

**CONTRACTUAL BENEFIT CLAIM
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

CITATION : 2021 WAIRC 00061

CORAM : COMMISSIONER T B WALKINGTON

HEARD : ON THE PAPERS

DELIVERED : WEDNESDAY, 10 MARCH 2021

FILE NO. : B 37 OF 2020

BETWEEN : DAMIEN BILLI
Applicant

AND

MACKENZIE MARINE AND TOWAGE PTY LTD
Respondent

CatchWords : Contractual benefits claim - Jurisdiction to deal with claim - Whether salary exceeds prescribed amount - Meaning of salary - Compulsory superannuation - Non-compulsory superannuation contributions - Salary exceeds prescribed amount

Legislation : *Industrial Relations Act 1979* (WA) s 29AA(3)
Industrial Relations (General) Regulations 1997 (WA) pt 3 reg 5

Result : Application dismissed for want of jurisdiction

Representation:

Applicant : Mr G Walsh (as agent)

Respondent : Mr S Mare (of counsel)

Cases referred to in reasons:

Adrian Ciccotosto v TPS Firepower Pty Ltd [2004] WAIRC 12079; (2004) 84 WAIG 2607

Andjelko Budimlich v J-Corp Pty Ltd [2014] WAIRC 00303; (2014) 94 WAIG 503

Martin Jasper Radford v Coinstar Pty Ltd [2002] WAIRC 05608; (2002) 82 WAIG 1049

Matthews v Cool or Cosy Pty Ltd [2004] WASCA 114; (2004) 84 WAIG 2152

Springdale Comfort Pty Ltd v Building Trades Association of Unions of Western Australia (Association of Workers) (1986) 67 WAIG 325

The Totalisator Agency Board v Edith Fisher (1997) 77 WAIG 1889

Reasons for Decision

- 1 Mr Damien Billi applied pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA) (**IR Act**) for payment of ‘Remuneration – Payment of Salary and Superannuation. Salary - \$13,421.13 per month; Superannuation - \$2,013.17 per month’ which he says he is entitled to and has not been paid.
- 2 At the time Mr Billi applied he was employed as a Tug Master by Mackenzie Marine and Towage Pty Ltd (**Mackenzie**).
- 3 Mackenzie contend that the Western Australian Industrial Relations Commission (**Commission**) lacks jurisdiction to deal with the matter because Mr Billi’s salary exceeds the prescribed amount. Mackenzie assert that s 29AA of the IR Act provides that where an employee’s contract of employment provides for a salary that exceeds the prescribed amount the Commission must not determine the claim. Mackenzie also contend that Mr Billi has not identified a benefit under a contract of employment that he has been denied.
- 4 On 15 September 2020, Mr Billi sought to amend his claim (**amended claim**) as follows:
 - The restoration of 30 days of personal leave.
 - The back payment of 2 months’ salary for the pay periods from 15/02/2020 – 14/03/2020 and from 15/03/2020 – 15/04/2020 in the amount of \$26,842.26.
 - The back payment of 2 months’ superannuation for the pay periods from 15/02/2020 – 14/03/2020 and from 15/03/2020 – 15/04/2020 in the amount of \$4026.34.
 - The additional back payment of salary and allowances from 1 April 2020 to 14 May 2020 as provided by the new Enterprise Agreement.
- 5 Mackenzie maintained their objection to the jurisdiction on the basis that the employment contract provided for a salary that exceeded the prescribed amount and as a consequence the Commission is not able to hear and determine Mr Billi’s claim.
- 6 As established in *Springdale Comfort Pty Ltd v Building Trades Association of Unions of Western Australia (Association of Workers)* (1986) 67 WAIG 325 once a question of jurisdiction is raised, the Commission must determine that question before exercising power to resolve the dispute before it.

The Question to be Decided

- 7 I must decide whether Mr Billi’s salary for the purposes of s 29AA of the IR Act exceeds the prescribed amount.

Facts and Evidence

- 8 It is not in dispute that Mr Billi was employed under a written contract of employment dated 3 December 2016 and cl 4 sets out the remuneration he was to be paid:

4. REMUNERATION

Salary

- 4.1 Your salary will be \$154,476 per annum. This salary will be paid in lieu of any wages, overtime, allowances or salaries payable under the Award or the Agreement. Base salary increase will be paid on CPI on the 6th of December 2017, 6th of December 2018, 6th of December 2019.

Superannuation

4.2 The Company will make superannuation contributions of 15%, in accordance with superannuation guarantee legislation. The contributions will be made to a complying fund of your choice.

Payment of salary

4.3 Your salary will be paid on a monthly basis on the 15th day of each month, (or before if the 15th is a weekend day or Public holiday) by electronic funds transfer to your nominated financial institution.

- 9 Clause 4.1 of the contract provides annual increases in salary, and at the time of the application (20 March 2020) Mr Billi's employment contract provided for a base salary of \$161,053.56, payment of a statutory superannuation contribution of \$15,300.08 and an additional payment in the form of a further employer superannuation contribution of \$8,857.95.
- 10 The parties do not agree on the period that ought be considered material for this matter (**the material period**). The parties also differ on the payment received by Mr Billi during the material period. Mr Billi contends that the payment received is a total of his base salary, statutory superannuation and additional superannuation contributions during 15 April 2019 to 15 April 2020. Mackenzie contend that the relevant payments that are to be considered are the base salary and the additional superannuation contributions. The statutory superannuation payments are to be excluded. Mackenzie say that the material period is the twelve months prior to the date of Mr Billi's claim, being made on 20 March 2020.
- 11 Given the dispute as to the facts concerning the material period and the salary received, the Commission convened a scheduling conference to determine the process for hearing evidence if the facts remained in dispute. Both parties expressed a strong preference for the matter of jurisdiction to be determined on the papers.

Principles

- 12 The jurisdiction to enquire into and deal with an industrial matter is conferred by s 23(1) of the IR Act to hear and determine a claim. Section 29(1)(b)(ii) of the IR Act provides standing to an employee to bring a claim: *Matthews v Cool or Cosy Pty Ltd* [2004] WASCA 114; (2004) 84 WAIG 2152.
- 13 Acting under the power conferred by s 23(1) and s 29(1)(b)(ii) of the IR Act, the Commission may hear and determine an industrial matter referred by an employee that is a claim of a benefit the employee claims to be entitled under his or her contract of employment.
- 14 Section 23(1) of the IR Act cannot be read in isolation, or only together with s 29(1)(b)(ii). Both of these provisions must be read with the restrictions set out in s 29AA(4) and s 29AA(5) of the IR Act. This approach applies the principle that the IR Act is to be read as a whole. Section 29AA(4) and s 29AA(5) of the IR Act are very specific provisions that operate to prohibit the Commission from determining a claim where the contract of employment of the employee who seeks to refer the claim pursuant to s 29(1)(b)(ii) of the IR Act provides for a salary that exceeds the prescribed amount.
- 15 The limitation provided for in s 29AA(4) and s 29AA(5) of the IR Act prevails to read down the general jurisdiction to enquire into and deal with an industrial matter conferred in s 23(1) of the IR Act when the matter referred is a claim that an employee has not been allowed a benefit to which he or she is entitled to under the contract of employment.

16 Section 29AA(4) and s 29AA(5) of the IR Act clearly provides a limitation on claims referred pursuant to s 29(1)(b)(ii) of the IR Act that can be determined by the Commission:

- (4) The Commission must not determine a claim that an employee has not been allowed by his or her employer a benefit to which the employee is entitled under a contract of employment if —
- (a) an industrial instrument does not apply to the employment of the employee; and
 - (b) the employee’s contract of employment provides for a salary exceeding the prescribed amount.

(5) In this section —

industrial instrument means —

- (a) an award; or
- (b) an order of the Commission under this Act that is not an order prescribed by regulations made by the Governor for the purposes of this section; or
- (c) an industrial agreement; or
- (d) an employer-employee agreement;

prescribed amount means —

- (a) \$90 000 per annum; or
- (b) the salary specified, or worked out in a manner specified, in regulations made by the Governor for the purposes of this section.

17 The relevant regulation which specifies the ‘prescribed amount’ is reg 5 of the *Industrial Relations (General) Regulations 1997 (WA) (Regulations)*:

5. Prescribed amount — section 29AA

- (1) For the purposes of paragraph (b) of the definition of “prescribed amount” in section 29AA(5) of the Act the specified salary is \$90 000, or that amount as affected by indexation in accordance with regulation 6.
- (2) For the purposes of paragraph (b) of the definition of “prescribed amount” in section 29AA(5) of the Act the salary provided for in an employee’s contract of employment is to be worked out as follows —
 - (a) for an employee who was continuously employed by an employer and was not on leave without full pay at any time during the period of 12 months immediately before the dismissal or claim — the greater of —
 - (i) the salary that the employee actually received in that period; and
 - (ii) the salary that the employee was entitled to receive in that period;
 - (b) for an employee who was continuously employed by an employer and was on leave without full pay at any time during the period of 12 months immediately before the dismissal or claim — the total of —
 - (i) the actual salary received by the employee for the days during that period that the employee was not on leave without full pay; and
 - (ii) for the days that the employee was on leave without full pay an amount worked out using the formula —

remuneration mentioned in subparagraph (i)

$\frac{x \text{ days on leave without full pay}}{\text{days not on leave without full pay;}}$

or

- (c) for an employee who was continuously employed by an employer for a period less than 12 months immediately before the dismissal or claim — the amount worked out using the formula —

$\frac{\text{remuneration received} \times 365}{\text{days employed.}}$

- 18 The definition of salary is important for the purposes of the calculation of an employee's salary concerning the prescribed amount.
- 19 As set out in *The Totalisator Agency Board v Edith Fisher* (1997) 77 WAIG 1889 (*TAB*); and *Andjelko Budimlich v J-Corp Pty Ltd* [2014] WAIRC 00303; (2014) 94 WAIG 503 [22] the elements of a salary are those payments that are fixed periodically and are paid for regular work or services.
- 20 In *Adrian Ciccotosto v TPS Firepower Pty Ltd* [2004] WAIRC 12079; (2004) 84 WAIG 2607 [16] (*Ciccotosto*) the Commission concluded that disbursement of remuneration at an employee's discretion under a more beneficial tax arrangement does not reduce the salary for the purposes of s 29AA of the IR Act. In *Martin Jasper Radford v Coinstar Pty Ltd* [2002] WAIRC 05608; (2002) 82 WAIG 1049 (*Radford*) the Commission held that superannuation contributions paid by an employer in addition to contributions prescribed by law, were to be included in the salary.

Application

- 21 I find that the prescribed amount for the period commencing 1 July 2019 and ending on 1 July 2020 of \$166,680 is the relevant determination for consideration of this matter.
- 22 Mr Billi's remuneration included a base salary, statutory superannuation payments and additional superannuation contributions paid to his nominated fund by his employer. I find that at the time of making the application Mr Billi's contract of employment provided for a gross annual salary of \$161,053.56 and statutory super of an amount equivalent to 9.5% (\$15,053.56) and additional superannuation contributions of an amount equivalent to 5.5% (\$8,857.95).
- 23 I do not include the amount of paid statutory superannuation payments in the 'salary' paid to Mr Billi. This amount is an obligation placed on the employer by a statutory scheme. Consistent with *TAB* and *Ciccotosto* I find that the payments identified as 'Employer Superannuation Contribution' that are additional contributions to Mr Billi's superannuation fund are payments that are regular and paid for services rendered and computed by time. The disbursement of salary by way of contribution to a superannuation fund is a beneficial tax arrangement and should be included for determining his salary for the purpose of s 29AA of the IR Act.

Applicant's Claim

- 24 At the time of making the application Mr Billi contended his contract of employment provided for a gross annual salary of \$161,053.56 and that during the 'last twelve months' he received a salary of \$129,930.89. Mr Billi asserted that on the basis that he received less than \$166,680 the Commission is able to determine the claim. Mr Billi did not provide the dates for the 'last

twelve months' nor the appropriate method to be applied within reg 5 of the Regulations. Calculations relied on, if any, for the purposes of reg 5 of the Regulations were not provided.

- 25 Mackenzie submits that the material period for the purposes of s 29AA of the IR Act is the 12 months immediately before the date of the claim, being 20 March 2020. During that period Mr Billi had not been paid for 35 days and received payments of \$154,987.95 which excluded the statutory superannuation contributions. These facts would result in a salary, for the purposes of s 29AA of the IR Act of \$171,426.07.
- 26 Mr Billi made a further submission that asserted he received \$138,395.81 in salary and superannuation payments in the period of 15 April 2019 to 15 April 2020. Mr Billi provided scanned copies of his pay slips. Mr Billi contended that as he received \$138,395.81 in salary and superannuation payments and this was below the prescribed amount therefore the Commission was able to hear and determine his claim.
- 27 Following an objection from Mackenzie it was resolved that the pay slip for the period 15 May 2019 to 14 June 2019 had been omitted from the information and materials provided by Mr Billi. The addition of the salary and superannuation payment for that month result in Mr Billi having received \$153,632.03 in salary and superannuation for the period Mr Billi claims is material
- 28 Consistent with *Radford* I consider the applicant is not correct to include payments received for statutory superannuation. The elements of the salary received by Mr Billi are his base salary and the amount equivalent to 5.5% of the base salary, being for additional contributions to his superannuation fund.
- 29 In his submissions Mr Billi sets out that he was paid 30 days personal leave for which he sought to be restored to his leave entitlement through this application. The days for which personal leave was paid are not specified. Mr Billi also seeks the payment of two months' salary and superannuation which he contends he was not paid.
- 30 The payslips submitted by Mr Billi show that he did not receive his usual salary and superannuation payments for two pay periods being 15 February 2020 to 14 March 2020 (29 days) and 15 March 2020 to 15 April 2020 (32 days). That is Mr Billi's claim includes a period of 61 days that he did not receive his salary and superannuation payments, that he was on leave without pay.
- 31 Taking Mr Billi's contentions, the preceding 12 months as being 15 April 2019 to 15 April 2020 with 61 days of that period being unpaid, Mr Billi received a base salary of \$133,707.05 and additional superannuation payments of \$7,358.89. The total salary received, excluding the statutory compulsory superannuation payments, by Mr Billi was \$141,060.94.
- 32 Mr Billi's submissions set out his contention that the salary he received during the period ought be used to determine whether his salary exceeded the prescribed amount. However, this does not correctly apply reg 5(2) of the Regulations. Mr Billi's submissions state that for a period of 61 days he was not paid. As such the formula in reg 5(2)(b) of the Regulations, applies and results in a salary of \$169,365.93. Mr Billi's salary exceeds the prescribed amount.
- 33 Alternately if there is not a period of leave without pay, reg 5(2)(a) of the Regulations sets out that the salary to be used is the greater of either the salary that the employee actually received in that period and the salary that the employee was entitled to receive. Applying this formula the greater is the salary entitled to be received which is \$169,911.51. The amount exceeds the prescribed amount.

- 34 Alternately Mackenzie contends that the 12 months immediately preceding the claim being 21 March 2019 to 20 March 2020 is the material period to consider. During this period Mr Billi was not paid for 35 days. In this scenario the base salary and additional superannuation, excluding the statutory compulsory superannuation payments, received is \$154,987.95. Applying reg 5(2)(b) of the Regulations, results in a salary of \$177,426.07. This amount exceeds the prescribed amount.
- 35 Mr Billi disputes the accuracy of the payroll summary provided by Mackenzie on the basis that they are 'entirely false and inaccurate'. No evidence was submitted in support of this assertion.

Amended Claim

- 36 On 15 September 2020 Mr Billi submitted an application to amend his claim. The amended claim maintained that he received \$153,632.03 in salary during the period 15 April 2019 to 15 April 2020. The amended claim refers to the prescribed salary being \$172,200.
- 37 I find that the making of an amended claim does not change the prescribed amount that ought to apply to this matter. The prescribed amount for the purposes of determining Mr Billi's claim is \$166,680. Mr Billi's claim was made on 20 March 2020 and the period for which he claims a benefit to which he is entitled and has been denied concerns a period up until 15 April 2020. The prescribed amount of \$172,200 was set for a period commencing 1 July 2020. Mr Billi does not provide any evidence nor authorities for the assertion that the prescribed salary that ought be applied is one that concerns a period some months after the period material to the claim.
- 38 Mr Billi's amended claim cites the text of reg 5(2)(b) of the Regulations, however the relevant calculations are not set out. Regulation 5(2)(b) of the Regulations sets out the formula to be applied in circumstances where an employee was on leave without pay for any time during the preceding period of 12 months immediately before the dismissal or claim. Despite citing the text of the regulation, Mr Billi's amended application maintains that the salary he received, being \$153,632.03 is the correct salary to assess the prescribed amount. Clearly this is incorrect. This amount includes statutory superannuation which ought be excluded. In addition, the correct application of reg 5 of the Regulations and the formula in reg 5(2)(b) of the Regulations results in a salary of \$169,365.93. This salary exceeds the relevant prescribed amount.
- 39 Both Mr Billi's original claim and amended claim included payment received for overtime of \$871.66 during 20 May 2019 to 19 June 2019. Inclusion of occasional overtime payments remains an open question in this matter. However, it is one that need not be determined as the removal of this amount does not result in a salary calculated in accordance with the Regulations, which is lower than the prescribed amount.

Conclusion

- 40 For the reasons set out above I conclude that Mr Billi's salary exceeds the prescribed amount and I do not have jurisdiction to hear and determine his claim.