6376
11/07/16-24/07/16	14			Paid time off – 21.36 A/L – 2.63
18/07/16-31/07/16	4	3.0772	6.9228	Paid time off – 18 A/L – 0