

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION : 2021 WAIRC 00053

CORAM : INDUSTRIAL MAGISTRATE J. HAWKINS

HEARD : WEDNESDAY, 25 NOVEMBER 2020

DELIVERED : FRIDAY, 5 MARCH 2021

FILE NO. : M 198 OF 2019

BETWEEN : FWC PTY LTD

CLAIMANT

AND

FAIR WORK INSPECTOR BELINDA MAUNDER

RESPONDENT

CatchWords : INDUSTRIAL LAW – Review of Compliance Notice pursuant to s 717 of the *Fair Work Act 2009* (Cth) – Alleged contravention of cl B.2.3 '*Food and beverage attendant grade 3*' of *Restaurant Industry Award 2010* (Cth) – Award coverage – Award Classification – Whether an employee is an Award Free Manager

Legislation : *Fair Work Act 2009* (Cth)
Acts Interpretation Act 1901 (Cth)
Industrial Relations Act 1979 (WA)

Instruments : *Restaurant Industry Award 2010* (Cth)
Restaurant, Tearoom and Catering Workers Award 1979 (WA)

Case(s) referred to in reasons: : *Hindu Society of Victoria (Australia) Inc v Fair Work Ombudsman* (2016) 304 FLR 264
Transport Workers Union of Australia v Coles Supermarkets Australia Pty Ltd [2014] FCAFC 1458
Hana Express Group Ltd v Fair Work Ombudsman (2020) 350 FLR 359
Miller v Minister of Pensions [1947] 2 All ER 372
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
Tucker v Digital Diagnostic Imaging [2011] FWA 1767
Spring 2002 Pty Ltd v Katherine Sampson [2006] WAIRC 5864

Result : Compliance Notice Confirmed

Representation:

Claimant : Mr G. McCorry (agent)
 Respondent : Ms H. Millar (of counsel) instructed by Ms S. Anici from Australian Government Solicitor

REASONS FOR DECISION

Introduction

- 1 The Claimant, FWC Pty Ltd (FWC), is a National System Employer within the meaning of s 14(1)(a) of the *Fair Work Act 2009* (Cth) (FW Act). FWC operated a restaurant called Chokolateria San Churro, Northbridge (the Restaurant).
- 2 It is not in dispute that between July 2011 and May 2016 FWC employed Mr Mohammed Usman Javed (Mr Javed) at the Restaurant on a fulltime basis, including during the period of 21 October 2013 to 20 May 2016 (the Contravention Period). During the Contravention Period, Mr Javed claims that he routinely worked 50 - 60 hours over 6 days per week but was not paid overtime as required under the *Restaurant Industry Award 2010* (Cth) (the Award).¹
- 3 On 26 September 2019, the Respondent, being Fairwork Inspector, Ms Belinda Maunder (Ms Maunder), issued a Compliance Notice to FWC under s 716 of the FW Act, in respect to Mr Javed's employment during the Contravention Period.
- 4 The Compliance Notice alleged that Mr Javed was employed as a '**Food and beverage attendant grade 3**' (the Attendant) under the Award and required FWC to calculate and rectify its failure to pay Mr Javed overtime for that classification during the Contravention Period.²
- 5 FWC seeks a review of the decision to issue the Compliance Notice under s 717(1)(a) of the FW Act and says that it has not committed the contraventions set out in the Compliance Notice.
- 6 The parties have lodged a '*Statement of Agreed Facts*' (SOAF) which is attached to these reasons at sch 1. As a result, FWC does not dispute the validity of the Compliance Notice. Further, the parties agree that cl 33 of the Award, which deals with overtime, remained in effect without amendment until the end of the Contravention Period. It is also agreed that cl 4 of the Award provides that it covers employers throughout Australia in the restaurant industry and their employees in the classifications listed in '*Schedule B – Classification Structure and Definitions*' to the exclusion of any other modern award. Although the parties do not agree as to whether the Award applied to Mr Javed during the Contravention Period, they accept that if the Western

Australian Industrial Magistrates Court (IMC) finds that the Award does apply, then Mr Javed is entitled to receive overtime payments in accordance with cl 33.1(a) and cl 33.2 of the Award.

7 The matters in dispute as listed in the SOAF are as follows:

- (a) FWC says that Mr Javed's employment was not covered by the Award.
- (b) Ms Maunder says that Mr Javed was an employee covered by the Award and was a full-time Attendant in accordance with '*Schedule B – Classification Structure and Definitions*' of the Award.

8 The Attendant is defined in the Award as follows:

B.2.3 Food and beverage attendant grade 3 means an employee appropriate level of training and is engaged in any of the following:

- (a) *supplying, dispensing or mixing of liquor;*
- (b) *assisting in the cellar;*
- (c) *undertaking general waiting duties of both food and liquor including cleaning of tables;*
- (d) *receipt of monies;*
- (e) *assisting in the training and supervision of food and beverage attendants of a lower grade;*
- (f) *delivery duties; and*
- (g) *taking reservations, greeting and seating guests.*

9 FWC's amended statement of claim alleges that there was no obligation to pay Mr Javed overtime as the annual salary paid to him was contractually intended to be compensation for all ordinary and reasonable additional hours of work. However, FWC abandoned that issue and made clear that it only sought to prove that:

- (a) dependent upon the written contracts between FWC and Mr Javed, which referred to Mr Javed as a Manager and reliant on other relevant documents and evidence, the Award had no application to Mr Javed and argued that the Award did not apply to a Manager. FWC further submitted that cl 4.1 and cl 4.2 of the Award and s 143(7) of the FW Act applied. In effect FWC argued that as a Manager, the Award could not apply to Mr Javed's employment; and/or
- (b) if Mr Javed was covered by the Award, FWC says that he would not have been classified as the Attendant. In effect, FWC says that this is because the work performed by Mr Javed did not fall within the classification in the Award of the Attendant or any relevant classification under the Award and further Mr Javed did not hold the '*appropriate level of training*' as defined in cl 3 of the Award.³

10 FWC seeks a finding that it did not contravene the Award and says the Compliance Notice should be cancelled.

11 Ms Maunder says the Compliance Notice should be confirmed as the Award applied to Mr Javed's employment and the appropriate classification under the Award is the Attendant. Alternatively, Ms Maunder submitted that should the IMC find that Mr Javed's employment was more properly characterised as falling within '*Food and beverage attendant grade 4*' of the Award, then the Compliance Notice should be varied pursuant to s 717(3) of the FW Act.

12 Accordingly, the role Mr Javed was employed to do is therefore one of the key issues for determination.

Jurisdiction And Burden Of Proof

13 The jurisdiction of the IMC is set out at sch 2 attached to these reasons.

14 FWC wants the Compliance Notice cancelled. As such, it is required to prove that this should occur on the balance of probabilities.⁴

15 The standard of balance of probabilities is well accepted and means '*more probable than not*'.⁵

16 When I say I am 'satisfied' in these reasons, I mean I am satisfied upon the balance of probabilities.

Issues To Be Determined

17 The issues to be determined are as follows:

(a) Whether Mr Javed and FWC are covered by the Award?

(b) If Mr Javed's employment was covered by the Award, what classification if any under the Award applied to his employment during the Contravention Period.

Assessment Of Evidence

18 Ms Maunder was called as a witness but was not subject to any cross-examination. Ms Maunder's statement is therefore accepted as reliable.⁶ Ms Maunder also relied upon the evidence of Mr Javed. Mr Javed's witness statement was tendered in evidence by consent.⁷

19 FWC relied upon the evidence of Mr Frederick Kok Wai Chew (Mr Chew), a Director of FWC. Mr Chew's witness statement was tendered in evidence by consent.⁸

20 Both Mr Chew and Mr Javed were the subject of cross-examination at trial.

21 Ultimately this matter requires the IMC to determine whether the Award covered Mr Javed's employment and if so, what classification, if any, was applicable to his employment during the Contravention Period.

22 The most significant factual dispute between the evidence of Mr Chew and Mr Javed concerned the extent of Mr Javed's duties during the Contravention Period.

23 There was no real dispute that, in 2011, Mr Javed commenced working for FWC as a kitchenhand. Nor is it disputed that in 2012, Mr Javed was offered and accepted a new role at the Restaurant entitled 'Café Manager'.⁹

24 FWC contend that Mr Javed was employed as a Manager and performed managerial functions. As such, FWC maintains that Mr Javed's essential and primary employment was as a Manager and that the Award does not apply to Managers, even if they perform duties covered by the Award.¹⁰

25 Broadly speaking Mr Chew's evidence attempted to prove that Mr Javed's employment was as some form of Manager whose duties were not covered by the Award or any classification within the Award. As stated, FWC submits that Mr Javed's essential and primary employment was as a Manager¹¹ and that he was an award free Manager. In substance, although Mr Chew conceded that some of Mr Javed's duties fell within the classification of the Attendant under the Award, he sought to suggest that Mr Javed's duties were more than those referred to in that classification.

- 26 Nonetheless, both Mr Chew and Mr Javed's evidence was that the majority of Mr Javed's time was spent undertaking duties referred to in cl B.2.3(c), cl B.2.3(d) and cl B.2.3(e) of the Award. That is both Mr Chew and Mr Javed agreed that the majority of Mr Javed's duties involved general waiting duties of food including cleaning of tables, receipt of monies, and assisting in the training and supervision of food and beverage attendants of a lower grade.¹²
- 27 However, in an attempt to suggest that Mr Javed's duties were more than that set out in the relevant classification, Mr Chew referred to Mr Javed's duties including:
- unlocking and preparing the Restaurant for business;
 - locking up the takings in the Restaurant safe;
 - shutting down and locking up the Restaurant;
 - having access to the safe;
 - being responsible for monitoring stock levels and ordering stock;
 - training staff;
 - being responsible for quality control and monitoring food safety;
 - cleaning logs;
 - dealing with complaints and incidents whilst on duty;
 - supervising and training staff;
 - assisting with the rostering of staff;
 - approving leave requests;
 - overseeing compliance issues and being responsible for repairs and maintenance.¹³
- 28 In effect, Mr Chew maintained that these further duties placed him outside of the Award.
- 29 Mr Javed disputed that he performed the variety of duties referred to by Mr Chew as not falling within the Award. Mr Javed was very clear in his evidence that he was not able to approve leave requests for staff, although, he acknowledged that he was able, from time to time, to approve timesheets.¹⁴ In respect to approving leave, Mr Javed explained that this was performed by staff through an online programme known as 'Deputy XL' and that all leave ultimately was approved by Mr Chew. Mr Javed explained he had no access to Deputy XL.¹⁵ As to the rostering of staff, Mr Javed only did this for a short period of three to four weeks in 2015. Further Mr Javed made clear that he was not responsible for locking up the takings in the Restaurant safe on a daily basis. Nor did he train staff in local area promotions or new roll out menus. He explained that staff were trained on new roll out menus via an online training software system known as 'Monk'. He also explained he was not responsible for ordering stock.¹⁶ As for stock levels, he indicated that the ordering of stock was done by the Operational Manager or Mr Chew. Mr Javed clarified that he was able to have input into this by advising that a particular item was running low, but the ultimate ordering was by others. Further, as to purchasing stock, it was only small incidentals such as milk or marshmallows that Mr Javed was able to quickly purchase from a nearby store.¹⁷ Mr Javed made clear that throughout the Contravention Period such responsibilities were divided between Ms Jessie Kong (who was the Store Manager), the Operational Manager, and Mr Chew.¹⁸

- 30 Mr Chew was carefully cross-examined in respect to the extent of Mr Javed's duties. In many instances, Mr Chew's evidence was difficult to understand. On the issue of ordering stock, he prevaricated, first suggesting that Mr Javed did order stock, then suggesting that technically he did not.¹⁹
- 31 On the issue of rostering, likewise, Mr Chew's evidence was difficult to understand. Although he suggested Mr Javed could approve leave, he also indicated Mr Javed did not do the rosters of staff and that the entering of approval of leave was carried out by someone else.²⁰
- 32 Further, despite in examination-in-chief suggesting that Mr Javed was responsible for repairs and maintenance,²¹ in cross-examination after some prevarication Mr Chew agreed that Mr Javed did not have the power to have third parties come and repair things at the Restaurant.²²
- 33 In addition, despite suggesting in examination-in-chief that Mr Javed was responsible for staff training,²³ Mr Chew agreed in cross-examination that Mr Javed did not have the power to monitor the training undertaken by staff on the training module known as Monk.²⁴
- 34 As to Mr Javed's job description, there was likewise a variety of evidence both from Mr Javed and Mr Chew.
- 35 Mr Javed received several letters on engagement which are set out at sch 3 of these reasons (Letters of Engagement).²⁵ Paragraph 1.3 of each of those Letters of Engagement states:
- The duties of this position are set out in the **attached** position description.* (original emphasis)
- 36 The Letters of Engagement annexed to Mr Javed's witness statement and Mr Chew's witness statement²⁶ did not have the position description attached.
- 37 The opening paragraph of the Letters of Engagement referred to Mr Javed's position as 'Café Manager'.
- 38 Mr Chew sought to suggest that no such role as Café Manager existed and that the description was only used to assist Mr Javed in his visa application.²⁷ This was clearly not correct. Mr Chew was referred to a document entitled 'Café Manager Job Description' at BM-7 of Ms Maunder's witness statement.²⁸ This was a document provided to Ms Maunder by Mr Chew himself. This was one of the examples of Mr Chew's inconsistent evidence.²⁹
- 39 In cross-examination, Mr Chew was taken to the position description of a Store Manager that he had provided to Ms Maunder.³⁰ He disagreed that the duties set out in the Store Manager's description was a more detailed and senior set of responsibilities as compared to the description of a Café Manager. When asked if there was anything in the Café Manager description about reaching or exceeding sales targets, Mr Chew disingenuously suggested that there was not in 'that' version of Café Manager. This was despite having been ordered by Ms Maunder to provide all relevant documentation. Confusingly Mr Chew then suggested that both position descriptions were applicable to Mr Javed.³¹ Despite Mr Javed's Letters of Engagement referring to his position as a Café Manager, Mr Chew sought to categorise Mr Javed's employment as a Co-Store Manager. Mr Chew did not however produce any documents to support his evidence that such a position existed.
- 40 Mr Chew was asked to explain the hierarchy of the staff in the Restaurant. He indicated that there were upwards of eight Managers employed in the Restaurant and the hierarchy was:

- Director;

- Store Manager;
- Shift supervisor; and
- Staff.

41 He made no mention of Duty Manager but maintained that a Duty Manager would fall between the category of a Store Manager and a Shift Supervisor. His evidence was to the effect that the Restaurant did not have a Duty Manager.³² This was despite the rosters provided by Mr Chew to Ms Maunder, describing Mr Javed as a Duty Manager. Again inconsistently, Mr Chew's witness statement at [12] states:

Now produced and shown to me and marked FWC-5 are a sample of rosters showing Mr Javed as the Duty Manager at various times.

42 Further at [10] of Mr Chew's witness statement, he suggested that Mr Javed would report to the Store Manager but then retracted this in cross-examination.³³

43 Mr Chew maintained that Mr Javed was not entitled to overtime because he was in a management position. This is despite cl 3.1 of the Letters of Engagement stating:

3.1 Unless more generous provisions are provided in this letter or in the attached Schedule, the terms and conditions of your employment will be those set out in the Restaurant Industry Award 2010 and applicable legislation. This includes, but is not limited to, the National Employment Standards in the Fair Work Act 2009 ...

44 Mr Chew sought to suggest that when appointing Mr Javed he simply used a template from the Fair Work Commission website and sought to suggest that he did not understand the meaning of the Letters of Engagement. However, when the extent of his professional experience and qualifications were put to him, which included attaining a Bachelor of Commerce, he then sought to suggest he had merely overlooked cl 3.1 of the Letters of Engagement.

45 Given the confusing and inconsistent evidence of Mr Chew outlined above, I did not form a favourable view of his evidence. He was not fulsome in his answers and slow to answer. Many times, his oral evidence was inconsistent with his witness statement and primary documents. Accordingly, where his evidence was inconsistent with Mr Javed's, I give it no weight and find his evidence unreliable.

46 There is no dispute that Mr Javed referred to himself in various written documents as a Manager. He accepted that:

- the Letters of Engagement referred to him as a Café Manager.³⁴
- in his 'LinkedIn' profile he referred to himself as a Duty Manager³⁵ and in his complaint to the Fair Work Ombudsman, he described himself as a Café Manager.³⁶
- in organisational charts he provided to Ms Maunder he described himself as a Duty Manager.
- he had some capacity to allow refunds or replacement orders for dissatisfied customers.
- if the Operational Manager or Assistant Store Manager were not present, he would be in charge.³⁷
- when new staff commenced or were on trial, he would show them where everything was located.³⁸

- 47 These were all admissions against interest which satisfied me that Mr Javed was not seeking to 'tailor his evidence'.
- 48 Mr Javed was challenged as to his '*appropriate level of training*' as defined in cl 3 of the Award.
- 49 Mr Javed clearly confirmed that he had received relevant training whilst undertaking a '*Diploma of Hospitality and Certificate 3 in Commercial Cookery*'.³⁹ It is accepted that Mr Javed agreed he did not finish that course, however, he made clear that he completed the competency units set out in his 'Statement of Attainment' from the College of Innovation & Industry Skills and from the Business Technology Institute of Australia.⁴⁰
- 50 The concessions referred to above by Mr Javed were against interest. Nonetheless, Mr Javed struck me as a forthright witness who was not seeking to tailor his evidence and I found him to be a credible witness. Where there is a disparity between the evidence of Mr Javed and Mr Chew, I prefer the evidence of Mr Javed.

Determination

- 51 The determination of Award coverage and Award classification in this matter are linked. Accordingly, my reasons in respect to both issues are as follows.
- 52 This matter requires consideration of the Award coverage and what Mr Javed's role was when employed by FWC.
- 53 A modern award made by the Fair Work Commission does not impose an obligation or give an entitlement unless the award *applies* to the employer and the employee: s 46 of the FW Act. An award *applies* to the employer and the employee if the award *covers* each of them: s 47 of the FW Act. An award *covers* an employer and an employee if the award is expressed to cover each of them: s 48(1) of the FW Act. It follows that the starting point to determine award coverage is the words of the award itself. More specifically, 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*': ***Transport Workers Union of Australia v Coles Supermarkets Australia Pty Ltd*** [2014] FCAFC 1458 [22].
- 54 The interpretation of an award begins with consideration of the natural and ordinary meaning of the words used. An award is to be interpreted in light of its industrial context and purpose, and must not be interpreted in a vacuum divorced from industrial realities. An award must make sense according to the basic conventions of the English language. Narrow and pedantic approaches to the interpretation of an award are misplaced.
- 55 The parties agreed that the Award applied to FWC and its employees (save that it was disputed that Mr Javed's employment was covered by the Award).⁴¹
- 56 There is no dispute that the Letters of Engagement made clear that unless more generous provisions were provided in those letters, the terms and conditions of Mr Javed's employment were those set out in the Award.⁴² The Letters of Engagement provide documentary evidence that in 2012 and 2015 FWC considered that the Award applied to Mr Javed's employment. There was no suggestion, in the Letters of Engagement, that being employed as Café Manager meant that the Award did not cover Mr Javed's employment.
- 57 It was not submitted by FWC that it provided Mr Javed with more generous provisions than those set out in the Letters of Engagement. Nor was any evidence led to prove this point.

58 Rather what was argued was that Mr Javed was an award free Manager. In arguing that Mr Javed was an award free Manager, FWC firstly submits that Mr Javed's employment was excluded under the Award.

59 FWC contended that pursuant to cl 4.2 of the Award, Mr Javed was excluded from Award coverage by the FW Act. Clause 4.2 of the Award provides as follows:

The award does not cover an employee excluded from award coverage by the Act [that is the FW Act]

60 FWC relies on s 143(7) of the FW Act which states as follows:

A modern award must not be expressed to cover classes of employees:

- (a) *who, because of the nature or seniority of their role, have traditionally not been covered by awards (whether made under laws of the Commonwealth or the States); or*
- (b) *who perform work that is not of a similar nature to work that has traditionally been regulated by such awards.*

61 There is a note at the foot of that provision that states that '*managerial employees have traditionally not been covered by awards*'.

62 No evidence was led by FWC that Managers in the restaurant and hospitality industry have traditionally not been covered by the Award. Accordingly, I am not satisfied that s 143(7) of the FW Act applies to exclude the Award.

63 The remainder of FWC's submissions as to the Award coverage focused on the work performed by Mr Javed and in particular whether the classification of the Attendant applied to Mr Javed's employment.

64 The following principles are relevant:

- (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 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.

(e) In *Tucker v Digital Diagnostic Imaging* [2011] FWA 1767 [22] the range of factors to be taken into consideration as part of a classification assessment were set out. This includes:

- *the contents of any job description;*
- *the actual time occupied in different duties (a substantive role/function analysis);*
- *possession or absence of particular qualifications and whether such qualifications are necessary to the exercise of the primary functions that are performed; and*
- *the level of importance ... of particular duties in the context of the employing organisation's overall purpose.*

65 I am satisfied that Mr Javed was employed by FWC as a Manager. The Letters of Engagement, being the written contract of employment between the parties, referred to him as a Café Manager and from time to time he was referred to by other titles, including Duty Manager.

66 However, as previously stated, the title given to an employee is not necessarily determinative. Regard must be given to the major, substantial or principal aspect of work performed by Mr Javed.

67 There was no job description attached to the Letters of Engagement. Further, the job descriptions of Store Manager and Duty Manager,⁴³ on the evidence I have accepted, did not match the major or substantial duties carried out by Mr Javed.

68 The undisputed evidence of both Mr Javed and Mr Chew was that the majority of Mr Javed's work involved general waiting duties of food including cleaning of tables, receipt of monies, and assisting in the training and supervision of food and beverage attendants of a lower grade. These were all duties described at cl B.2.3(c), cl B.2.3(d) and cl B.2.3(e) of the Award.

69 Although these were not the only duties performed by Mr Javed, they were the major and substantial aspect of his employment.

70 That is not to say that Mr Javed's duties did not involve him carrying out other duties some of which could be described as managerial or supervisory. Examples of such managerial or supervisory duties include Mr Javed having the capacity to allow refunds or replacement orders for dissatisfied customers. Also, if the Operational Manager or Assistant Store Manager was not present, Mr Javed accepted he would be in charge. In addition, when new staff commenced, Mr Javed would show them where things were located in the Restaurant.

71 There was no clear evidence that these duties formed the major or substantial aspect of Mr Javed's work.

72 Further, I was not satisfied based on my findings of credibility, that the major and substantial role performed by Mr Javed involved (as suggested by Mr Chew):

- locking up the takings in the Restaurant safe;
- having access to the safe;

- ordering stock;
- approving leave requests;
- rostering staff;
- training staff in menu roll outs; and
- being responsible for repairs and maintenance.

73 Therefore, while the Letters of Engagement, being the contract of employment, refer to Mr Javed as a Café Manager, his role as a Manager did not wholly or principally require him to be engaged in award free managerial duties.

74 The major and substantial duties of Mr Javed were those described at cl B.2.3(c), cl B.2.3(d) and cl B.2.3(e) of the Award.

75 The remaining issues to be determined are:

(a) whether Mr Javed held the appropriate qualifications to be classified as the Attendant; and

(b) whether some other classification under the Award applies.

76 Mr Javed held the appropriate qualifications to be classified as the Attendant. Mr Javed held a Certificate IV and Diploma in Business. He also partially completed a Diploma of Hospitality.⁴⁴

77 However, FWC submits that Mr Javed has not achieved the appropriate level of training as defined in cl 3 of the Award.

78 '[A]***appropriate level of training***' is defined in cl 3.1 of the Award. Clause 3.1(a) of Award states:

(a) *has completed an appropriate training program that meets the training and assessment requirements of a qualification or one or more designated units of competency from a Training Package* (emphasis added).

79 The Award does not define 'Training Package'.

80 Given the requirement to not adopt a narrow or pedantic approach to the interpretation of an Award, when read in context, I am satisfied that an '***appropriate level of training***' can mean the grouping together of units of competency.

81 Although Mr Javed did not complete his Diploma of Hospitality he completed many units towards its completion.

82 Those units of competency included cleaning and maintaining kitchen premises, preparing and serving espresso coffee, implementing food and safety procedures, et cetera.

83 Both Mr Javed and Mr Chew agreed that Mr Javed's duties included many of the competencies set out in his qualifications.⁴⁵

84 Therefore, when judged objectively many of the qualifications held by Mr Javed were pertinent to the duties he performed for FWC.

85 The definition of '***appropriate level of training***' in cl 3.1 of the Award only requires a person to hold '*one or more designated units of competency*'. FWC however submitted, based on comments by Ritter AP in *Spring 2002 Pty Ltd v Katherine Sampson*,⁴⁶ that the appropriate level of training must relate to cl B.2.3(a) to cl B.2.3(f) of the Award.

86 *Spring v Sampson* does not stand for that proposition. In that case, Ritter AP analysed the grammar used in the clause of the Award being scrutinised. The relevant classification being scrutinised was under the *Restaurant, Tearoom and Catering Workers Award 1979 (WA)* and read as follows:

- (5) *Food and Beverage Attendant Grade 3* means an employee who has the appropriate level of training and is engaged in any of the following:
- (a) supplying, dispensing or mixing of liquor including the sale of liquor from the bottle department;
 - (b) assisting in the cellar or bottle department, where duties could include working up to four hours per day (averaged over the relevant work cycle) in the cellar without supervision;
 - (c) undertaking general waiting duties of both food and liquor including cleaning of tables;
 - (d) receipt and dispensing of monies;
 - (e) engaged on delivery duties; or
 - (f) in addition to the tasks performed by a food and beverage attendant grade 2 the employee is also involved in:
 - (i) the operation of a mechanical lifting device; or
 - (ii) attending a wagering (e.g. TAB) terminal, electronic gaming terminal or similar terminal.
 - (g) and/or means an employee who is engaged in any of the following:
 - (i) full control of a cellar or liquor store (including the receipt, delivery and recording of goods within such an area);
 - (ii) mixing a range of sophisticated drinks;
 - (iii) supervising food and beverage attendants of a lower grade;
 - (iv) taking reservations, greeting and seating guests;
 - (v) training food and beverage attendants of a lower grade (emphasis added)

87 At [54] Ritter AP found:

- 54 The Industrial Magistrate decided that the Respondent was not a Food and Beverage Attendant Grade 3 because the training requirement applied to all of the duties set out within this classification. In my opinion, with respect, the Industrial Magistrate was in error in so deciding. This is because in my opinion the description of duties in clause 6(5)(g) of the definition of a Food and Beverage Attendant Grade 3 is disjunctive from subclauses 6(5)(a)-(f). In using the word 'disjunctive' I intend it to mean that the requirement for an appropriate level of training applies to subclauses (a)-(f) but not subclause (g). This is so, in my opinion, despite the way in which the clause is set out in that the reference to an appropriate level of training is in what is set out as a preamble to all of subclauses (a)-(g). Despite this however, at the end of each of subclauses (a)-(e) there is a semicolon and following the final semicolon there is the word 'or'. There is then subclause (f) which is concluded by a full stop. Subclause (g) then commences 'and/or'. The use of the word 'or' at this point is consistent with the commencement of a disjunctive criterion. Overall the grammatical arrangement of clause 6(5) is consistent with subclause (g) being disjunctive from subclauses (a)-(f). This view is reinforced by the preamble to subclause (g). This preamble would be unnecessary if subclause (g) was not to be construed as disjunctive from subclauses (a)-(f). (emphasis added)

- 88 Accordingly, Ritter AP in *Spring v Sampson* found that the words ‘and/or’ between cl 5(a) to cl 5(f) and cl 5(g) of the relevant award were disjunctive. Therefore, Ritter AP found that the appropriate level of training applied only to cl 5(a) to cl 5 (f) of the relevant award.
- 89 I am not satisfied Ritter AP’s determination stands for the broader position put by FWC, that for a relevant classification to apply, the appropriate level of training must be held in respect to all elements of a classification simply because those elements are expressed conjunctively.
- 90 I accept that the conjunctive word ‘and’ appears after subclauses B.2.3(f) and B.2.3(g) of the Award.
- 91 This is not the same grammar discussed by Ritter AP in *Spring v Sampson*.
- 92 Further, to hold that the use of ‘and’ after cl B.2.3(f) of the Award meant that an employee needs to hold appropriate qualifications in all the duties mentioned in cl B.2.3(a) to cl B.2.3(f) would give the words, ‘*any of the following*’ in the preamble of cl B.2.3 no meaning.
- 93 I am therefore not satisfied that to bring himself within the definition of the Attendant, Mr Javed was required to hold an appropriate level of training in all duties mentioned in cl B.2.3(a) to cl B.2.3(f) of the Award.
- 94 Based on the findings previously made I am satisfied that Mr Javed had achieved qualifications in competencies relevant to his duties and relevant to the definition of the Attendant under the Award.
- 95 Having attained such competencies I am satisfied that Mr Javed had achieved the appropriate level of training for the Attendant as described in the Award.
- 96 Having found that the major or principal duties of Mr Javed were those described in cl B.2.3(c), cl B.2.3(d), cl B.2.3(e) and cl B.2.3(g) of the Award, I am satisfied that this is the appropriate classification.
- 97 For the reasons expressed above, I am satisfied that the Award applied to Mr Javed’s employment during the Contravention Period and he was required to be paid as the Attendant as described in the Award.

Orders

- 98 Pursuant to s 717(3) of the FW Act the Compliance Notice is confirmed.

J. HAWKINS
INDUSTRIAL MAGISTRATE

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- ¹ Exhibit 3 - Witness statement of Mr Javed dated 11 November 2020 (Javed Statement) [28].
- ² Exhibit 1 - Witness statement of Ms Maunder dated 11 November 2020 (Maunder Statement), Annexure BM-15.
- ³ FWC's Outline of Submissions dated 18 November 2020 (FWC's Outline of Submissions) [12] - [34].
- ⁴ See *Hindu Society of Victoria (Australia) Inc v Fair Work Ombudsman* (2016) 304 FLR 264 [28] - [29], [32] - [35]; *Hana Express Group Ltd v Fair Work Ombudsman* (2020) 350 FLR 359 [49], [54].
- ⁵ See *Miller v Minister of Pensions* [1947] 2 All ER 372.
- ⁶ Exhibit 1.
- ⁷ Exhibit 3.
- ⁸ Exhibit 2 - Witness statement of Frederick Kok Wai Chew dated 29 October 2020 (Chew Statement).
- ⁹ Exhibit 3 [2] - [3].
- ¹⁰ FWC's Outline of Submissions [33].
- ¹¹ FWC's Outline of Submissions [25].
- ¹² Transcript, 32 (Mr Chew's evidence), 36 (Mr Javed's evidence); Exhibit 3 [26].
- ¹³ Exhibit 2 [10] - [15]; Transcript, 11.
- ¹⁴ Transcript, 37 (Mr Javed's evidence).
- ¹⁵ Transcript, 37 (Mr Javed's evidence).
- ¹⁶ Transcript, 38 (Mr Javed's evidence).
- ¹⁷ Transcript, 38 (Mr Javed's evidence).
- ¹⁸ Exhibit 3.
- ¹⁹ Transcript, 16 (Mr Javed's evidence).
- ²⁰ Transcript, 17 (Mr Chew's evidence).
- ²¹ Transcript, 11.
- ²² Transcript, 17.
- ²³ Transcript, 11.
- ²⁴ Transcript, 17.
- ²⁵ Exhibit 3.
- ²⁶ Exhibit 2, FWC 1.
- ²⁷ Transcript, 18.
- ²⁸ Exhibit 1.
- ²⁹ Exhibit 1 [8.h].
- ³⁰ Exhibit 1, BM-8.
- ³¹ Transcript, 19 - 20.
- ³² Transcript, 21 - 22.
- ³³ Transcript, 25.
- ³⁴ Transcript, 36.
- ³⁵ Transcript, 39.
- ³⁶ Transcript, 40.
- ³⁷ Transcript, 48 - 49.
- ³⁸ Transcript, 50.
- ³⁹ Transcript, 45.
- ⁴⁰ Exhibit 3, MUJ-5, MUJ-9
- ⁴¹ SOAF [19], [21].
- ⁴² Clause 3.1 of the Letters of Engagement.
- ⁴³ Exhibit 1, FWC-3, FWC-4.
- ⁴⁴ Exhibit 3, [19] - [21], [23]-[24], MUJ-5 - MUJ-7, MUJ-9 - MUJ-10.
- ⁴⁵ Exhibit 3, MUJ-5 - MUJ-7, MUJ-9 - MUJ-10.
- ⁴⁶ [2006] WAIRC 5864 [54] (*Spring v Sampson*).

Schedule 1 – ‘Statement of Agreed Facts’**Statement of Agreed Facts****A. Introduction**

1. This document, a Statement of Agreed Facts, relates to proceedings M 198 of 2019 (the **Proceedings**) commenced by FWC Pty Ltd (the **Claimant**) against Fair Work Inspector (**FWI**) Belinda Maunders (the **Respondent**). By the Proceedings, the Claimant has sought review of a statutory notice issued by the Respondent in her capacity as a FWI employed by the Fair Work Ombudsman.
2. The Claimant and the Respondent have agreed that the facts and admissions in paragraphs 4 to 20 below are not disputed for the purpose of the Proceedings only.
3. The Claimant and the Respondent have also agreed that the matters in paragraphs 21 and 22 are in dispute.

B. Background

4. The Claimant is and was at all material times:
 - a. registered as an Australian proprietary company limited by shares;
 - b. directed by Mr Frederick Kok Wai Chew and Ms Wenjie Fong;
 - c. trading under the business name 'Chocolateria San Churro Northbridge' (the **Restaurant**); and
 - d. operating a restaurant.
5. At all material times, the Claimant's registered office was at BM&Y 47 Ord Street, West Perth WA 6005 (**Registered Office**).
6. The Respondent is and was from 7 November 2018:
 - a. a FWI appointed pursuant to s 700(1)(a) of the *Fair Work Act 2009* (Cth) (the **FW Act**); and
 - b. empowered to exercise the duties, functions and powers conferred upon her by the FW Act, including pursuant to s 716 of the FW Act.
7. Mohammed Usman Javed:
 - a. was employed by the Claimant to work full-time at the Restaurant, including during the period from 21 October 2013 to 20 May 2016 (the **Contravention Period**); and
 - b. was provided two letters of employment dated 15 August 2012 and 23 January 2015.

C. Compliance Notice

8. On 26 September 2019, the Respondent issued a statutory notice pursuant to s 716 of the FW Act (the **Compliance Notice**) to the Claimant in respect of the employment of former employee Mr Javed during the Contravention Period.
9. The Compliance Notice stated that the Respondent reasonably believed that the Claimant had contravened clauses 33.1(a) and 33.2 of the *Restaurant Industry Award 2010* (the **Award**).
10. The Compliance Notice required the Claimant by 14 October 2019 to:
 - a. calculate the underpayments, if any, owed to Mr Javed;
 - b. rectify the underpayments; and
 - c. prepare a schedule of underpayments calculated to be owing to Mr Javed, outlining the amount Mr Javed had been paid to remedy any underpayment identified (**Schedule**).
11. The Compliance Notice also required the Claimant to provide the Respondent with the Schedule and reasonable evidence demonstrating that the rectification of any underpayments had been made to Mr Javed, within 7 days of the payment being paid.
12. The Compliance Notice:
 - a. was validly issued;
 - b. was validly served on the Claimant by way of service at the Registered Office;
 - c. was also sent by email to the Claimant's Director, Mr Frederick Kok Wai Chew, on 26 September 2019 and receipt of same was confirmed by Mr Chew on 27 September 2019; and
 - d. met the requirements of s 716(3) of the FW Act.
13. The Claimant has not entered into an undertaking with respect to the contraventions referred to in the Compliance Notice.
14. The Claimant now seeks review of the Compliance Notice on the ground that it has not committed the contraventions set out in the Compliance Notice (see s 717(1)(a) of the FW Act).

D. The Award

Agreed Facts

15. The Award as first made by the Australian Industrial Relations Commission is the document linked here:
<https://www.fwc.gov.au/documents/awardsandorders/html/pr991086.htm>.

16. Clause 33 of the Award, which deals with overtime, remained in effect without amendment until the end of the Contravention Period.
17. Clause 4 of the Award provides that it covers employers throughout Australia in the restaurant industry and their employees in the classifications listed in Schedule B – Classification Structure and Definitions to the exclusion of any other modern award.
18. During the Contravention Period, the Restaurant operated in the restaurant industry.
19. During the Contravention Period, the Award applied to the Claimant and its employees (save that Mr Javed's coverage is in dispute, see paragraph 21 below) in the classifications listed in Schedule B – Classification Structure and Definitions to the Award.
20. While the parties do not agree as to whether the Award applied to Mr Javed during the Contravention Period, the parties agree that if the Award applied to Mr Javed during the Contravention Period, then Mr Javed was entitled to receive overtime payments in accordance with clauses 33.1(a) and 33.2 of the Award.

Matters in Dispute

21. The Claimant's position is that Mr Javed's employment was not covered by the Award.
22. The Respondent's position is that Mr Javed was an employee covered by the Award. The Respondent says that Mr Javed was a full-time Food and Beverage Attendant Grade 3 in accordance with Schedule B – Classification Structure and Definitions of the Award.
23. If it is held that the Award applied to Mr Javed, then:
 - a. the Claimant's position is that the Claimant has not committed the alleged contraventions of the Award
 - b. the Respondent's position is that Mr Javed was not paid the amounts he was entitled to under clauses 33.1(a) and 33.2 of the Award.

Schedule 2 – Jurisdiction of Western Australian Industrial Magistrates Court (IMC) to review a Compliance Notice

[1] Section 717(1) of the FW Act states:

717 view of compliance notices

(1) *A person who has been given a notice under section 716 may apply to the Federal Court, the Federal Circuit Court or an eligible State or Territory Court for a review of the notice on either or both of the following grounds:*

(a) *the person has not committed a contravention set out in the notice;*

(b) *the notice does not comply with subsection 716(2) or (3).* (emphasis added)

[2] Section 2C of the *Acts Interpretation Act 1901* (Cth) provides that reference to a ‘person’ includes ‘*corporate as well as an individual*’.

[3] The IMC, being a court constituted by an industrial magistrate, is ‘*an eligible State or Territory Court*’: FW Act, s 12 (see definition of ‘*eligible State or Territory court*’ and ‘*magistrate court*’): and also *Industrial Relations Act 1979* (WA) s 81 and s 81B.

[4] Accordingly, it is open to the IMC to review a Compliance Notice given to a person by a Fair Work Inspector on the grounds that the person has not committed a contravention set out in the Notice.

[5] The extent of a court’s power to review has been the subject of detailed analysis: *Hindu Society of Victoria (Australia) Inc v Fair Work Ombudsman* (2016) 304 FLR 264.

[6] Section 717 of the FW Act does not state what rules of evidence and procedure applies in a review of a Compliance Notice.

[7] Section 551 of the FW Act requires the strict rules of evidence and procedure for civil matters to be applied when hearing proceedings relating to a contravention of a civil remedy provision.

[8] Albeit, that s 717 is not defined under the FW Act as a civil remedy provision (see s 539 of the FW Act), the review requires a determination of whether FWC contravened the Award. A contravention of an Award (s 45 of the FW Act) is a civil remedy provision (s 539 of the FW Act). Accordingly, I am satisfied s 551 of the FW Act applies to this application under s 717 of the FW Act.