

## WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

**CITATION** : 2021 WAIRC 00035

**CORAM** : INDUSTRIAL MAGISTRATE J. HAWKINS

**HEARD** : WEDNESDAY, 9 DECEMBER 2020, THURSDAY, 10 DECEMBER 2020

**DELIVERED** : FRIDAY, 12 FEBRUARY 2021

**FILE NO.** : M 167 OF 2018

**BETWEEN** : GREGORY WILLIAM DAY  
**CLAIMANT**

AND

ROBERT LINDSAY SEVERN  
**RESPONDENT**

**CatchWords** : INDUSTRIAL LAW – Employee/Employer Relationship or Independent Contractor – Scope of *Clerk (Commercial, Social and Professional Services) Award No. 14 of 1972 (WA)* – Casual Employee vs Permanent Part-Time Employee – Annual Leave under *Minimum Conditions of Employment Act 1993 (WA)* – Payment in Lieu of Notice under s 759 of the *Fair Work Act 2009 (Cth)*

**Legislation** : *Minimum Conditions of Employment Act 1993 (WA)*  
*Fair Work Act 2009 (Cth)*  
*Industrial Relations Act 1979 (WA)*  
*Workers’ Compensation and Rehabilitation Act 1981 (WA)*  
*Superannuation Guarantee (Administration) Act 1992 (Cth)*  
*Taxation Administration Act 1953 (Cth)*  
*Magistrates Court (Civil Proceedings) Act 2004 (WA)*

**Instruments** : *Clerks (Commercial, Social and Professional Services) Award No. 14 of 1972 (WA)*

**Case(s) referred to in reasons:** : *Botica v Top Cut TMS Holdings Pty Ltd (ACN 134606661)* [2020] WAIRC 61  
*Abdulla v Viewdaze Pty Ltd AIRC trading as Malta Travel* (2003) 53 ATR 30  
*Stevens v Brodrigg Sawmilling Co Pty Ltd* [1986] HCA 1; 160 CLR 16  
*Hollis v Vabu Pty Ltd* [2001] HCA 44

*Karen Bailey v Spangaro (No 1) Pty Ltd* [2019] FWC 4359  
*Kimber v Western Auger Drilling Pty Ltd* [2015] FWCFB 3704; 252 IR 1  
*Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] FCAFC 37  
*Transport Workers Union of Australia v Coles Supermarkets Pty Ltd* [2014] FCAFC 148  
*City of Wanneroo v Australian Municipal, Administrative, Clerical Services Union* [2006] FCA 813; 153 IR 426  
*Kucks v CSR Limited* (1996) 66 IR 182  
*Amcors Limited v Construction, Forestry, Mining and Energy Union* [2005] HCA 10; 222 CLR 241  
*RJ Donovan And Associates Pty Ltd v Federated Clerks Union of Australia Industrial Union of Workers, W.A. Branch* (1977) 57 WAIG 1317  
*Fair Work Ombudsman v Complete Windscreens (SA) Pty Ltd* [2016] FCA 621  
*The Director of the Fair Work Building Industry Inspectorate v Linkhill Pty Ltd (No 7)* [2013] FCCA 1097  
*Logan v Otis Elevator Company Pty Ltd* [1997] IRCA 200  
*Ware v O'Donnell Griffin (Television Services) Pty Ltd* [1971] AR (NSW) 18  
*Fair Work Ombudsman v D'Adamo Nominees Pty Ltd (No.4)* [2015] FCCA 1178; 301 FLR 1  
*City of Wanneroo v Holmes* [1989] FCA 553; 30 IR 362  
*Joyce v Christoffersen* [1990] FCA 381; 33 IR 390  
*Kershaw v Sunvalley Australia Pty Ltd* [2007] WASCA 278  
*WorkPac Pty Ltd v Skene* [2018] FCAFC 131; 264 FCR 536  
*Moate v IPC Pty Ltd* [2020] WAIRC 390  
*Sammur v AVM Holdings Pty Ltd [No 2]* [2012] WASC 27

**Result** : Claim in part proven

**Representation:**

Claimant : Mr P. Mullally (agent) from Workclaims Australia  
 Respondent : Mr D. Eley (agent) from Sterling IR Pty Ltd

**REASONS FOR DECISION**

**Introduction**

- 1 Mr Gregory William Day (Mr Day) entered into an oral contract with Mr Robert Lindsay Severn (Mr Severn) on 2 July 2013 to undertake work for him. Mr Day carried out work for Mr Severn until 25 March 2018, when this arrangement was terminated by Mr Severn.
- 2 The role of Mr Day's employment was in dispute. Mr Day claimed he was in an employee/employer relationship with Mr Severn. Mr Severn disputed this and maintained Mr Day was an independent contractor.

- 3 The nature of Mr Day's claim, which commenced on 1 October 2018, has changed over the lengthy course of this proceedings. At trial Mr Day confirmed that his claim was limited to:
  - (a) Penalty rates that should have been paid to him for Saturday and Sunday work performed for Mr Severn for the period 4 July 2015 to 17 December 2017 at the rates claimed for a 'Grade 6 administrative officer' pursuant to the *Clerk (Commercial, Social and Professional Services) Award No. 14 of 1972* (WA) (the Award);
  - (b) Unpaid annual leave for the period from 2 July 2013 to 25 March 2018 pursuant to cl 12 of the Award or, in the alternative, pursuant to the *Minimum Conditions of Employment Act 1993* (WA) (MCE Act); and
  - (c) Three weeks payment in lieu of notice of termination of Mr Day's employment pursuant to s 759 and s 117 of the *Fair Work Act 2009* (Cth) (FW Act).
- 4 In addition, Mr Day is also seeking that the Western Australian Industrial Magistrates Court (IMC) impose penalties pursuant to s 83(4)(a)(ii) of the *Industrial Relations Act 1979* (WA) (IR Act) and that such penalties be paid to Mr Day.
- 5 Schedule 1 of these reasons for decisions outline the jurisdiction, and practice and procedure of the IMC.
- 6 It was uncontentious that Mr Day was employed to attend a land sales site office (the Office) located at Jindowie estate in Western Australia (the Site). Nor is there any dispute that Mr Severn did not own the land being sold at that site. Rather, Mr Severn had contract with Australand/Frasers Property Australia (Australand/Frasers), the developers of the Site, to have the Office manned during set hours and days of the week.
- 7 As stated, Mr Severn firstly denies that Mr Day was an employee but, rather, maintains that he was an independent contractor.
- 8 Secondly, Mr Severn claims that if Mr Day was an employee then the applicable instrument that should be applied to the relationship would be the MCE Act and not the Award for the following reasons:
  - (a) Mr Day was engaged as a real estate sales representative for the purposes of selling parcels of land;
  - (b) Any clerical work undertaken by Mr Day was merely incidental to the function of selling parcels of land;
  - (c) Mr Day was required, as a part of his employment, to maintain a licence to be a real estate sales representative;
  - (d) The Office at which Mr Day worked had no office equipment other than a chair and a table;
  - (e) Mr Day has given evidence that he handed out sales brochures and advertising literature;
  - (f) Mr Day has given evidence that he went to movie nights and social functions;
  - (g) None of the classifications in cl 11 of the Award relate in any way to the functions performed by Mr Day as a clerk; and
  - (h) No other award or instrument covers the functions performed by Mr Day.
- 9 Thirdly, Mr Severn says that if an employee/employer relationship existed then Mr Day was a casual employee not a permanent part-time employee.

10 Potentially the following issues arise for determination:

- (a) Was Mr Day in a relationship of employee/employer or independent contractor with Mr Severn?
- (b) If Mr Day was in a relationship of employee/employer with Mr Severn then:
  - (i) Is the Award applicable to Mr Day's employment?
  - (ii) If the Award is not applicable, is the MCE Act applicable and was Mr Day a casual or part-time employee?
  - (iii) Was Mr Day entitled to payment in lieu of notice?
- (c) What orders and payment of pecuniary penalty, if any, should be awarded to Mr Day?

**Issue 1 – Was Mr Day An Employee Or Independent Contractor?**

11 This is like many cases that come before the IMC where there are factors that suggest an employer/employee relationship and factors that suggest an independent contractor relationship.

12 The IR Act in s 7 defines '*employee*' and '*employer*' to mean as follows:

*[E]mployee means –*

- (a) *any person employed by an employer to do work for hire or reward including an apprentice; or*
- (b) *any person whose usual status is that of an employee; or*
- (c) *any person employed as a canvasser whose services are remunerated wholly or partly by commission or percentage reward; or*
- (d) *any person who is the lessee of any tools or other implements of production or of any vehicle used in the delivery of goods or who is the owner, whether wholly or partly, of any vehicle used in the transport of goods or passengers if he is in all other respects an employee,*

*but does not include any person engaged in domestic service in a private home unless ...*

*[E]mployer includes –*

- (a) *persons, firms, companies and corporations; and*
- (b) *the Crown and any Minister of the Crown, or any public authority,*

*employing one or more employees and also includes a labour hire agency or group training organisation that arranges for an employee (being a person who is a party to a contract of service with the agency or organisation) to do work for another person, even though the employee is working for the other person under an arrangement between the agency or organisation and the other person*

13 The IR Act, however, does not define the meaning of an 'independent contractor'. The meaning given to an employee in the IR Act is not expansive. Unlike other statutes such as the *Workers' Compensation and Rehabilitation Act 1981* (WA) and the *Superannuation Guarantee (Administration) Act 1992* (Cth) (SGAA) the IR Act does not have an extended definition of '*employee*'.

14 Mr Day argued that given the extended definition in the SGAA it may have application. It has previously been found by this Court that it is impermissible to draw upon an extended definition of '*employee*' in the SGAA to determine the ordinary meaning of employee.<sup>1</sup> Although not

bound by that determination, given principles of judicial consistency, I adopt the reasoning in *Botica*.

- 15 The summary of common law principles governing the employee and independent contractor issue likewise was set out in *Botica* and those principles are adopted.<sup>2</sup>
- 16 It was made clear in respect to the authorities referred in *Botica* that there are competing factors that suggest Mr Day and Mr Severn were in employer/employee relationship and there were factors that suggested that Mr Day was an independent contractor. Nonetheless it is necessary to view the totality of the relationship between the parties and not any single factor in determining this issue.
- 17 Below sets out findings of some factors that have been referred to in various authorities in determining whether Mr Day was an employee pursuant to a contract of service or was an independent contractor pursuant to a contract for services.<sup>3</sup>

#### The terms of engagement

- 18 There was no express written contract between the parties governing Mr Day's terms of engagement. However, a contract of employment can exist as a result of a verbal agreement. There was no dispute that in or about mid-2013, Mr Severn met with Mr Day and Mrs Jenine Fay Day (Mrs Day) and agreed to employ Mr Day. The dispute between the parties is whether Mr Severn agreed to employ Mr Day as an independent contractor or as an employee.
- 19 There is divergent evidence on whether Mr Day was told he was being engaged as an independent contractor. Mr Severn was adamant that he made clear to Mr Day when he met Mr Day and Mrs Day in mid-2013, that Mr Day's appointment would be as an independent contractor and that he was required to provide his ABN number. Whereas Mr Day and Mrs Day were firm in their evidence that the issue of being an independent contractor was never discussed nor was the need to provide an ABN number. Although evidence was produced that Mr Day did have an ABN number, despite him suggesting he never had one, he was steadfast that he had not been asked for it by Mr Severn.
- 20 Both Mr Day and Mr Severn however agreed that Mr Day was engaged to sell lots of land at the Site as a real estate sales representative and to attend the Office at the times required by Australand/Frasers. There was also no dispute that Mr Day was required during his employment to maintain his licence as a real estate sales representative. There was no dispute between both Mr Day and Mr Severn that it was agreed he would be paid an hourly rate of \$25 for his attendance at the Office. It was also agreed that he would be paid commissions for the sale of lots of land. Apart from the exact times when Mr Day attended the Office, both Mr Severn and Mr Day agreed that his duties would be to attend the Office on Monday, Tuesday, Wednesday, Saturday and Sunday.
- 21 Mr Day, as required by Mr Severn, sent Mr Severn timesheets that recorded the dates and times he attended the Office and the lots of land for which he sought commission. The only parties present at the time of the discussions in mid-2013 as to Mr Day's engagement, was Mr Day, Mrs Day and Mr Severn. Although Mr Gavin Grieve (Mr Grieve), Mr Severn's tax agent, confirms Mr Severn's evidence that Mr Severn had never directly employed anyone, it is to be noted that Mr Grieve was not present at the meeting between Mr Day and Mr Severn. Any evidence as to what Mr Severn told Mr Grieve in respect to that meeting has no probative force.
- 22 It was submitted that Mr Day's evidence was implausible and not credible because:

- (a) He denied having an ABN number wherein in reality ASIC records revealed Mr Day did possess an ABN number in 2013 which was ultimately cancelled in 2015;
- (b) Mr Day could give no other detail about other entitlements that were discussed at the mid-2013 meeting. It was argued therefore that this was more consistent with Mr Day understanding that his appointment was that of an independent contractor, as suggested by Mr Severn; and
- (c) Mr Day gave evidence that he had always been self-employed.

- 23 I am not satisfied that Mr Day's evidence on this issue lacked credibility. Mrs Day, who was a credible witness, corroborated his version of events. Mr Day's lack of memory as to his ABN number was consistent with it not having been discussed at the mid-2013 meeting. Further, despite Mr Severn being adamant he had asked Mr Day for his ABN number, there is no evidence he followed this up in writing nor sought to have his tax agent do so which would be more consistent with Mr Severn's suggestion that he had appointed Mr Day as an independent contractor. Nor was there any evidence that Mr Severn required Mr Day to present him with invoices for work completed. At one point Mr Severn sought to suggest that the timesheets were invoices that Mr Day presented but ultimately, he agreed that they were not. Mr Severn paid Mr Day pursuant to timesheets, (which is more consistent with Mr Severn not having raised the issue of independent contractor).
- 24 Given those issues of plausibility and inconsistencies, I found Mr Severn's evidence on this issue unreliable. Whereas for the reasons outlined above I found Mr Day and Mrs Day's evidence on this issue reliable. I therefore prefer the evidence of Mr Day and Mrs Day and find that the issue of whether Mr Day would be an independent contractor was not discussed by Mr Severn with Mr Day. I also find that it was agreed that Mr Day would be paid \$25 per hour for attending the Office and a commission for sales of land as a licensed real estate sales representative. Mr Day's timesheets produced by Mr Severn consistently show that Mr Day provided details of the days and number of hours worked, and the lot numbers of land sold.

#### Did Mr Day have the right to delegate work to others?

- 25 There was no evidence that Mr Day could have others undertake the work he was required to perform.

#### Control

- 26 There was no dispute that Mr Severn did have the right to exercise control over the place Mr Day worked and his hours of work.<sup>4</sup>
- 27 There is no real dispute on the evidence of the parties that Mr Day was required to attend the Office on Monday, Tuesday, Wednesday, Saturday and Sunday. There was some discrepancy between Mr Day's witness statements as to the exact hours he worked. However, in cross-examination he conceded that generally he worked between 11.00 am - 4.00 pm on Monday, Tuesday, Wednesday and 12.00 noon - 4.00 pm on Saturdays and Sundays. Further, Mr Day's timesheets generally accord with the times he recalled attending, albeit on some occasions he worked more hours and sometimes he worked less. Indeed, this is corroborated by Mr Severn's evidence who indicated he paid Mr Day for the times set out in his timesheets, despite sometimes being more hours than contemplated and sometimes less hours.
- 28 Further, both Mr Day and Mr Severn gave evidence that it was a requirement of Mr Severn's arrangement with Australand/Frasers that the Office be open during Monday, Tuesday,

Wednesday and Saturday and Sunday. This arrangement with Mr Day commenced on or about 2 July 2013 and continued until 25 March 2018 (a period of four years and eight months).

- 29 The Office was rudimentary with only tables and chairs. The Office was made available for Mr Day's use by Mr Severn and Mr Day was also provided with brochures. I accept that those brochures were not necessarily brochures provided directly by Mr Severn as they were brochures created by Australand/Frasers. However, access to those brochures was made available to Mr Day when given use of the Office by Mr Severn.
- 30 I also accept that there was little evidence that Mr Severn maintained day-to-day on-site control of Mr Day. This is not a situation where Mr Day attended Mr Severn's office and met Mr Severn on a daily basis. However, it is clear that Mr Day was required to submit his timesheets to Mr Severn which recorded the time worked and the lots he sold. Mr Severn confirmed that he only paid Mr Day based on those timesheets which impliedly confirmed that Mr Severn was maintaining control of Mr Day to ensure that he was compliant with the days and hours that he was required to attend the Office.
- 31 Further, it was not disputed that Mr Day did take phone calls after hours as his phone number was placed on advertisements created by Australand/Frasers. In addition, there was not any dispute in the evidence that Mr Day at one point completed contracts of sale. Mr Severn did not dispute that Mr Day completed contracts of sale but suggest he stopped this as Mr Day had completed a contract incorrectly and had cost him money. Mr Day disputed that this ever occurred, and he continued to complete contracts regularly in respect to sales of lots of land. Nonetheless Mr Severn accepted that Mr Day would still fill in basic details of contracts.<sup>5</sup>
- 32 As to Mr Day's attendance at the Office, Mr Severn confirmed Mr Day's evidence that whilst at the Office he was required to meet and greet people which included members of the public and builders. Mr Severn also did not dispute that Mr Day attended weekly meetings on a Monday at the offices of Australand/Frasers. Mr Severn was aware those meetings generally involved discussions of sales at the Site. However, Mr Severn was adamant he never directed Mr Day to attend those meetings. Equally so, Mr Severn never directed Mr Day not to attend those meetings and it can be inferred that he had given approval therefore for Mr Day to attend those meetings.
- 33 I accept that Mr Day's witness statements did seek to suggest he was also involved in daily inspections of the Site and reporting any problems with the Site, such as graffiti or illegal dumping, to Mr Severn. However, in cross-examination Mr Day conceded that any reports on these issues were made to Australand/Frasers and were without the direction of Mr Severn.
- 34 Mr Day also suggested he was engaged in arranging finance for prospective purchasers. There was, however, a dispute that this was at the direction of Mr Severn. Mr Severn's unchallenged evidence is that this was never at his direction. Accordingly, I am not satisfied that Mr Severn gave Mr Day direction to organise finance, undertake the inspection of the Site and report any problem to him.
- 35 Nonetheless, I am satisfied that on Monday, Tuesday, Wednesday, Saturday and Sunday during the hours 11.00 am - 4.00 pm and 12.00 noon - 4.00 pm Mr Day was required to attend the Office and meet and greet the general public or builders, and provide them with any information such as brochures in respect to the sale of lots of land. I am also satisfied that Mr Day, whilst in attendance at the Office, was involved in preparing contracts of sale by at least preparing the preliminaries of such contracts. I am also satisfied that Mr Day was required to provide Mr Severn with proof of his attendance at the Office by submitting timesheets which indicated the times at which he attended the Office.

36 For the reasons expressed above I am satisfied that Mr Severn exercised control over Mr Day's work.

Was Mr Day able to do other work?

37 Mr Severn's unchallenged evidence was that he never prevented Mr Day from working for others. However, there was no cogent evidence Mr Day did so. Nor is there any evidence that he had separate premises from where he worked for others. Indeed, there is a lack of documentary evidence to prove that Mr Day, during the relevant periods, undertook paid work for others. Albeit I accept that there is some evidence that in the period from November 2017 to March 2018 he had been advertised as a real estate agent representing LJ Hooker, there was simply no evidence he performed any work or was remunerated for any work with LJ Hooker during that period.

Tools of trade

38 Mr Day did concede that he used his own mobile phone, computer, and rudimentary stationery when at the Office. However, there was no evidence he invested significantly in items of equipment necessary to complete his daily task. Nor was there evidence these items of equipment were shown to relate to any separate business Mr Day was operating whilst also undertaking work for Mr Severn.

Was Mr Day representing himself to the world at large as an emanation of Mr Severn's business?

39 There was no evidence Mr Day was required to wear a uniform by Mr Severn nor was there any evidence that Mr Day did wear such a uniform. Although Mr Day initially suggested he was provided with a business card, he conceded that the business card he may have been provided with, was provided to him by Australand/Frasers.

Could Mr Severn dismiss Mr Day?

40 There is no dispute that Mr Severn did bring the arrangement with Mr Day to an end on 25 March 2018. The unchallenged evidence of Mr Severn was that his contract with Australand/Frasers was subject to review and that he had informed Mr Day of this.

41 This indicia, to some extent, is neutral as to whether Mr Day was an employee or contractor, as Mr Severn would always have the ability to terminate his contract with Mr Day.

How was Mr Day remunerated?

42 There is no dispute Mr Severn paid Mr Day \$25 per hour for the hours worked. Nor is there any dispute that the amount paid coincided with the times set out on the timesheets submitted weekly to Mr Severn by Mr Day. This occurred throughout the period from 2013 to 2018. Further, the sample of timesheets reveal amounts of commission (which apart from the commission for a development known as 'Santorini') were paid by Mr Severn. Accordingly, the weight of the evidence shows Mr Severn remunerated Mr Day on a weekly basis for attending the Office and for commissions upon the sales of lots.

Was tax deducted from amounts paid to Mr Day?

43 There is no dispute that PAYG tax was deducted from the amounts paid to Mr Day by Mr Severn. However, there was evidence from Mr Grieve that he needed to account for tax that might be able to be recouped by Mr Day. Mr Grieve conceded that he issued the PAYG group certificates as this was the form he had available at his office, albeit that he was aware that a different form was the most suitable.

- 44 Mr Grieve was not presented as an expert witness and conceded that he was not an expert in assessing if a person was employer, employee or an independent contractor. Mr Grieve insisted he was told by Mr Severn that Mr Day was an independent contractor. Despite this, on the tax documents prepared by Mr Grieve, Mr Day was treated as an employee.
- 45 At face value the payment of group tax is generally the strongest feature suggesting a relationship of employment. However, it has been accepted that the issuing of group certificates in error may affect the weight to be given to such indications.<sup>6</sup> This however is not a case where the PAYG group certificate was issued in error. Mr Grieve did not suggest that he sought at any time to rectify this error. I consider his explanation of the use of an incorrect form to account for tax simply implausible.

#### Other Indicia

- 46 Clearly on the evidence from both parties Mr Day was never paid any sick leave or holiday pay. Mr Day was required to work as a licenced real estate sales representative and indeed there was evidence that from November 2017 LJ Hooker commenced advertising Mr Day's services as a real estate agent whilst Mr Day was still carrying out work for Mr Severn. To some extent this was consistent with Mr Day being aware that Mr Severn's contract with Australand/Frasers was coming to an end. However as previously stated, there was no evidence that Mr Day was remunerated for the work he carried out, if any, with LJ Hooker in the period from November 2017 to March 2018. Nor is there any financial documentation which shows that during the period from 2013 to 2018 Mr Day operated a business or expended significant expenses carrying out business work for others.

#### Issue 1 – Was Mr Day An Employee Or Independent Contractor – Conclusion

- 47 It is necessary to view the totality of the relationship between the parties and not one factor. In *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd*<sup>7</sup> the Federal Court suggested it was helpful also to determine firstly whether a worker was engaged in the conduct of business in his or her own right. If a worker is not engaged in his or her own business, it follows that the worker is serving the interests of the employer's business and is the employee of that business.
- 48 On the basis of the findings made above, I am satisfied that the contract between the parties was oral and made no mention of Mr Day working as an independent contractor. Mr Day was employed to provide his personal services as a licensed real estate sales representative for set times and days of the week. He was required also to submit timesheets, not invoices, upon which he was remunerated. Mr Day did so for a substantial period, from 2013 to 2018. There is simply no evidence that Mr Day, during this period, ran a separate business for which he was remunerated. There was no evidence he invested significantly in plant or equipment or other significant items used to carry out work in a business he owned or operated. There was no evidence Mr Day conducted business from a separate premises during this period. Further, the work performed by Mr Day was carried out at a premises to which he was directed to attend by Mr Severn. This premises was made available to him by Mr Severn albeit that Mr Severn did not own or lease those premises.
- 49 Mr Day was paid upon the provision of timesheets required to be submitted to Mr Severn. The timesheets set out the times and dates Mr Day attended the Office, and sales of lots of land for which he was paid a commission. Further, PAYG tax was deducted from those payments. Even though Mr Day had some capacity to work for others there was no evidence which can be given any weight to show that he did so. Mr Day was the subject of control by Mr Severn in relation to his attendance at work and indeed in the manner in which he performed his work. Mr Severn

himself, gave evidence that Mr Day was not, in the latter part of his employment, able to complete contracts of sale but only fill in the preliminaries due to errors Mr Day had made on such a document. The primary purpose of the relationship between the parties was for Mr Day to provide his personal services to Mr Severn. As such, he fell within the definition of an ‘*employee*’ under the IR Act, being a person employed to do work for reward or in part for commission.

- 50 Further, when the totality of the relationship is viewed objectively, I am satisfied that Mr Day was employed under a contract of service and was in an employee/employer relationship with Mr Severn and was not an independent contractor.

### **Issue 2 – Is The Award Applicable To Mr Day’s Employment By Mr Severn?**

- 51 Being satisfied that Mr Day was an ‘*employee*’, the next issue to be determined is whether the Award applied to Mr Day’s employment. This is not a case where the parties entered into a written agreement that made reference to the Award. Nor was it discussed between the parties that the Award governed his conditions of employment. Mr Day submits that the Award applied to his employment and that he was employed as a ‘*Grade 6 administrative officer*’ under the Award.

- 52 The starting point to determine award coverage are the words of the Award itself. In particular, it is, ‘*the objective meaning of the words used [in the relevant Award] bearing in mind the context in which they appear and the purpose they are intended to serve*’.<sup>8</sup>

- 53 An award has to be interpreted:

- by giving consideration to the natural and ordinary meaning of the words used;<sup>9</sup> and
- in light of its industrial context and purpose, not in ‘*a vacuum divorced from industrial realities*’.<sup>10</sup>

- 54 An award must ‘*make sense according to the basic conventions of English language*’<sup>11</sup> and ‘*narrow [and] pedantic approaches to the interpretation of an award are misplaced*’.<sup>12</sup>

- 55 Although there is some limitation to the claim by Mr Day in respect to penalty rates it is nonetheless accepted by the parties that in respect to the claim for annual leave, Mr Day is not time-barred. That claim runs from 2 July 2013 to 25 March 2018. This is relevant to which version of the Award applies and the scope of the Award.

- 56 Clause 4 of the 2013 version of the Award (which appears to have been unchanged in subsequent versions of the Award) reads as follows:

#### 4. – SCOPE

*This award shall apply to all workers employed in the clerical callings mentioned herein (including telephone attendants and messengers where such worker does clerical work) by those employers named and engaged in the industry set out in Schedule ‘A’ hereto, provided that it shall not apply to workers employed in the callings of Dental Assistant and or Dental Receptionist under the Dental Technicians’ and Attendant/Receptionists’ Award 1982.*

- 57 Accordingly, the scope of this Award was fixed by reference to an industry as carried on by ‘*the Respondents*’ set out in the schedule to the Award. Such a scope clause was the subject of an industrial appeal court decision in *RJ Donovan And Associates Pty Ltd v Federated Clerks Union of Australia Industrial Union of Workers, W.A. Branch*.<sup>13</sup> Such clauses are sometimes referred to as ‘Donovan Scope Clause’.

- 58 In the Award, named employers are parties to the Award under an industry heading and one such heading is '*Agents Real Estate and/or Developers and/or Builders*'. Thereafter employers, who are Respondents to the Award, are named. It is generally accepted that it is the industry heading itself that is relevant in determining the scope of the Award.
- 59 The issue of scope of the Award was not contested by Mr Severn. I am satisfied that Mr Severn was not named as a respondent to the Award. However, the Award was applicable to the industries named in sch A of the Award which includes '*Agents Real Estate and/or Developers and/or Builders*' which was the industry in which Mr Severn operated. I am therefore satisfied that the scope of the Award applied to Mr Severn.
- 60 The key issue as to the Award coverage was whether Mr Day fell within any classification under the Award. Mr Severn argued that largely upon the evidence of Mr Day he was not carrying out functions of a clerk for Mr Severn. Accordingly, Mr Severn argued that the applicable instrument (if any) that should be applied to the relationship would be the MCE Act.
- 61 Mr Day however submits that his classification under the Award for the period from 4 July 2015 to 17 December 2017 was that of a '*Grade 6 administrative officer*'. Clause 11.2.6 of the Award that applied from 4 July 2015 to 17 December 2017 sets out the meaning given to a '*Grade 6 administrative officer*' in the Award in summary, as follows:
- (a) *Employees in this grade perform clerical and administrative duties using a more extensive range of skills and knowledge at a level higher than required in Grade 5. They are responsible and accountable for their own work, and may have responsibility for the work of a section or unit. They exercise initiative, discretion and judgement within the range of their skills and knowledge. Supervision is by means of reporting to more senior staff as required.*
  - (b) *Computer - skill level 5*  
*Operating/co-ordinating a group of computers such as a small multi-user system or a large group of personal computers which may include operating a help desk, running and monitoring batch jobs and performing regular back-ups and restores.*
  - (c) *Enterprise/industry, specialist skills - skill level 6*  
*Apply knowledge of the organisation's objectives and performance, and apply specialist knowledge, in areas such as projected growth, product trends and general industry conditions, examples include: knowledge of competitors and major clients market structure in the performance of own responsibilities; import/export activities. Indicative Specialist Skills Include; Use knowledge of basic statistics to interpret data from spreadsheets, statistical tables, graphs and frequency tables in the performance of own responsibilities. Administration of workers compensation claims, insurance and disputed claims.*
  - (d) *Supervisory - skill level 3*  
*Plan and organise work priorities of a unit or section; re-schedule workloads as necessary and resolve operational problems for unit or section; monitor work quality of those supervised; use observations, diagnosis and intervention skills to ensure unit/section meets objectives; organise and chair necessary work meetings/conferences; assist in planning future sectional/office organisational resources and equipment needs.*
  - (e) *Business/financial skills - skill level 5*  
*Administer individual salary packages, travel expenses, allowances and company transport. Administer specialist salary and payroll requirements, e.g. Eligible Termination Payments, Superannuation Trust Deed Requirements, Redundancy Calculations, Maintenance Support Schemes, etc.*

(f) *Secretarial - skill level 4*

*As well as having shorthand skills of Skill Level 3, arrange conferences and external meetings, including venues, agendas, documentation, audio-visual requirements, catering, transport and accommodation; originate executive correspondence; assist executive in preparing, attending and following up appointments, interviews, meetings, etc; assume responsibility for Designated areas of executive's work, on delegated authority.*

62 The meaning of a 'Grade 6 administrative officer' has been unchanged in the versions of the Award that apply to the period claimed.

63 I am satisfied that on the undisputed evidence Mr Day's tasks required him principally to undertake the following duties:

- (a) To act as a real estate sales representative for the purposes of selling parcels of land at the Office of the Site;
- (b) To attend the Office of the Site on limited hours on Monday, Tuesday, Wednesday and Saturday and Sunday;
- (c) To meet and greet members of the public or builders who were interested in purchasing lots at the Site;
- (d) To prepare contracts of sale of lots from the Site; and
- (e) To provide sales brochures and advertising literatures to any persons who attended the Office.

64 As to whether the classification relied on by Mr Day in the Award applies, I must have regard to the following relevant principles:

- (a) *'Where the particular issue is whether an employee is engaged in a particular classification or class of work, then the Court takes a practical approach and will consider the aspect of the employee's employment which is the principal or major or substantial aspect': Fair Work Ombudsman v Complete Windscreens (SA) Pty Ltd [2016] FCA 621 [27]; The Director of the Fair Work Building Industry Inspectorate v Linkhill Pty Ltd (No 7) [2013] FCCA 1097; Logan v Otis Elevator Company Pty Ltd [1997] IRCA 200 (Moore J).*
- (b) Determining the major or substantial aspect of an employee's employment is *'not merely a matter of quantifying the time spent on the various elements of work performed ... the quality of the different types of work done is also a relevant consideration': Ware v O'Donnell Griffin (Television Services) Pty Ltd [1971] AR (NSW) 18.*
- (c) The focus is upon the identification of the skills and duties required of an employee who is called upon to perform the function that is required to be performed by the employer. The individual performance of a particular employee (e.g. quality and quantity of work, capacity for more complex work, et cetera) is less relevant than the skills and duties necessary to perform the function required to be performed by the employer: *Fair Work Ombudsman v Complete Windscreens (SA) Pty Ltd [2016] FCA 621 [32]; Fair Work Ombudsman v D'Adamo Nominees Pty Ltd (No.4) [2015] FCCA 1178; 301 FLR 1 [256].*
- (d) The courts and industrial tribunals have developed principles to be applied to ascertain whether an employee falls within a particular classification described in

an award or an agreement. Where the employee performs mixed functions, the approach has been to examine the ‘*major and substantial employment*’ of the employee or the ‘*principal purpose*’ or ‘*primary function*’ of the employee. For example, in *Logan v Otis Elevator Company Pty Ltd* [1997] IRCA 200, Moore J referred to and applied decision of Sheldon J in *Ware v O’Donnell Griffin (Television Services) Pty Ltd* [1971] AR (NSW) 18 where his Honour, applying the ‘*major and substantial employment*’ test, relevantly observed:

*...it is not merely a matter of quantifying the time spent on the various elements of work performed by a complainant; the quality of the different types of work done is also a relevant consideration.*

- (e) The task of the Court in examining the major, substantial or principal aspect of the work performed by the employee will include consideration of the amount of time spent performing particular tasks, but also the circumstances of the employment, and what the employee was employed to do. The question is one of fact, to be determined by reference to the duties actually attaching to the position, rather than its title: *City of Wanneroo v Holmes* [1989] FCA 553; 30 IR 362, 379; *Joyce v Christoffersen* [1990] FCA 381; 33 IR 390, 278.

65 On the issue of classification, I am satisfied that the Office at which Mr Day was employed was rudimentary. It was not set up as a typical office with computers, photocopiers, telephones, working desk, relevant stationery normally expected for carrying out clerical duties.

66 Although in a very rudimentary way,

- Mr Day carried out some clerical duties such as answering phone calls and filling out sales documentation, his clerical duties were incidental to his core role of selling parcels of land as a licensed real estate sales representative.
- Mr Day was not required to report to more senior staff.
- He did not ‘[o]perate or co-ordinate a group of computers ... or large group of personal computers’.
- He was not required to ‘[u]se knowledge of basic statistics to interpret data from spreadsheets, statistical tables’ or ‘apply specialist knowledge, in areas such as projected growth, product trends and general industry conditions’.
- He was not required to ‘plan and organise work priorities of a unit or section’ or ‘re-schedule workloads as necessary [or] resolve operational problems’.
- He was not required to monitor the quality of persons he supervised nor did he supervise any persons.
- He was not required to ‘assist in planning future ... organisational resources and equipment’, nor did he ‘[a]dminister individual salary packages, travel expenses or allowances’ of others.
- There was no evidence he had any shorthand skills at level 3 or was involved in arranging ‘conferences and external meetings, including venues, agendas, documentation, audio-visual requirements, catering, transport’, accommodation et cetera.

67 A ‘Grade 6 administrative officer’ under the Award is the highest class of clerical officer.

- 68 It was not submitted that any other classification applied to Mr Day's employment.
- 69 Mr Day was employed by Mr Severn as a licensed real estate sales representative.
- 70 Given my finding in [63] above, I am satisfied that Mr Day's role did not wholly or principally require him to carry out the clerical duties outlined in the classification relied upon by Mr Day or any of the classifications in the Award.
- 71 I am, therefore, not satisfied that the Award covered Mr Day's employment with Mr Severn. Accordingly, Mr Day has no entitlement to claim annual leave pursuant to the Award.

**Issue 3 – Is The MCE Act Applicable To Mr Day's Employment And Was Mr Day A Casual Or Part-Time Employee?**

- 72 Having found the Award inapplicable, the next issue is whether the MCE Act applies to Mr Day's claim for annual leave. There is no real dispute on the evidence that Mr Day was not paid for periods that he was on leave.

- 73 Section 12 of the MCE Act provides as follows:

*The minimum weekly rate of pay applicable at a particular time to an employee —*

*(a) who has reached 21 years of age; and*

*(b) who is not an apprentice,*

*is the rate in effect at that time under section 50A(1)(a)(i) of the IR Act in relation to employees who have reached 21 years of age and who are not apprentices.*

- 74 There is no dispute that Mr Day's claim was one that has changed materially over time. It could be described as an ambit claim. The amended statement of claim lodged on 18 June 2020 (Amended Claim) makes claims in the alternative. At [15] of the Amended Claim it is submitted:

*The entitlement to paid annual leave arose from clause 12 of the Award or in the alternative by operation of S. 23 of the Minimum Conditions of Employment Act 1993 (WA).*

- 75 Despite that alternative claim, the Amended Claim seeks to quantify the entitlement to annual leave by reference to an hourly rate of \$24.19.<sup>14</sup> Albeit that it has not been properly stated, this appears to be the hourly rate relied upon by Mr Day as applicable to a 'Grade 6 administrative officer' classification under the Award and that rate, being the rate applicable as at 1 July 2017, as set out in [13] of the Amended Claim.
- 76 Accordingly, the Amended Claim does not quantify the entitlement to annual leave on the alternative basis of the application of the MCE Act. Nor do the submissions lodged by Mr Day or Mr Severn deal with the jurisdiction of IMC to order any payments under the MCE Act.
- 77 The jurisdiction of the IMC to deal with an application for annual leave pursuant to the MCE Act has not been addressed by the parties.
- 78 Pursuant to s 83 of the IR Act, an application to the IMC for enforcement can only be made in respect to an instrument to which s 83 of the IR Act applies. The instruments referred to in s 83 of the IR Act include an award, an industrial agreement or an employer-employee agreement or an order made by the Western Australia Industrial Relations Commission. This jurisdiction was discussed in *Kershaw v Sunvalley Australia Pty Ltd.*<sup>15</sup> Le Miere J at [17] stated as follows:

*17 The MCE Act provides for minimum conditions of employment. Section 3(1) provides that 'minimum condition of employment' means amongst other things, a condition for leave prescribed by the MCE Act. Section 23(1) provides that an employee (other than a casual employee) is entitled, in relation to each year of service, to a period of paid annual leave equal*

*to the number of hours the employee is required ordinarily to work in a four week period during the year, up to 152 hours. Section 5(1) provides that the minimum conditions of employment are taken to be implied in a contract of employment. Section 7 provides that a minimum condition of employment may be enforced where the condition is implied in a contract of employment, under s 83 of the Industrial Relation Act 1979 (WA) ... as if it were a provision of an award, industrial agreement or order other than an order made under s 32 or s 66 of that act.*

79 At [22] it was stated:

22 *The effect of s 5 of the MCE Act is that the minimum conditions of employment, including entitlement to paid annual leave prescribed by s 23, is implied in a contract of employment. The effect of s 7 is that that minimum condition may be enforced under s 83 of the IR Act as if it were a provision of an award, industrial agreement or order other than a order made under s 32 or s 66 of that Act.*

80 Further, in [23]:

23 *Section 83 of the IR Act provides that specified people may apply for the enforcement of a provision 'where a person contravenes or fails to comply with a provision of an instrument to which this section applies'. A condition for paid annual leave prescribed by s 23 of the MCE Act and implied in a contract of employment is, by reason of s 7 of the MCE Act, deemed to be a provision of an instrument to which s 83 of the IR Act applies. Any person who is a party to the instrument or to whom it applies may apply for the enforcement of the provision of the instrument - see s 83(1)(e). (emphasis added)*

81 In **Kershaw**, the Full Court was dealing with whether the respondent was a party to the contract of employment with the appellant. In that case there had been a sale of the employer's business to the respondent, set out in a Deed. The Full Court found that such a Deed was not an instrument to which s 83(1) of the IR Act applied by application of the deeming provision in s 7 of the MCE Act.

82 I am bound by the decision of **Kershaw**. Albeit that the plurality did not comment on the applicability of the MCE Act and s 83 of the IR Act as it concerns oral contracts, I am nonetheless satisfied that it cannot be distinguished. To do so would exclude employees employed under an oral contract of employment from pursuing such entitlements. Given that the MCE Act is beneficial legislation, such an interpretation would result in an absurdity.

83 Accordingly, I am satisfied that Mr Day was employed pursuant to an oral contract of employment with Mr Severn.

84 As such, a condition of paid annual leave prescribed by s 23 of the MCE Act can be implied into that contract of employment and in accordance with the decision of **Kershaw** is deemed to be a provision of an instrument to which s 83 of the IR Act applies.

85 Further, s 23 of the MCE Act provides as follows:

(1) *An employee, other than a casual employee, is entitled for each year of service, to paid annual leave for the number of hours the employee is required ordinarily to work in a 4 week period during that year, up to 152 hours.*

(2) *An entitlement under subsection (1) accrues pro rata on a weekly basis.*

(2a) *Entitlements under subsection (1) are cumulative.*

(3) *In subsection (1), **year** does not include any period of unpaid leave.*

(4) *Subsection (1) does not apply to an employee of a class prescribed by the regulations. (emphasis added)*

- 86 This gives rise to the issue as to whether or not Mr Day was a permanent part-time employee or a casual employee. Mr Severn submits that the overwhelming evidence is that Mr Day was a casual employee. The MCE Act does not define the meaning of casual employee. Albeit dealing with the FW Act the issue of the meaning of casual employment was discussed in *WorkPac Pty Ltd v Skene*.<sup>16</sup>
- 87 This issue was discussed in the decision of *Moate v IPC Pty Ltd*<sup>17</sup> where the following propositions in respect to the meaning of casual employee was set out at [70] by reference to *Skene* and are as follows:
- (a) *The vast majority of employees fall into one of three categories – full-time, part-time or casual.*
  - (b) *The characteristic that distinguishes full-time and part-time employment is that those employments are on-going ... on-going employment is employment for an indefinite term subject to rights of termination ... It is characterised by a commitment by the employer, subject to rights of termination, to provide the employee with continuous and indefinite employment according to an agreed pattern of ordinary time ... A corresponding commitment to provide service is given by the employee.*
  - (c) *The characteristics that distinguish casual employment is the absence of a ‘firm advance commitment from the employer to the continuing and indefinite work according to an agreed pattern of work. Nor does a casual employee provide a reciprocal commitment to the employer’.*
  - (d) *‘The key indicators of an absence of the requisite firm advance commitment will be irregularity, uncertainty, unpredictability, intermittency and discontinuity in the pattern of work of the employee in question. Those features will commonly reflect the fact that, whilst employed, the availability of work for the employee is short-term and not-ongoing and that the employer’s need for further work to be performed by the employee in the future is not reasonably predictable’. Examination of the particular circumstances of an employee’s pattern of work is necessary to determine the significance of the pattern; a regular pattern of work may not, in particular circumstances, evidence an advance commitment by an employer.*
  - (e) *Whether an employer’s ‘requisite advance commitment ... is absent or present must be objectively assessed including by reference to the surrounding circumstances created by both the contractual terms and the regulatory regime ... applicable to the employment’ ... ‘[T]he real substance, practical reality and true nature of that relationship will need to be assessed’.*
  - (f) *The characterisation of employment by the employer or employee (or both) are ‘matters to be taken into account in determining the true character of the employment ... The payment by the employer and the acceptance by the employee of a casual loading ... speaks to the intent of the parties to create casual employment’ and will be relevant to the characterisation of the relationship. The engagement or remuneration of an employee on an hourly basis will also be relevant in assessing the relationship of the parties. However, if examination of the real substance, practical reality and true nature of that relationship reveals an objectively demonstrated firm advance commitment to continuing and indefinite work by the employer, self-characterisation as ‘a casual’ or payment of a ‘casual loading’ or engagement on an hourly basis will not alter the true characterisation of the relationship as one of full-time or part-time employment. Payment of a casual loading and payment of hourly rates are not determinative factors.*
  - (g) *Employment arrangements may change over time. Casual employment may become full-time or part-time. [R]epetition of a particular working arrangement may become so predictable and expected that, at some point, it may be possible to say that what began as ... [casual employment] has become, upon the tacit understanding of the parties, a regular ongoing engagement’.* (original emphasis)

- 88 This is not a case where the parties discussed whether Mr Day's employment amounted to casual employment. There was some inconsistency in Mr Day's evidence that he categorised the position he held as a full-time role. However, there was clear and largely unchallenged evidence by Mr Day that he worked from 11.00 am - 4.00 pm on Mondays, Tuesdays, Wednesdays and 12.00 noon - 4.00 pm on Saturdays and Sundays, which clearly proved he was not employed full-time.
- 89 Some timesheets were produced by Mr Day. They did not cover the entirety of the period for which Mr Day was employed by Mr Severn. Mr Severn seeks to rely on an average produced by those timesheets that Mr Day worked 19.23 hours per week over a 32-week period. However, Mr Day maintained that he rarely took time off. Mr Day continued to undertake work for a significant period of time from 2013 to 2018. There was a striking feature of Mr Day's work that it was regular and predictable. It was not a case that Mr Day was contacted at the beginning of each week and advised the number of hours he would be working. Rather, Mr Severn required him to attend the Office on Monday, Tuesday, Wednesday, Saturday and Sunday on the hours required by Australand/Frasers. At no time was Mr Day paid anything other than a flat rate of \$25 per hour with there being no casual loading applied to his rate of pay. There was no self-categorisation by the parties that Mr Day was employed on a casual basis. Mr Day's income, as shown in his Income Tax Returns for the periods from 2014 to 2018, was as follows:
- 2014 – \$19,433;
  - 2015 – \$41,875;
  - 2016 – \$35,656;
  - 2017 – \$26,613; and
  - 2018 – \$20,333.
- 90 Albeit that the average number of hours worked over the 32-week period (from the sample of weekly hours provided by the timesheets) fluctuated from time to time, this was still consistent with an observable pattern occurring on a regular basis. The features of the employment relationships therefore suggest that the practical reality of the relationship between the parties was a firm advance commitment by Mr Severn to Mr Day to continuing and indefinite work in accordance with an agreed pattern and a reciprocal commitment by Mr Day to provide his labour indefinitely and continuously to Mr Severn.
- 91 I am therefore satisfied that Mr Day was not a casual worker but, rather, was a permanent part-time employee.
- 92 Mr Severn's submissions in respect to the issue of annual leave were directed to there being insufficient information to properly deal with the claim for entitlement for annual leave under the MCE Act. In particular, it was contended that the claim by Mr Day was simply for an average number of hours over a designated period of time on the assumption that no annual leave had ever been taken. In particular, Mr Severn points to the timesheets submitted by Mr Day (Exhibit 4) that show at various times Mr Day may have been on leave. As a result, in [91] of Mr Severn's outline of final trial submissions it is stated:

*The Claimant, if able to show that he was an employee and entitled to annual leave will need to provide substantial more detail about exactly what dates he is claiming for unpaid leave, as there is evidence of leave that has already been taken, albeit unpaid, but the time limit to seek payment has expired.*

- 93 Despite this written submission, Mr Severn’s agent accepted during oral submissions that, if accrued annual leave had not been taken, this would not be affected by any limitation period.
- 94 Exhibit 4 reveal notations that Mr Day was on holiday between:
- 28 September 2015 – 4 October 2015 (five working days);
  - 7 March 2016 – 13 March 2016 (five working days);
  - 6 June 2016 – 12 June 2016 (five working days);
  - 4 March 2017 – 8 March 2017 (five working days);
  - 12 August 2017 – 16 August 2017 (five working days); and
  - 23 September 2017 – 27 September 2017 (five working days).
- 95 Section 23(3) of the MCE Act provides that for the purposes of calculating annual leave pursuant to s 23(1) of the MCE Act, ‘a *year* does not include any period of unpaid leave’. There is no dispute on the evidence that Mr Day was not paid for periods which he did not work. There is a lack of clarity on the evidence as to whether or not Mr Day’s absence from work during the periods mentioned above was with the permission of Mr Severn. This was not addressed to the requisite standard by Mr Severn. To exclude periods of unpaid leave I need to be satisfied that such a period was with the permission of Mr Severn.
- 96 Given the lack of clarity on the issue of whether the time noted on the timesheets produced by Mr Day were taken with the permission of or at the discretion of Mr Severn, I am not satisfied that I can find that these periods were unpaid leave.
- 97 Turning then to the number of hours worked by Mr Day. There was acceptance by Mr Day that on some occasions he worked 23 hours per week and on other occasions he worked less. The timesheets corroborate this evidence. As a result, it is appropriate to calculate Mr Days entitlement by reference to an average as corroborated by the available timesheets.
- 98 The average number of hours worked per week over 32-week period set out in the timesheets is 19.23 hours. The agreed hourly rate for Mr Day was \$25 per hour. Therefore, I am satisfied that pursuant to s 23 of the MCE Act Mr Day was entitled to annual leave that accrued upon the date of termination, being 25 March 2018. Pursuant to s 24(2) of the MCE Act, Mr Day was entitled to be paid for annual leave that accrued at the date of termination.
- 99 Applying the requirements of s 23(1) of the MCE Act, annual leave is calculated as follows:

19.23/38 hours x 152 hours	= 76.92 hours per year
4.75 years (the number of years worked by Mr Day) x 76.92 hours per year	= 365.37 hours
365.37 hours x \$25 per hour	= <u>\$9,134.25</u>

#### **Issue 4 – Is Mr Day Entitled To Payment In Lieu Of Notice?**

- 100 Although this is a state based claim, Mr Day relies on s 759 of the FW Act to claim payment in lieu of notice. Section 759 of the FW Act provides as follows:

(1) *The provisions of Subdivision A of Division 11 of Part 2-2, and the related provisions identified in subsection (2), apply in relation to a non-national system employee as if:*

- (a) any reference in the provisions to a national system employee also included a reference to a non-national system employee; and
- (b) any reference in the provisions to a national system employer also included a reference to a non-national system employer.

- 101 Section 117 of the FW Act deals with the requirement for notice of termination or payment in lieu and falls within Subdivision A of div 11 of pt 2-2 of the FW Act. No issue was taken with the application of that provision to this claim. The only contention raised in respect to this issue by Mr Severn, was that, on Mr Day's own evidence, he had been given no less than two to three weeks' advance notice of the fact that his employment would be terminated. The evidence of Mr Day in his supplementary witness statement was that he had three months' notice of termination of his employment. However, in cross-examination he sought to assert that this was a mistake in the document and that he meant it to read two to three weeks. Whether Mr Day was given two to three weeks or two to three months' notice, is irrelevant, as the notice, under s 117 of FW Act, must be in writing. No such written notice was given.
- 102 Pursuant to s 117(2) of the FW Act the amount paid for payment in lieu must be '*at the full rate of pay for the hours the employee would have worked had the employment continued until the end of the minimum period of notice*'. Section 117(3) of the FW Act sets out the method for ascertaining the minimum period of notice and for a period of more than three years but not more than five years, the period for payment in lieu is three weeks.
- 103 There was no written notice given to Mr Day of date of termination of his employment. Accordingly, Mr Day was entitled to be paid three weeks' wages in lieu of notice at his full rate of pay. On the facts that I have found, the average hours worked by Mr Day was 19.23 hours. Accordingly, Mr Day is entitled to payment in lieu of notice calculated as follows:
- 19.23 hours x \$25 per hour x 3 weeks = \$1,442.25.

### **Orders**

- 104 Subject to any liability to the Commissioner of Taxation under the *Taxation Administration Act 1953* (Cth), Mr Severn shall pay to Mr Day, \$10,576.50 for unpaid annual leave pursuant to the MCE Act and payment in lieu of notice pursuant to s 759 and s 117 of FW Act.
- 105 I will hear further submissions from the parties in respect to the claim for interest and the claim for a penalty.

**J. HAWKINS**  
**INDUSTRIAL MAGISTRATE**

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<sup>1</sup> *Botica v Top Cut TMS Holdings Pty Ltd (ACN 134606661)* [2020] WAIRC 61 [31].

<sup>2</sup> *Botica* [32] - [39].

<sup>3</sup> *Abdalla v Viewdaze Pty Ltd* (2003) 53 ATR 30; *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] HCA 1; 160 CLR 16; *Hollis v Vabu Pty Ltd* [2001] HCA 44.

<sup>4</sup> *Karen Bailey v Spangaro (No 1) Pty Ltd* [2019] FWC 4359 [38] (citing *Kimber v Western Auger Drilling Pty Ltd* [2015] FWCFB 3704; 252 IR 1): ‘Whether the putative employer exercises, or has the right to exercise, control over the manner in which work is performed, place or work, hours of work and the like. Control of this sort is indicative of a relationship of employment’.

<sup>5</sup> Exhibit 11: Mr Severn’s Witness Statement [52], [53].

<sup>6</sup> *Abdulla v Viewdaze Pty Ltd AIRC trading as Malta Travel* (2003) 53 ATR 30 [42].

<sup>7</sup> [2015] FCAFC 37.

<sup>8</sup> *Transport Workers Union of Australia v Coles Supermarkets Pty Ltd* [2014] FCAFC 148 [22].

<sup>9</sup> *City of Wanneroo v Australian Municipal, Administrative, Clerical Services Union* [2006] FCA 813; 153 IR 426, 438.

<sup>10</sup> *City of Wanneroo*, 438, 440.

<sup>11</sup> *City of Wanneroo*, 440.

<sup>12</sup> *Kucks v CSR Limited* (1996) 66 IR 182; *Amcor Limited v Construction, Forestry, Mining and Energy Union* [2005] HCA 10; 222 CLR 241.

<sup>13</sup> (1977) 57 WAIG 1317.

<sup>14</sup> See [12] of the Amended Claim.

<sup>15</sup> [2007] WASCA 278.

<sup>16</sup> [2018] FCAFC 131; 264 FCR 536 [172] - [173].

<sup>17</sup> [2020] WAIRC 390.

### **Schedule 1 – Jurisdiction Of The Western Australian Industrial Magistrates Court**

- [1] The IMC has the jurisdiction conferred by the IR Act and other legislation. Section 83 and s 83A of the IR Act confer jurisdiction on the Court to make orders for the enforcement of a provision of an award, industrial agreement, an employer-employee agreement where a person has contravened or failed to comply with that instrument. If the contravention or failure to comply is proved, the IMC may issue a caution or impose a penalty and make any other order, including an interim order, necessary for the purpose of preventing any further contravention. The IMC must order the payment of any unpaid entitlements due under an instrument to which s 83 of the IR Act applies.
- [2] The powers, practice and procedure of the IMC are the same as a case under the *Magistrates Court (Civil Proceedings) Act 2004* (WA). The onus of proving a claim is on the Claimant and the standard of proof required to discharge this onus is proof ‘*on the balance of probabilities*’.
- [3] When in these reasons I say I am satisfied, that means I am satisfied on the balance of probabilities. The IMC is not bound by the rules of evidence and may inform itself on any matter and in any manner as it thinks fit. In *Sammut v AVM Holdings Pty Ltd [No 2]* [2012] WASC 27 [40] - [47], Commissioner Sleight examined a similarly worded provision regulating cases in the State Administrative Tribunal of Western Australia, noting:

[T]he rules of evidence are [not] to be ignored ... After all, they represent the attempt made, through many generations, to evolve a method of enquiry best calculated to prevent error and elicit truth ... The more flexible procedure provided for does not justify decisions made without a basis in evidence having probative force.