WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2020 WAIRC 00794
CORAM	**:**	INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD	**:**	THURSDAY, 20 AUGUST 2020
DELIVERED	**:**	THURSDAY, 10 SEPTEMBER 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) – Alleged contravention of an enterprise agreement – Alleged contravention of a National Employment Standard – Claim for untaken paid annual leave upon termination of employment – Construction of annual leave clause of the relevant enterprise agreement – Alternative claim for set off of alleged entitlements paid
Legislation	**:**	*Fair Work Act 2009* (Cth) *Industrial Relations Act 1979* (WA)
Instruments	**:**	*Go Inshore Port Hedland Agreement 2009* (Cth) *Go Inshore Port Hedland Agreement 2013* (Cth) *GO INSHORE Port Hedland Agreement 2016* (Cth)
Case(s) referred to in reasons:	**:**	***David Jones v Odyssey Marine Pty Ltd*** [2020] WAIRC 00118 ***City of Wanneroo v Australian Municipal, Administrative, Clerical Services Union (2006)*** 153 IR 426; [2006] FCA 813 ***Transport Workers' Union of Australia v Linfox Australia Pty Ltd*** (2014) 318 ALR 54 ***Kucks v CSR Ltd*** (1996) 66 IR 182 ***Amcor Ltd v CFMEU*** [2005] HCA 10 ***The Australian Maritime Officers' Union v Curtis Island Services Pty Ltd*** [2015] FWC 1836 ***WorkPac Pty Ltd v Rossato*** [2020] FCAFC 84 ***Mildren v Gabbusch*** [2014] SAIRC 15

Miller v Minister of Pensions [1947] 2 All ER 372
Briginshaw v Briginshaw [1938] HCA 34

Result	**:**	The Claim is dismissed

Representation:

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

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REASONS FOR DECISION

1 The dispute in Mr David Jones' (Mr Jones) claim against his previous employer, Odyssey Marine Pty Ltd (Odyssey), concerns the accumulation and taking of annual leave while on an Even Time Roster.

2 This dispute has been determined, in part, by the Industrial Magistrates Court of Western Australia (IMC) dismissing Mr Jones' claim as it relates to his employment period covered by two previous industrial agreements, *Go Inshore Port Hedland Agreement 2009* (Cth) and *Go Inshore Port Hedland Enterprise Agreement 2013* (Cth) (the 2009 and 2013 Agreements respectively) (the Summary Decision).[1]

3 The remainder of the dispute concerns the construction and application of cl 24 of the *GO INSHORE Port Hedland Enterprise Agreement 2016* (Cth) (the 2016 Agreement) for the period of employment from 16 May 2016 to 15 August 2018 (the Claimed Period).

4 At the conclusion of the hearing, the subject of this decision, Mr Jones abandoned his contention that he was a continuous shift worker, which only had a bearing on the amount of annual leave he may have been entitled to.

5 Mr Jones was employed as a Master on an Even Time Roster of 28 days on and 28 days off where the parties were covered by the 2016 Agreement (the Even Time Roster).

6 Mr Jones claims:

- he was entitled to four weeks annual leave for each year of service under cl 24.2.2 of the 2016 Agreement or, alternatively, s 87(1)(b) of the *Fair Work Act 2009* (Cth) (FWA);
- 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 upon termination of his employment contrary to s 90(2) of the FWA.

(the Claim).

7 Odyssey denies the Claim and says:

- on its proper construction, cl 24.4 of the 2016 Agreement operates to deem full-time employees to have taken accrued annual leave during off duty periods;
- cl 24.4 of the 2016 Agreement imposes a reasonable requirement to take paid annual leave in particular circumstances or otherwise deals with the taking of paid annual leave pursuant to s 93(3) and s 93(4) of the FWA; and

- Mr Jones received paid annual leave during the off duty periods of the Even Time Roster and had no balance of accrued and untaken annual leave at the cessation of his employment.

8 Schedule I outlines the jurisdiction and practice and procedure relevant to the IMC.

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 The parties agree:

- the 2016 Agreement covered Mr Jones and applied to his employment with Odyssey for the Claimed Period;
- Mr Jones is a '***national system employee***' as that term is defined in the FWA;
- Odyssey is a '***national system employer***' as that term is defined in the FWA; and
- the National Employment Standards (NES) and the FWA applied to Mr Jones's employment.

11 I adopt the relevant part of the Summary Decision where I am satisfied that the contents remain the same for the purpose of this decision:[2]

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

12 Clause 24 of the 2016 Agreement provides as follows:

> *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.

13 The 2016 Agreement was approved pursuant to s 186 of the FWA.

Issues For Determination

14 The following issues require determination:

(a) What is the proper construction and application of cl 24 in the 2016 Agreement?

(b) Is Mr Jones entitled to the payment of untaken paid annual leave under s 90(2) of the FWA for the Claimed Period?

(c) If the answer to (b) is yes, should any amounts owed for the Claimed Period be set off against payments made to Mr Jones?

Mr Jones's Contentions

15 Mr Jones contends that:

(a) he did not apply for or take annual leave during the Claimed Period;

(b) his right to annual leave arises under the NES contained in the FWA or under cl 24.4 of the 2016 Agreement;

(c) *deemed* annual leave under cl 24 of the 2016 Agreement (if Odyssey's contention is accepted) is inconsistent with the provision of annual leave in the NES;

(d) while cl 24.4 of the 2016 Agreement provides that the parties acknowledge and agree that paid annual leave is taken during the off roster periods, the clause does not state that during this period an employee is *deemed* to be on annual leave. It was open to the relevant parties as part of the negotiation process to have expressly stated in the 2016 Agreement that annual leave was *deemed* to have been taken during the off roster periods, but no such language was used in cl 24;

(e) Odyssey's interpretation of cl 24 of the 2016 Agreement is not in accordance with authorities on the proper interpretation of modern awards and industrial agreements, namely it does not have regard to the legislative context of the FWA (and the NES), it is devoid of any clear intention of depriving an employee of his or her right to payment of annual leave, there is no system in place to apply for annual leave to ensure annual leave balances were kept at a reasonable level or to apply to have annual leave cashed out, the Even Time Roster is to compensate an employee for working 28 days on 12 hour shifts, and it results in an unfair and unjust outcome for an employee;

(f) he did not apply for annual leave and was paid an 'all in salary' for 28 days work and 28 days non-work, and nothing in the 'all in salary' was referrable to annual leave; and

(g) the recording on the pay slips of annual leave is no more than a reallocation of annual salary, and annual leave is specifically included in the 2016 Agreement and is not referrable to, or included in, what is meant by annual salary in cl 17.2 of the 2016 Agreement (by reason of the words '*save for those that are otherwise specifically included in this Agreement*').

Odyssey's Response

16 Odyssey's response to Mr Jones' contentions is:

(a) two-fold:

(A) the Even Time Roster discharges the annual leave entitlement where annual leave is built into the off duty time and the amendment to cl 24 of the 2016 Agreement properly construed did not alter the existing Even Time Roster arrangements under the 2009 and 2013 Agreements; and

(B) if its preferred construction of cl 24 of the 2016 Agreement is not accepted, Mr Jones has been paid amounts on account of annual leave capable of being set off against any amount owed such that there is a zero-balance owing;

(b) in support of (A), eight contextual reasons, which when considered alongside the principles in construing industrial agreements, demonstrate that while the effect of cl 24 of the 2016 Agreement was intended to be changed, it was not in a manner that changed how employees working on an Even Time Roster were to accrue and take annual leave;

(c) the eight contextual reasons are supported by the evidence of Mr Wesley van der Spuy (Mr van der Spuy), Chief Executive Officer of Odyssey, and by reference to the 2009 and 2013 Agreements;

(d) in support of (B), payments were made to Mr Jones on account of annual leave expressly referrable to Odyssey's discharging its obligation to provide paid annual leave. Further, Mr Jones had the benefit of the purpose for which annual leave is paid and provided;

(e) in response to Mr Jones' submissions, cl 24.4 of the 2016 Agreement is a term which reasonably requires an employee to take paid annual leave in particular circumstances. The NES does not prohibit enterprise agreements containing terms reasonably requiring employees to take paid annual leave in particular circumstances. Further, it was unnecessary for Mr Jones to apply for annual leave where there was no change in circumstances and annual leave was discharged while in the off duty period.

What Is The Proper Construction And Application Of Cl 24 In The 2016 Agreement?

17 The preferred construction of the relevant annual leave clauses in the 2009 and 2013 Agreements was determined from the words used in the context of the whole of the Agreements and the work arrangements provided by the Even Time Roster.

18 The conclusion in the Summary Decision in respect of the 2009 and 2013 Agreements was that the taking of annual leave was intended to, and in fact was, incorporated into the off duty period and that this was accounted for by paying annual leave on an accrued basis for the preceding period. The effect was a zero-sum balance of annual leave, accrued or otherwise.

19 The obvious re-drafting of the annual leave clause, cl 24 in the 2016 Agreement, left open the question of what was intended by its amendment and what relevance that may have in respect of how cl 24 of the 2016 Agreement was expected to operate. That is, resolution of the construction of the clause was not a matter of merely reading the words in the context of the 2016 Agreement and understanding the operation of the Even Time Roster.

20 The contentious parts of cl 24 of the 2016 Agreement are sub-cl 24.4, sub-cl 24.5 and sub-cl 24.6.

21 The three central pillars of Mr Jones' argument why cl 24 of the 2016 Agreement should be construed in favour of the claimant are:

(1) the absence of the word *deemed* in the clause demonstrates a lack of express intention to deprive employees of their statutory entitlements under the NES and the 2016 Agreement;

(2) there was no application or proper accounting process for the taking of annual leave where leave liability and the cashing out of annual leave was anticipated; and

(3) the recording on payslips of annual leave is no more than a reallocation of an annual salary.

22 The principles for construing industrial instruments, including enterprise agreements, are uncontroversial. I adopt the principles referred to in the Summary Decision, which can be broadly summarised as follows.

23 The interpretation of an industrial instrument begins with consideration of the natural and ordinary meaning of the words used.[3] An industrial instrument is to be interpreted in light of its industrial context and purpose and must not be interpreted in a vacuum divorced from industrial realities.[4] An industrial agreement must make sense according to the basic conventions of English language.[5] The circumstances of the origin and use of a clause is relevant to an understanding of what is likely to have been intended by its use.[6] Narrow and pedantic approaches to the interpretation of an industrial agreement are misplaced.[7]

Is the exclusion of deeming language determinative of the intention of cl 24 of the 2016 Agreement?

24 The Summary Decision at [20] to [25] discussed leave entitlements in the context of an even time roster referred to in ***The Australian Maritime Officers' Union v Curtis Island Services Pty Ltd*** [2015] FWC 1836 (***Curtis Island***). I adopt those paragraphs in these reasons.

25 Importantly in ***Curtis Island***, at first instance and on appeal, it was acknowledged that days off on an even time roster are not paid leave as that term is ordinarily understood, but, having regard to the words used in the analogous annual leave clause in ***Curtis Island*** and the particular work arrangements, it was clearly intended that the off duty period satisfy the taking of all leave.

26 The analogous annual leave clause in ***Curtis Island*** expressly stated that a period of non-duty (or off duty) roster period was *deemed* to have satisfied the employees entitlement to annual leave provided in the NES.

27 Clause 24 of the 2016 Agreement contains no such express reference and, therefore, it is perhaps understandable why Mr Jones has formed the view about the purported intention of cl 24 of the 2016 Agreement and how it is to operate. To that end, Mr Jones says cl 24 of the 2016 Agreement expresses no clear intent to otherwise displace his basal annual leave entitlements, save that he accepts under the terms of cl 24.4 of the 2016 Agreement it is '*acknowledged and agreed that accrued paid annual leave is taken during the off duty periods*'.

28 Mr Jones relies on the words, or lack of words, contained in cl 24 of the 2016 Agreement in support of his preferred construction of the clause.

29 Odyssey's response to Mr Jones' proposition is that proper consideration of the clause requires something more than consideration of the words themselves and that something more is, in part, contained in the uncontroverted evidence of Mr van der Spuy about his involvement in the 2016 Agreement bargaining process and the reasons for the amendment.[8]

30 In summary:

- Odyssey sought to future proof its work force in the event it tendered for work that required the implementation of non-Even Time Rosters and, in doing so, amended the 2016 Agreement to enable more flexibility to engage employees to work something other than an Even Time Roster;[9]

- the 2009 and 2013 Agreements did not anticipate a rostering structure other than an Even Time Roster and thus did not address the accrual of annual leave outside of this structure. The 2016 Agreement amendments were designed to address the possibility of a different rostering structure and the accrual of annual leave that may flow from that and how annual leave in that context would be managed;[10]
- the amendments to cl 24 in the 2016 Agreement were not intended to change the historical and prevailing operation of how annual leave was accrued and taken to that contained in the 2009 and 2013 Agreements;[11]
- clause 24 of the 2016 Agreement was drafted in similar terms to that contained in an enterprise agreement for Total AMS Pty Ltd, a competitor, and is also consistent with other competitor's enterprise agreements both in content and application within the Even Time Roster structure;[12]
- during the bargaining process for the 2016 Agreement, Mr van der Spuy met with employee and union representatives where the purpose of the amendments was discussed and the existing arrangements for annual leave for the Even Time Roster were maintained;[13]
- prior to the employee vote and on behalf of Odyssey, he sent an email to all employees to be covered by the 2016 Agreement with an explanatory table of the 2016 Agreement clauses. In that explanatory table reference was made to annual leave and stated '[a]*nnual leave is accrued in accordance with the Fair Work Act. Accrued paid annual leave is taken during off duty periods not at work as part of the even time roster, as per the current arrangement*';[14]
- the reference to '*current arrangement*' in the email was a reference to the current annual leave clause applicable at the time of the bargaining process, namely cl 22 of the 2013 Agreement;[15] and
- while the amendments in the 2016 Agreement were to address alternative future roster structures, Odyssey did not employ any employees on a non-Even Time Roster as scopes of work did not require, and have not yet required, it.[16]

31 The effect of this evidence, which I accept, is that I find that one of the purposes (if not the sole purpose) of the amendments to the 2016 Agreement was to enable a more flexible rostering structure in the event Odyssey's scope of work changed. The consequence to this was that provision was made to annual leave in cl 24 so as to accommodate annual leave for a rostering structure other than an Even Time Roster.

32 Consistent with this finding is that certain other clauses in the 2016 Agreement were amended to reflect the possibility of an alternative rostering structure being implemented (albeit that ultimately this did not occur). For example, cl 12.3 of the 2013 Agreement provided for an Even Time Roster which could only be varied by agreement between the parties, whereas cl 12.1 of the 2016 Agreement provides for the same Even Time Roster but cl 12.3 provides that employees agree to roster flexibility in certain circumstances and in respect of different projects.

33 I further find that Odyssey's intention was for annual leave in cl 24 of the 2016 Agreement to operate in the same manner to which it operated under cl 22 of the 2013 Agreement (and to cl 15.3.1 of the 2009 Agreement) for employees on an Even Time Roster. I find that this intention was also reflected in the relevant workforce.

34 Consistent with this finding is that implicit in the 2016 Agreement being approved following the employee vote in April 2016, there was no identifiable dispute between the parties or the applicable union prior to its approval. That is, if there was evidence of a dispute as to the terms of the 2016 Agreement, particularly cl 24, then I would have expected Mr Jones to refer to this evidence in support of the Claim and his preferred construction of the clause. No such evidence was led by Mr Jones and, therefore, I reasonably find there was no dispute as to the amendment of the cl 24. The consequence of this is that it supports the finding that Odyssey's employees (and the applicable union) understood that the effect of the amendments to cl 24 of the 2016 Agreement did not change, and were not intended to change, how annual leave was to operate under an Even Time Roster.

35 In addition, following approval of the 2016 Agreement no employee took annual leave during the on duty periods.[17] Mr Jones applied for annual leave during an on duty period following the birth of a child, but this was refused, and he was granted parental leave.[18]

36 The simple point that flows from this is that nothing changed with respect to Mr Jones' work arrangements, including in relation to the operation of the Even Time Roster, how annual leave was accrued and how it was accounted for on the payslips, as a result of the transition from the 2013 Agreement to the 2016 Agreement.

37 Therefore, consistent with the conclusions above, in my view, the fact that cl 24 of the 2016 Agreement did not expressly state that annual leave was *deemed* to have been included in the off duty period is not determinative of the intention and purpose of the clause. The intention and purpose of the clause is capable of being deduced by reference to other relevant factors.

<u>The relevance of an application and accounting process for the taking of annual leave</u>

38 Mr van der Spuy agreed that Mr Jones (and any other employee) did not apply to take annual leave. While annual leave records were maintained on an external database by an external consultant, Mr Jones' payslips showed a regular accrual and deduction of annual leave over a four-week cycle. The pattern in the payslips show Mr Jones' annual leave accruing during the on duty period and then taken in the off duty period.[19]

39 Mr Jones says without an application and accounting process in relation to annual leave, there is no mechanism for ensuring annual leave balances are maintained at reasonable levels or for annual leave to be cashed out.[20] I infer from this that Mr Jones implies that cl 24.5 and cl 24.6 of the 2016 Agreement must have some relevance to the workforce and that their inclusion in the 2016 Agreement anticipated annual leave accruing on an Even Time Roster.

40 Mr van der Spuy's evidence in response is that cl 24.5 and cl 24.6 of the 2016 Agreement was inserted into the 2016 Agreement to deal with the scenario of an employee working a roster other than an Even Time Roster, where the possibility of accrued annual leave and its associated liability might arise.[21]

<u>Whether the recording on payslips of annual leave is a reallocation of annual salary?</u>

41 Mr Jones says that the recording on his payslips of annual leave is a reallocation of his annual salary. That is, the recording of annual leave on the payslip does not support the fact that he applied for or was provided with paid annual leave in accordance with his application.

42 In support of this, Mr Jones says that the annual salary under the 2016 Agreement, unlike cl 14.3 of the 2013 Agreement, does not include a component for annual leave and relies upon the words in brackets in cl 17.2 of the 2016 Agreement, '*save for those that are otherwise specifically included in* [the] *Agreement*'.

43 The annual salary is inclusive of all notional allowances, overtime and penalty rates other than those specifically included in the 2016 Agreement,[22] and Mr Jones says annual leave is an entitlement specifically included in the 2016 Agreement.

44 Odyssey responds by saying Mr Jones misunderstands the operation of the Even Time Roster, where each 28 days off roster period comprises of paid off duty days and paid annual leave days. Further, Odyssey says the 2016 Agreement schedules certain payments made to employees, whereas the 2013 Agreement included those payments as part of the body of the Agreement. Therefore, when read as a whole, the annual salary includes annual leave, along with other payments.

45 Clause 17.2 of the 2016 Agreement provides:

> *Full-Time Employees will be paid an annual salary in accordance with Schedule 1. The annual salary is paid in respect of any and all entitlements arising in respect of all time working on duty and time not working off duty as part of the Even Time Roster within that 12 month period (save for those that are otherwise specifically included in this Agreement).*

46 I accept Odyssey's characterisation of cl 17.2 of the 2016 Agreement and what it includes. It is apparent from the wording in cl 17.2 of the 2016 Agreement, '[t]*he annual salary is paid in respect of <u>any and all entitlements</u> arising*' from the Even Time Roster (emphasis added). These words, when read with the whole of the 2016 Agreement, reflect that the entitlements *otherwise* specifically included in the 2016 Agreements are the amounts referred to in sch 2 to sch 5, and are either separate to that of a full-time employee or in addition to work carried out as an employee.

47 For example, the amount in sch 2 of the 2016 Agreement is the day rate for casual employees and includes a 20% loading for all entitlements usually associated with permanent employees: cl 6.6 of the 2016 Agreement. The amount in sch 3 of the 2016 Agreement only arises if a full-time employee makes their own travel arrangements to attend and leave the work site: cl 17.13 of the 2016 Agreement. The amount in sch 4 only arises if an employee is '*not provided with food or incidentals while on duty … for each working day*': cl 15.1 of the 2016 Agreement. The amount in sch 5 only arises if an employee is requested while off duty to deliver a vessel between ports for refit and are paid a day rate to do so: cl 17.19 of the 2016 Agreement.

48 I further note cl 23.1 of the 2016 Agreement relating to public holidays provide that public holiday entitlements are to '*be taken in accordance with the NES*'. However, cl 23.2 of the 2016 Agreement provides for the scenario where an Even Time Roster may include public holidays, but employees agree that the annual salary and the off duty periods, amongst other things, reflect the reasonableness of requests to work on public holidays:[23] cl 23.2 of the 2016 Agreement.

49 Notwithstanding what is contained in the 'note' to sch 1 of the 2016 Agreement, in my view, this merely serves to reinforce that the annual salary is an inclusive amount, including inclusive of annual leave, unless *otherwise* provided. The amounts *otherwise* provided are those contained in sch 2 to sch 5.

50 Therefore, in my view, the amount recorded as annual leave on the pay slips is not a reallocation of annual salary, where the amount of annual salary includes a component for annual leave. However, of itself, this is also not determinative of the preferred construction of cl 24 of the 2016 Agreement, where Mr Jones' claim concerns the application and taking of annual leave as part of the Even Time Roster.

What is the preferred construction of cl 24 of the 2016 Agreement?

51 The starting point is that Odyssey's employees, including Mr Jones, are entitled to be *paid* annual leave in accordance with the FWA: cl 17.2 of the 2016 Agreement.

52 Mr Jones' '*entitlement to paid annual leave*' arises under s 87(1)(a) of the FWA, which '*accrues progressively … and accumulates from year to year*' (emphasis added): s 87(2) of the FWA. '*Paid annual leave may be taken for a period agreed between an employee and his or her employer*' and '[t]*he employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave*': s 88 of the FWA.

53 However, s 93(3) of the FWA provides that a '*modern award or enterprise agreement may include terms requiring an employee, or allowing for an employee to be required, to take paid annual leave in particular circumstances, but only if the requirement is reasonable*'. Further, a '*modern award or enterprise agreement may include terms otherwise dealing with the taking of paid annual leave*': s 93(4) of the FWA.

54 What do the words '[i]*t 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*' mean, if they do not mean that accrued annual leave can only be taken during off duty period?

55 These words are plain and unambiguous. There is no other period of the Even Time Roster to take accrued annual leave if the parties to the 2016 Agreement agree that it can only be taken during the off duty period. In addition, the only evidence before the IMC regarding the reasonableness or otherwise of the requirement to take annual leave during the off duty period was that lead by Odyssey, namely:

- the predominate industry practice reflects not only the Even Time Roster structure, but also the accrual and taking of annual leave in the same manner as Odyssey;[24]
- the taking of annual leave during the off duty time is part of the acknowledgment that employees in the industry have an extended period of paid time off in contrast to other employees who have traditionally four to five weeks of paid annual leave;[25]
- the structure of Odyssey's annual leave clause is consistent with key competitors' enterprise agreement annual leave arrangements;[26] and
- while Mr Jones' was refused two requests to take annual leave during the on duty period, he was granted access to other leave types for the same period.[27]

56 Therefore, while the NES and the FWA provide for an entitlement to *paid* annual leave (consistent with the wording in cl 24.4 of the 2016 Agreement), the 2016 Agreement requires an employee (including Mr Jones) to *take* paid annual leave in particular circumstances, provided the requirement in the particular circumstances is reasonable. The requirement in Mr Jones' case is that '*accrued paid annual leave is taken during off duty periods not at work*' and the particular circumstance is being '*part of the Even Time Roster*'.

57 Having regard to the evidence outlined in paragraph [55] above, I find that the requirement to take accrued paid annual leave during the off duty period is reasonable, having regard to the particular circumstances. Namely, the net effect of the Even Time Roster is that employees are paid an annual salary which includes six months of the year off duty (noting the 12 hours per day worked while on duty), but the Even Time Roster does not prohibit access to other types of leave while at work during the on duty period (such as sick leave and parental leave) where appropriate.

58 I find that the preferred construction of cl 24.4 of the 2016 Agreement is that accrued paid annual leave was incorporated into Mr Jones' off duty time on the Even Time Roster. The practical manner in which this was done was annual leave was deducted in the subsequent off duty period as and when it accrued in the preceding on duty period.

59 The reasons are as follows (consistent with the findings made):

- one of the purposes (if not the only purpose) for the re-drafting of the annual leave clause in cl 24 of the 2016 Agreement was to provide for employees working a non-Even Time Roster if Odyssey successfully tendered for different scopes of work;
- Odyssey intended for the existing arrangements relating to annual leave under previous iterations of the enterprise agreements to continue in the same manner under the 2016 Agreement;
- Odyssey conveyed both the purpose and the intention of cl 24 of the 2016 Agreement to its workforce prior to the vote on the 2016 Agreement;
- no objection or dispute arose in respect of the existing annual leave arrangements (under the 2013 Agreement) being continued under the 2016 Agreement;
- the 2016 Agreement was approved by the Fair Work Commission;
- accordingly, the only reasonable inference to be drawn is that Odyssey's workforce understood the existing annual leave arrangements under an Even Time Roster would continue in the same manner under the 2016 Agreement where other working conditions also remained the same (in particular, the Even Time Roster continued in the same manner that it had under the 2013 Agreement); and
- not only did the Even Time Roster under the 2016 Agreement continue in the same manner as it had under the 2013 Agreement, the manner in which annual leave was recorded on Odyssey's payslips continued in the same manner under both enterprise agreements. That is, consistent with the 2009 and 2013 Agreements, paid annual leave was accrued and taken in the same ratio.

60 Therefore, I find that notwithstanding cl 24.4 of the 2016 Agreement does not use *deeming* words with respect to the incorporation of accrued paid annual leave as part of the off duty period, the common understanding of Odyssey and its employees is that accrued paid annual leave formed part of the off duty period on the Even Time Roster.

61 This is also consistent with the known annual leave arrangements for industry competitors, in an industry where employees have extended periods of off duty time.

62 The preferred construction of cl 24 of the 2016 Agreement is likewise consistent with what was intended to constitute the annual salary referred to in cl 17.2 of the 2016 Agreement, and where it appears that it was never otherwise countenanced by Odyssey that employees may indirectly receive an increase of approximately 7 - 8% in annual salary (in addition to the 2.2% provided by the 2016 Agreement).

Outcome

63 I am satisfied that the preferred construction of cl 24 of the 2016 Agreement means that all accrued annual leave was paid by Odyssey to Mr Jones during the course of his employment where the annual leave accrued and was incorporated into and paid as part of the off duty period on the Even Time Roster.

64 I am further satisfied that at the time of the termination of his employment, Mr Jones had no accrued and untaken annual leave, and, therefore, Odyssey has not contravened s 90(2) of the FWA.

65 Accordingly, I find the Claim unproven and the Claim is dismissed.

Odyssey's Alternative Argument Concerning Set-Off

66 In the alternative and had cl 24 of the 2016 Agreement been interpreted as suggested by Mr Jones, Odyssey says that any amounts paid in annual leave are capable of being set off against the amount sought by Mr Jones.

67 It is arguably unnecessary to determine Odyssey's alternative argument where I found the Claim unproven. However, I make the following comments.

68 The Summary Decision at [68] to [69] briefly discussed the law in relation to claims for set-off. I adopt those paragraphs in these reasons.

69 In addition to those paragraphs, the Full Court of the Federal Court published its reason for decision in ***WorkPac Pty Ltd v Rossato*** [2020] FCAFC 84 (***Rossato***). His Honour White J at [818] to [864] reviewed the law as in related to claims for set-off and at [865] summarised the applicable principles into four propositions:

> *(a)* … *application of the parties* [employment] *contract* … [if the parties] *agree that a sum of money is paid and received for a specific purpose which is over and above or extraneous to an award entitlement, the* [employment] *contract precludes the employer from later seeking to rely on the payment as satisfying an award obligation which is outside the agreed purpose of the payment* … [A]*n employer cannot later reallocate an amount agreed to be paid to an employee in respect of* [one purpose] … *(for example, ordinary hours of work) to meet a claim in respect of* [another purpose] … *(for example, overtime pay)* … *If* [the purpose of the payment] *arises out of the same purpose as the award obligation, it can be set off;*
>
> *(b)* … *application of the common law principles* … [w]*hen there are outstanding award or enterprise agreement entitlements, a payment designated by the employer as being for a purpose other than satisfaction of the award entitlement cannot be regarded as having satisfied the award or enterprise agreement';*
>
> *(c) close regard must be had to the character of the payment on which the employer relies for the claimed set off and the purpose … for which it was made; and*
>
> *(d) the purpose for which a payment was made will be a question of fact in each case. It may be express or … implied from the parties' agreement or from the employer's conduct*. (original emphasis)

70 Odyssey contends that the payments made to Mr Jones were directly on account of an entitlement to paid annual leave (as recorded on the pay slips) and these payments have the requisite 'close correlation' with the obligation to pay paid annual leave. Accordingly, Odyssey contends that it is entitled to set off those payments against any accrued and untaken annual leave balance if found to have existed at the time of the termination of Mr Jones' employment.

71 Odyssey says the circumstances in the Claim are materially different to that in ***Rossato*** where Mr Jones had the composite benefit of annual leave by being paid amounts expressly referrable to annual leave for the benefit of rest and recreation.

72 In response, Mr Jones says that he was only ever paid his annual salary and that was to work for 28 days and not to work for 28 days. Further, he never applied to take annual leave during the

off duty period and, therefore, annual leave accrued and was never taken during the Claim Period.

73 Odyssey's alternative argument and the response to that argument is circular.

74 However, *if* the preferred construction of cl 24.4 of the 2016 Agreement was that paid annual leave was not intended to be incorporated into the off duty roster and consequently paid annual leave was intended to be leave additional to off duty time, then an entitlement flows from this.

75 In my view, if this separate and additional entitlement to paid annual leave did arise (because it was not intended for annual leave to accrue and then be taken during the off duty period), it follows that only off duty time was accounted for and the accrued annual leave was not taken. In that circumstance, there could be no claim for set off.

76 The corollary of this is that this arguably further buttresses the preferred construction of cl 24.4 of the 2016 Agreement, but perhaps not in the way Odyssey intended in its submissions on set off. That is, by agreeing to take annual leave during the off duty period, it was never intended employees get *further* entitlements to not be at work when they are already being paid to not be at work.

Result

77 The Claimant's claim is dismissed.

D. SCADDAN
INDUSTRIAL MAGISTRATE

[1] ***David Jones v Odyssey Marine Pty Ltd*** [2020] WAIRC 00118.
[2] ***Jones v Odyssey Marine*** [12], [13].
[3] ***City of Wanneroo v Australian Municipal, Administrative, Clerical Services Union*** (2006) 153 IR 426, 438.
[4] ***City of Wanneroo*** 438, 440.
[5] ***City of Wanneroo*** 440.
[6] ***Transport Workers' Union of Australia v Linfox Australia Pty Ltd*** (2014) 318 ALR 54.
[7] ***Kucks v CSR Ltd*** (1996) 66 IR 182; ***Amcor Ltd v CFMEU*** [2005] HCA 10.
[8] Exhibit 4 – Affidavit of Wesley John van der Spuy sworn 12 August 2020.
[9] Exhibit 4 [14].
[10] Exhibit 4 [15], [16].
[11] Exhibit 4 [13].
[12] Exhibit 4 [10], [16].
[13] Exhibit 4 [17], [18].
[14] Exhibit 4 [19], annexure WVDS-1.
[15] Exhibit 4 [20], annexure WVDS-2.
[16] Exhibit 4 [21].
[17] Exhibit 4 [22].
[18] Exhibit 4 [27].
[19] Exhibit 4 [24], [25], annexure WVDS-3.
[20] Clause 24.5 and cl 24.6 of the 2016 Agreement.
[21] Exhibit 4 [15], [16].
[22] Schedule 1 of the 2016 Agreement.
[23] See also s 114(2) to s 114(4) of the FWA.
[24] Exhibit 4 [7], [8].
[25] Exhibit 4 [8].
[26] Exhibit 4 [10].
[27] Exhibit 4 [27].

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), s 81 and s 81B.

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

[4] The civil penalty provisions identified in s 539 of the FWA include 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: FWA, s 539 and s 44(1)

[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.

[10] 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 and Anor v Gabbusch*** [2014] SAIRC 15.

Burden and standard of proof

[11] 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.*

[12] 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.*

[13] 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.