



DECISION

Fair Work Act 2009

s.394 - Application for unfair dismissal remedy

Mr Jerome Monteiro

v

Valco Group Australia Pty Ltd T/A Valco Group Australia
(U2017/13650)

COMMISSIONER HUNT

BRISBANE, 13 MAY 2019

Application for an unfair dismissal remedy – jurisdictional objection – applicant’s annual rate of earnings exceeded high income threshold – private value of vehicle allowance – fuel paid in addition to vehicle allowance – parking and overseas car hire included as earnings – Applicant’s total earnings exceeded high income threshold – application dismissed.

[1] On 20 December 2017, Mr Jerome Monteiro made an application pursuant to s.394 of the *Fair Work Act 2009* (the Act) alleging that his dismissal from Valco Group Australia Pty Ltd T/A Valco Group Australia (Valco) was unfair as it was harsh, unjust or unreasonable.

[2] On 22 January 2018 Valco filed a Form F3 Employer Response to Mr Monteiro’s application. In its response, Valco objected to Mr Monteiro’s application alleging that he earned more than the applicable high income threshold at the time of his dismissal, being \$142,000 per annum, and therefore Mr Monteiro is not a person protected from unfair dismissal pursuant to s.382 of the *Fair Work Act 2009* (the Act).

[3] The crux of Valco’s objection is that Mr Monteiro’s annual earnings comprised of:

- Annualised salary of \$126,250.08;
- Annualised health insurance of \$3,934.44; and
- Annualised vehicle allowance of \$21,311.48

The total of which is \$151,496; above the applicable high-income threshold of \$142,000.

[4] This matter was originally allocated to Commissioner Bissett, who considered Valco’s jurisdictional objection. The Commissioner reviewed the material before her and determined that Mr Monteiro’s earnings at the time of his dismissal exceeded the high income threshold, in part due to amounts paid to Mr Monteiro in the course of his employment for health insurance and all of the vehicle allowance.¹

[5] Mr Monteiro appealed the Commissioner’s decision on several grounds, including in relation to the Commissioner’s approach to the calculation of the value of Mr Monteiro’s vehicle allowance. Mr Monteiro submitted that the inclusion of the value of his vehicle

allowance did not align with the Full Bench decision in *Sam Technology Engineers Pty Ltd v Bernadou* [2018] FWCFB 1767 (*Sam Technology*) issued six days after the Commissioner's decision.

[6] A Full Bench of this Commission granted permission for Mr Monteiro to appeal principally on two grounds:²

“(a) We were persuaded that there was at least an arguable case of error in the decision at first instance, to the extent that the Commissioner had not undertaken an examination of the distances travelled by Mr Monteiro in the 12 months prior to the dismissal, relevant to business and personal travel. This consideration would appear to us to have helped guide the Commissioner in apportioning some of the car allowance as earnings, but not necessarily all of the amount; and

(b) It was explained in the hearing before us that in addition to the car allowance, Mr Monteiro was reimbursed by the Valco Group for fuel on certain business trips in the car travelled by him. This appeared to us to be an unusual circumstance where an employee was paid a car allowance for at least some business travel, and the fuel expense was paid by the employer in addition to that.”

[7] The Full Bench considered the approach taken by the Commissioner to the calculation of Mr Monteiro's vehicle allowance, and stated:³

“[27] It is noted that prior to the Full Bench decision in *Sam Technology* there had been a disparity of approaches in decisions of individual members of the Commission relevant to the value, if any, a car allowance should have towards an applicant's earnings for the purposes of s.332 of the Act. The decision in *Sam Technology* was issued shortly after the Commissioner issued her Decision. Accordingly, the Commissioner did not have the benefit of *Sam Technology* and we therefore imply no criticism of the Commissioner for not having regard to that decision.

[28] We consider, however, that regard should have been had by the Commissioner to the Full Bench decision in *Kunbarllanjja Community Government Council v Fewings* (*Fewings*), where it was held:

“In our view the most appropriate method of calculating the value of the motor vehicle component of an applicant's remuneration is as follows:

1. Determine the annual distance travelled by the vehicle in question.
2. Determine the percentage of the annual distance travelled which was for the applicant's private purposes.
3. Multiply the figures from 1. and 2. This provides the annual distance travelled for private purposes.
4. Estimate the cost per kilometre for a vehicle of the type used. This information can be obtained from the RACV, NRMA or like motoring organisations.

5. Multiply the annual distance travelled for private purposes by the estimated cost per kilometre. The result is the value of the motor vehicle component of the applicant's remuneration.”

[29] The decision in *Sam Technology* has given further precision as to the examination required in *Fewings*, but is based on the same principle of examining the business versus private use of the vehicle. In failing to have regard to those matters and without relevant examination of the same, we are of the view that the Commissioner erred in finding that all of the car allowance paid to Mr Monteiro should have been treated as ‘earnings’ for the purpose of s.332(1) of the Act.

[30] Relevant to the second reason for granting permission to appeal, we note that it does not appear to have been before the Commissioner that the employer paid to Mr Monteiro, in addition to the car allowance, fuel reimbursement. This will be a consideration which will likely weigh against Mr Monteiro in the subsequent rehearing of the jurisdictional matter concerning Mr Monteiro’s earnings.

[31] In respect of the Commissioner’s determination of the private health insurance expenses as ‘earnings’ for the purpose of s.332(1) of the Act, we do not find any error. We consider this to be an appropriate conclusion despite the contract entered into between the parties labelling it as a ‘reimbursement’. It is not a reimbursement. The payment by an employer for an employee’s private health insurance is a benefit to an employee, and is not, unless agreed, an entitlement of employment for which an employee would need to reimburse an employee. [footnotes omitted].”

[8] After upholding Mr Monteiro’s appeal and quashing the Commissioner’s decision, the Full Bench directed that this matter be remitted to me for rehearing concerning the question of, “whether, at the time of his dismissal, Mr Monteiro’s annual rate of earnings, and such other sums (if any) worked out in relation to him in accordance with the regulations is less than the high income threshold?”⁴

Hearings and material submitted

[9] This matter was heard before me by telephone on 21 September 2018. Mr Monteiro appeared on his own behalf from Perth. Mr Raphael Bazin, Group Chief Financial Officer and Director of Valco appeared for Valco from a location in France.

[10] Following the hearing I sought further submissions from the parties regarding Mr Monteiro’s vehicle allowance. After receiving each party’s further submissions I considered it necessary to list this matter for a second hearing before me. This occurred on 14 December 2018 by telephone. Mr Monteiro appeared on his own behalf from Perth. Mr Bazin and Mr Mike Forbes, Director of Valco, appeared for Valco; Mr Bazin from France and Mr Forbes from Perth.

[11] Again, I sought further limited submissions from the parties regarding matters arising at the second hearing and after receiving those further submissions, invited the parties to indicate whether they requested a further hearing of this matter. Neither party indicated that they required a further hearing, and I reserved my decision in this matter.

[12] Throughout the course of this matter before me I have discussed each party's evidence and submissions with the parties at significant length. Both parties have produced additional evidence and altered their submissions throughout the progress of this matter. I do not say this as a criticism of either party; instead, the factual complexity of this matter and indeed the calculation required in accordance with *Sam Technology* has made necessary detailed investigation by all parties of Mr Monteiro's vehicle usage in his employment. Such detailed investigation has not always yielded information relevant to my decision in this matter. Nevertheless, whilst not all of the submissions and evidence before me may be referred to in this decision, all of such have been considered.

Legislative framework and approach set out in *Sam Technology*

[13] Section 396 of the Act sets out the limited matters that must be considered before the merits of an application can be considered, which includes "whether the person was protected from unfair dismissal."⁵

[14] Section 382 of the Act sets out when a person is protected from unfair dismissal, and states:

"382 When a person is protected from unfair dismissal

A person is protected from unfair dismissal at a time if, at that time:

- (a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and
- (b) one or more of the following apply:
 - (i) a modern award covers the person;
 - (ii) an enterprise agreement applies to the person in relation to the employment;
 - (iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold."

[15] Section 332 of the Act defines "earnings" and states:

"332 Earnings

(1) An employee's earnings include:

- (a) the employee's wages; and
- (b) amounts applied or dealt with in any way on the employee's behalf or as the employee directs; and
- (c) the agreed money value of non-monetary benefits; and

(d) amounts or benefits prescribed by the regulations.

(2) However, an employee's earnings do not include the following:

(a) payments the amount of which cannot be determined in advance;

(b) reimbursements;

(c) contributions to a superannuation fund to the extent that they are contributions to which subsection (4) applies;

(d) amounts prescribed by the regulations.

Note: Some examples of payments covered by paragraph (a) are commissions, incentive-based payments and bonuses, and overtime (unless the overtime is guaranteed).

(3) Non-monetary benefits are benefits other than an entitlement to a payment of money:

(a) to which the employee is entitled in return for the performance of work; and

(b) for which a reasonable money value has been agreed by the employee and the employer;

but does not include a benefit prescribed by the regulations.

(4) This subsection applies to contributions that the employer makes to a superannuation fund to the extent that one or more of the following applies:

(a) the employer would have been liable to pay superannuation guarantee charge under the Superannuation Guarantee Charge Act 1992 in relation to the person if the amounts had not been so contributed;

(b) the employer is required to contribute to the fund for the employee's benefit in relation to a defined benefit interest (within the meaning of section 291-175 of the Income Tax Assessment Act 1997) of the employee;

(c) the employer is required to contribute to the fund for the employee's benefit under a law of the Commonwealth, a State or a Territory."

[16] Regulation 3.05 of the *Fair Work Regulations 2009* (the Regulations), "explains how to work out amounts for the purpose of assessing whether the high income threshold applies in relation to the dismissal of a person at a particular time", and states:

“3.05 When a person is protected from unfair dismissal – high income threshold

(1) For subparagraph 382(b)(iii) of the Act, this regulation explains how to work out amounts for the purpose of assessing whether the high income threshold applies in relation to the dismissal of a person at a particular time.

Note: Under section 382 of the Act, a person is protected from unfair dismissal if specified circumstances apply. One of the circumstances is that the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

Piece rates

(2) Subregulations (3), (4) and (5) apply if part or all of the person's income at the time of the dismissal is paid as piece rates that are:

- (a) set by reference to a quantifiable output or task; and
- (b) not paid as a rate set by reference to a period of time worked.

(3) If the person was continuously employed by the employer and was not on leave without full pay at any time during the period of 12 months immediately before the dismissal, the total amount of piece rates paid or payable to the person in respect of the period of 12 months ending immediately before the dismissal is an amount for subparagraph 382(b)(iii) of the Act.

(4) If the person was continuously employed by the employer and was on leave without full pay at any time during the period of 12 months immediately before the dismissal, the total of:

- (a) for the days during that period that the employee was not on leave without full pay—the actual piece rates received by the employee; and
- (b) for the days that the employee was on leave without full pay—an amount worked out using the formula:

$$\frac{\text{Piece rates mentioned in paragraph (a) X Days on leave without full pay}}{\text{Days not on leave without full pay}}$$

is an amount for subparagraph 382(b)(iii) of the Act.

(5) If the person was continuously employed by the employer for a period of less than 12 months immediately before the dismissal, the total amount of piece rates worked out using the formula:

$$\frac{\text{Piece rates X 365}}{\text{Days employed}}$$

is an amount for subparagraph 382(b)(iii) of the Act.

Benefits other than payment of money

(6) If:

- (a) the person is entitled to receive, or has received, a benefit in accordance with an agreement between the person and the person's employer; and
- (b) the benefit is not an entitlement to a payment of money and is not a non-monetary benefit within the meaning of subsection 332(3) of the Act; and
- (c) the FWC is satisfied, having regard to the circumstances, that:
 - (i) it should consider the benefit for the purpose of assessing whether the high income threshold applies to a person at the time of the dismissal; and
 - (ii) a reasonable money value of the benefit has not been agreed by the person and the employer; and
 - (iii) the FWC can estimate a real or notional money value of the benefit;

the real or notional money value of the benefit estimated by the FWC is an amount for subparagraph 382(b)(iii) of the Act.”

[17] If an employee is provided with a fully maintained vehicle for use in the course of their employment and the employee also uses that vehicle for private use, the value of that private use can be included in the employee's annualised earnings.⁶ Where there has been no agreement as to the value of the private use of a vehicle, the value of the private use is calculated by excluding the vehicle's use for business purposes and considering the associated costs of the remaining use of the vehicle. The method of that calculation has most recently been set out in *Sam Technology*.

[18] In *Sam Technology*, the Full Bench embarked upon a detailed consideration of how the value of a vehicle allowance should be calculated as it relates to a person's earnings. In addition to the parties to that matter, the Australian Taxation Office, the Australian Council of Trade Unions, the Australian Chamber of Commerce & Industry and the Australian Industry Group all filed submissions and gave oral argument at the hearing of the matter.

[19] After a comprehensive consideration of legal precedent regarding what amounts may fall within a person's earnings and how the value of a vehicle allowance had previously been dealt with, the Full Bench stated:

“[72] For the reasons set out above and having regard to the relevant statutory context, we are of the view that a car allowance should be treated in the following way for the purpose of calculating an employee's “annual rate of earnings” within the meaning of ss.332 and 382(b)(iii) of the Act:

- (a) If a car allowance is paid to an employee in circumstances in which there is no requirement or expectation that the employee will have to use his or her car for work purposes, then the whole of the car allowance is, in reality, part of the employee's wages and is therefore included in their “earnings”; or
- (b) If a car allowance is paid to an employee at the time of their dismissal in circumstances in which there is a requirement or expectation that the employee

will have to use his or her car for work purposes, then it will be necessary to determine and calculate the private benefit, if any, derived by the employee from the car allowance. To that end, we suggest the following methodology, which is based on the approach taken in *Fewings*:

1. Determine the annual distance travelled by the car in question. The amount of the annual distance will be as follows:

a. if the car allowance has been paid for at least 12 months prior to the dismissal – the distance travelled by the car over the 12 months immediately prior to the dismissal; or

b. if the car allowance has been paid for a period of less than 12 months prior to the dismissal, determine the distance travelled by the car in the period during which the car allowance has been paid and then extrapolate that distance over a period of 12 months to calculate an annual distance. For example, if an employee moved into a new position with his or her employer 6 months prior to his or her dismissal, received a car allowance during that 6 month period, and drove his or her car for 10,000 km in that 6 month period, the assumed annual distance travelled by the car for the purpose of calculating the employee's "annual rate of earnings" would be 20,000 km.

2. Determine the percentage of the annual distance travelled which was for business use, which would not include travel between the employee's home and usual place of work. If the car allowance has been paid for a period of less than 12 months prior to the dismissal, determine the business use percentage of the distance travelled in the period during which the car allowance was paid.

3. Multiply the annual distance calculated in accordance with paragraph 1 above by the business use percentage calculated in accordance with paragraph 2 above. This provides the annual distance travelled for business purposes.

4. Estimate the cost per kilometre for a car of the type used. This information can be obtained from the RACV, NRMA or like motoring organisations.

5. Multiply the annual distance travelled for business purposes by the estimated cost per kilometre. The result is the annual cost of using the car for work purposes. Compare that annual cost with the amount of the annual car allowance. The amount of the annual car allowance will be as follows:

a. if the car allowance was paid for at least 12 months prior to the dismissal – the amount of the car allowance paid to the employee in the 12 months immediately prior to the dismissal; or

b. if the car allowance has been paid for a period of less than 12 months prior to the dismissal, determine the amount of the car allowance paid in that period and then extrapolate that payment over a period of 12 months to calculate an annual amount of the car allowance. For example, if an employee in a business other than a small business was employed in that business for a period of 9 months prior to his or her dismissal, and received a car allowance of \$2,000 each month in that 9 month period, the assumed annual car allowance for the purpose of calculating the employee's "annual rate of earnings" would be \$24,000 ($\$2,000/\text{month} \times 12 \text{ months} = \$24,000$).

6. If the amount of the annual car allowance exceeds the annual cost of using the car for work purposes, the difference is the private benefit to the employee of the car allowance, which forms part of their "annual rate of earnings".

Matters arising during and after hearings before me

[20] It is relevant to the evidence and submissions of both parties that Mr Monteiro drove three vehicles during the last 12 months of his employment. Those vehicles were (jointly, the vehicles):

- (a) Volkswagen 5G13GZ/15 Golf 90TSI Comfortline 1.4L 7Spd DSG 5Dr Hatchback (the Golf);
- (b) Volkswagen AD12PY/17 Tiguan 110TSI Trendline 1.4L 6Spd DSG Wagon (the Tiguan); and
- (c) Volkswagen Amarok TDI420 Core Edition (4x4) 2H MY18 Dual Cab Utility Diesel Turbo 4 1968cc DTFI 8Spd Automatic (the Amarok).

[21] On 28 June 2018 I sought each party's response to several questions regarding Mr Monteiro's vehicle allowance, as follows:

- (a) How many kilometres did the relevant vehicle/s travel within the last 12 months of Mr Monteiro's employment?
- (b) What was the distance from Mr Monteiro's home to his workplace, and vice versa if it differed?
- (c) How many days did Mr Monteiro travel from home to work and return?
- (d) Details for all business related trips including the distance travelled and whether Mr Monteiro was reimbursed for fuel?
- (e) Parking expenses within the last 12 months of Mr Monteiro's employment, and including information on where Mr Monteiro parked whether while visiting clients or at the workplace?
- (f) Expenses for family members' attendance whilst working.

[22] Both parties filed submissions regarding the above matters on 11 July 2018. On its own initiative, on 12 July 2018 Valco submitted further material in reply to Mr Monteiro's submissions.

[23] During the course of the hearing of 21 September 2018 Mr Monteiro provided to my chambers an extract of a document published by the Royal Automotive Club of Western Australia (RACWA) providing estimated running costs for the vehicles, although in relation to newer year models of the vehicles than were used by Mr Monteiro.

[24] I considered each party's evidence and submissions given during the hearing of 21 September 2018 and their further submissions following that hearing. In my consideration I developed a spreadsheet setting out my preliminary views on the travel undertaken by Mr Monteiro in the last 12 months of his employment and the estimated private benefit accruing to Mr Monteiro for that travel (the Spreadsheet). On 27 November 2018 I provided a copy of the Spreadsheet to the parties and sought their views on the information set out therein and particularly in relation to the following matters:

- (a) Whether the superannuation paid on the vehicle allowance should count towards Mr Monteiro's earnings as it may not have been required to be paid pursuant to the applicable Superannuation Guarantee legislation;
- (b) Whether the fuel paid in addition to the vehicle allowance should be counted towards Mr Monteiro's earnings on the basis that it constitutes a 'double-payment'.
- (c) I noted that Valco contests some of the business travel that Mr Monteiro claimed to have undertaken. The parties were directed to provide details on the particular dates of the relevant business travel and note them in the applicable row of the Spreadsheet;
- (d) Mr Monteiro was directed to confirm where he had used the Amarok vehicle and provide as much evidence as possible regarding the usage of the Amarok vehicle, including but not limited to dates, distances of travel, trip details and fuel expenses.

[25] Relevant material was filed by the parties. On 13 December 2018 Valco provided to my chambers only, without copying in Mr Monteiro, copies of documents filed in respect of unrelated proceedings brought by Mr Monteiro against Valco in a Magistrates Court of Western Australia, which it submitted could be used to draw inferences against Mr Monteiro's character in this matter. I have had no regard to such materials.

[26] On 14 December 2018 and after the hearing, I provided the parties with a copy of the Spreadsheet updated with the parties' further submissions and evidence given at the second hearing. The updated spreadsheet described that on a preliminary calculation:

- (a) Mr Monteiro had travelled 15,852.2 km for business-related purposes in the last 12 months of his employment across the three vehicles;
- (b) Applying the per/km cost estimates for the distances travelled by Mr Monteiro in each of the three vehicles for business purposes returned a value of \$11,212.60;
- (c) The personal value of the vehicle allowance for Mr Monteiro was therefore \$10,098.88 (being \$21,411.88 - \$11,212.60); and
- (d) Mr Monteiro's earnings in the last 12 months of his employment were \$140,283.40; less than the applicable high income threshold.

[27] However, I directed Mr Monteiro to provide a copy of his PAYG summary for the 2017 – 2018 financial year and further evidence regarding four particular business-related

trips that Mr Monteiro claimed to have taken. Each party made submissions and evidence regarding those trips through the course of this matter, which is set out below.

[28] On 18 December 2018 Mr Monteiro provided the further information and material requested, with Valco making further submissions on 28 December 2018.

[29] On 3 January 2019 and after reviewing each party's further material, I drew the parties' attention r.3.05(6) of the Regulations (set out above at [16]) and I noted a possible effect of that regulation could be that Mr Monteiro's parking expenses for attending work on days where he did not conduct any business-related travel and which were borne by Valco upfront (i.e. not reimbursed to Mr Monteiro) could be included in his earnings. I noted that r.3.05(6) of the Regulations could similarly apply to expenses paid upfront by Valco relating to travel for Mr Monteiro's family. I sought the parties' views on the possible application of r.3.05(6) of the Regulations to this matter.

[30] Both parties submitted their views regarding r.3.05(6) of the Regulations to my chambers on 9 January 2019.

[31] I continued to consider the evidence and submissions of each party before me. On 1 March 2019 I confirmed to the parties in writing that Valco had sent to my chambers documents relating to a matter before a Magistrates Court of Western Australia and confirmed that I have not and would not have any regard to those documents or Valco's submissions regarding those documents. I provided the parties an opportunity to consider whether they wanted to file any further material for my consideration of this matter prior to my decision being reserved. Neither party sought to file any further material and I reserved my decision in this matter.

Evidence and submissions of Mr Monteiro

Original submissions

[32] On 11 July 2018 Mr Monteiro filed submissions responding to each of the matters above. Mr Monteiro's submissions included a spreadsheet document showing his business-related travel from 1 November 2016 to 4 December 2017, including related expenses. Mr Monteiro's submissions on each of the above points were as follows.

[33] He travelled 24,786 km within the last 12 months of his employment, although he believed that several work-related trips were undertaken in addition to that distance but he could not verify those trips.⁷

[34] Mr Monteiro had resided at two different home addresses in the last 12 months of his employment. He submitted that he used public transport to and from work when no out-of-office meetings were scheduled for a particular day. He submitted:⁸

“When meetings outside of office were scheduled or highly likely to occur the Applicant was driving to work incidentally and subsequently parking nearby before reaching the time of his meeting out. The same occurred when the Applicant was out in a meeting in the morning and returned to the office.”

[35] Mr Monteiro submitted that he travelled a distance of 2,452 km from home to work and a further 2,233.6 km from work to home during the last 12 months of his employment.⁹

[36] Mr Monteiro submitted that he travelled from home to work and returned home on 211 days from both of his residential addresses (56 from the first, 155 from the second). Mr Monteiro submitted, “Part of these days and travels are incidental to customer visits or travels for work.”¹⁰

[37] Mr Monteiro submitted that he had travelled 20,100.56 km for business travel and had received \$2,910.72 of fuel reimbursements within the last 12 months of his employment. Mr Monteiro submitted that for the limited travel undertaken using the Amarok he had not “*attract[ed] any financial benefit from [Valco] such as indemnification per km for vehicle usage.*”¹¹

[38] Mr Monteiro submitted that he received \$2,586.87 of parking reimbursements within the last 12 months of his employment. He submitted that his parking expenses were subsequent and incidental to off-site work meetings or where it was necessary for him to have access to a vehicle for parcel pick-ups or urgent customer callouts.

[39] Some expenses for travel for Mr Monteiro’s family members had been paid by Valco during his employment. Mr Monteiro submitted that in all cases those expenses had been pre-approved and subsequently reimbursed to him by Valco.

[40] Mr Monteiro confirmed that his vehicle allowance was paid to him as an annualised lump sum amount of \$21,311.48 on 29 September 2017. Mr Monteiro provided and referred to a payslip from Valco for the period of 1 November 2017 to 1 December 2017 and paid to Mr Monteiro on 10 January 2018, which appeared to be Mr Monteiro’s final payslip in his employment with Valco. The payslip included a deduction of \$15,983.60, described as a “Car Allowance Repayment”.

[41] Mr Monteiro submitted that the amount of \$15,983.60 had been deducted from his final pay as the proportionate amount of Mr Monteiro’s total car allowance that Mr Monteiro should not be entitled to after his dismissal from Valco. Mr Monteiro submitted that the actual benefit that he received from the vehicle allowance was \$5,328.20.¹² Mr Monteiro submitted that Valco could not ‘double-dip’ by deducting amounts of the vehicle allowance from his final pay and then relying on the full amount of the vehicle allowance to object to Mr Monteiro’s application.

[42] Mr Monteiro submitted that he had been unable to find vehicle operating cost tables for the precise models of the vehicles on the RACWA website.

Submissions in response to Valco’s submissions

[43] On 10 August 2018 Mr Monteiro filed further submissions in reply to Valco’s submissions.

[44] In response to Valco’s assertion that Mr Monteiro’s estimation of business-related travel had changed from 35,000 km to 24,000 km, Mr Monteiro maintained that the 24,786 km figure represented the travel that Mr Monteiro had been able to confirm, and he had

acknowledged in his submissions that several work-related trips may have been missed because he could not confirm the details of any such trips.¹³

[45] Regarding the trip to Karratha, WA (see below at [79]), Mr Monteiro acknowledged that the Amarok had been towed back to Perth after it broke down during the trip to Karratha. Mr Monteiro submitted that nevertheless, the Amarok had travelled a kilometre amount, although without using fuel, and that Mr Monteiro's original estimation of the kilometres travelled by the vehicle was still correct.¹⁴ Mr Monteiro did not understand Valco's submissions regarding his trip to Chadwick (see below at [85]).

[46] Regarding the 'Collie power station' trip, Mr Monteiro acknowledged that Valco's evidence appeared to be genuine. Mr Monteiro noted that he had been asked to provide detailed material of his travel more than a year after that travel occurred and, although he could not determine the exact date of the 'Collie power station' meetings, maintained that his notes showed that he had been at the Collie power station on 30 August 2017 although conceded that those notes must be incorrect.¹⁵

[47] Mr Monteiro submitted that he had travelled by car to a meeting in Coogee, WA on 7 September 2017. Mr Monteiro submitted that the 'Uber reports' submitted by Valco were related to a business-related package delivery performed by two separate 'Uber' drivers. Such a delivery would usually have been done by Mr Monteiro, but he was unable to do so that day since he was already in a meeting in Coogee.¹⁶

[48] Mr Monteiro made similar submissions regarding his return trip of 356 km to Davenport, WA on 28 September 2017; that 'Uber' receipts for that day were more than likely linked to transportation of goods while he himself could not transport them. Mr Monteiro maintained that he had travelled to Davenport that day and had had lunch upon his return to Perth.

[49] Mr Monteiro submitted that Valco's submissions regarding his travel to work on 12 October 2017 were irrelevant to the distance travelled by any of the vehicles.

[50] Mr Monteiro submitted that Valco's submissions relevant to travel on 23 March 2017 were not supported by any evidence. Mr Monteiro was unable to verify whether he had been on personal leave on 23 March 2017.

Submissions during and following hearings

[51] On 18 December 2018 Mr Monteiro provided further material in accordance with my directions during the hearing of 14 December 2018.

[52] Mr Monteiro provided a copy of his PAYG summary for the 2017 – 2018 financial year along with a copy of his final payslip, which had already been provided. The PAYG summary showed that Mr Monteiro had earned \$66,934.00 from 1 July 2017 until the date of his dismissal on 4 December 2017. However, Mr Monteiro submitted that the earnings described in the PAYG summary were a misrepresentation of his actual earnings.

[53] Mr Monteiro submitted that amounts paid to him for unused annual leave in his final pay should not be classed as 'earnings' because that amount could not have been determined in advance as the date of Mr Monteiro's dismissal could not have been known when he signed

his contract of employment.¹⁷ Mr Monteiro submitted that his earnings in the last 12 months of his employment were:

- (a) \$75,940.97 from 5 December 2017 to 30 June 2016;
- (b) \$65,034.19 from 1 July 2017 to 4 December 2017; totalling
- (c) \$140,975.16 inclusive of the entire vehicle allowance.

[54] Mr Monteiro submitted that the ‘Project Waitsia’ site is located in Dongara, WA. He had visited the site on 3 March 2017 to ascertain Valco’s ability to provide equipment for the project, but had been unable to speak to the person in charge of the site that day. Mr Monteiro was able to arrange to meet with the person in charge of the site on 23 March 2017 and he did so, despite having originally scheduled to take a day of parental leave on 23 March 2017.

[55] Mr Monteiro provided an email from himself to Mr Galichet dated 27 October 2017 which described a submitted quote which Mr Monteiro alleged to have secured following his trips to the Project Waitsia site. Mr Monteiro also noted that in his original submissions he noted that he had purchased \$80.02 of fuel on 21 March 2017 and a further \$60.16 on 24 March 2017 which circumstantially supported that he had undertaken significant travel around those dates.

[56] Mr Monteiro submitted a copy of an email he had sent on 14 August 2017 stating that he was “currently in a remote area up north”, which Mr Monteiro relied upon as proof that he had been travelling in Karratha, WA on and around 14 August 2017.

[57] Mr Monteiro acknowledged that his original submission that he had travelled to Chadwick on 17 August 2017 was incorrect, and he had in fact travelled to Chadwick on 21 August 2017. Mr Monteiro maintained that he had completed this trip.

[58] Mr Monteiro acknowledged that his original submission that he had travelled to the Collie power station on 30 August 2017 was not correct, as he had been in Adelaide that day. Mr Monteiro submitted that he had in fact travelled to the Collie power station on the morning of 31 August 2017, after flying into Perth from Adelaide earlier that morning.

[59] Mr Monteiro maintained that he had travelled to Davenport, WA on 28 September 2017. He repeated his submissions that the Uber receipts provided by Valco were for the delivery of parts or small relief valves that Mr Monteiro was unable to deliver himself due to his trip to Davenport.

[60] On 9 January 2019 Mr Monteiro provided submissions regarding r.3.05(6) of the Regulations as I had requested through my chambers.

[61] Mr Monteiro submitted that there had been no agreement between him and Valco regarding parking costs for the vehicles or flights for Mr Monteiro. Mr Monteiro submitted that he had no guarantee that he would be reimbursed by Valco for parking costs or flights, and had to provide receipts and other explanatory justification for those costs and regarding their business purpose before he would be reimbursed by Valco.

Parking expenses

[62] Mr Monteiro submitted that if any personal benefit had accrued to him in relation to any of those payments, fringe benefits tax would have been applied. Mr Monteiro submitted that Valco had never been exposed to or declared fringe benefits tax and therefore, there could be no personal benefit accruing to him from those payments.

[63] Mr Monteiro maintained his earlier submissions that his parking expenses were incidental to meetings outside of his workplace or necessary to have one of the vehicles at his disposal for any parcel pick-ups or urgent customer callouts. Mr Monteiro noted that one of the duties of his role was to collect or dispose of valves from Valco's customers' and subcontractors' businesses. When Mr Monteiro was required to undertake those duties was inconsistent and unpredictable, as valves could break down or leak without notice. Mr Monteiro also submitted that another of his duties was to transport brochures and promotional material for Valco which he received at his home address.

[64] Mr Monteiro submitted that due to the nature of his duties, he could have been required to undertake business related travel at very short notice at any time.

[65] Mr Monteiro submitted that if the Commission considered that some amount of personal benefit did accrue to him from the payment of parking expenses, the 'real value' of that benefit was the cost that Mr Monteiro avoided paying as a result of not using public transport to attend his workplace. Therefore, the personal value should be the amount of a return trip by public transport from Mr Monteiro's home to his workplace, and not the value of the parking expenses.

Flights to France

[66] Mr Monteiro agreed that he had travelled with his family to France in June and July 2017. Mr Monteiro noted that the business-related purpose of this trip was to participate in a seminar organised by Valco, and Mr Monteiro arranged with Valco to take annual leave with his family immediately after the seminar.

[67] Mr Monteiro submitted that Valco's travel policies entitled Mr Monteiro to travel to France and return to Australia at a cost of no more than €3,500, which usually covered a return trip in business class. Mr Monteiro stated that prior to this trip, he sought Valco's approval for his partner and new-born son to travel with him to France in economy class, reducing the cost of travel for Mr Monteiro and his family to less than €3,500. Mr Monteiro stated that Valco approved his proposal and Mr Monteiro was subsequently reimbursed for the cost of the flights for him and his family.

[68] Mr Monteiro submitted however, that there was no guarantee for him that Valco would acquiesce to his request, and therefore any benefit accruing to him for his family's travel costs could not meet r.3.05(6)(a) of the Regulations.

Business trips generally

[69] Mr Monteiro noted that throughout the consideration of his earnings he had always maintained that he had completed more business travel than he had described in his submissions, but had not included travel that was not supported on the information available

to him. Mr Monteiro submitted that he had lost access to much of his historical emails and the calendar he used in the course of his employment, which remained within Valco's possession.

[70] Mr Monteiro submitted that Valco's submissions had dwindled over the course of this matter from its original submissions before the Full Bench of this Commission that 'there was no business use of the vehicles' to its present submissions before me. Mr Monteiro submitted that Valco and witnesses appearing on its behalf had given inconsistent evidence over the course of this matter, and witnesses whose evidence no longer fit with Valco's submissions had 'disappeared'.

Final submissions as to earnings

[71] Mr Monteiro did not disagree with the estimate of his earnings set out in the updated Spreadsheet provided to the parties on 14 December 2018.

Evidence and submissions of Valco

Original submissions

[72] On 11 July 2018 Valco filed submissions addressing the matters set out at paragraph [21]. Valco's submissions included a Microsoft Excel spread-sheet document describing all of Mr Monteiro's business-related expenses which had been charged to Valco from 1 December 2016 to 7 June 2017.¹⁸

[73] Valco estimated the distance that Mr Monteiro had travelled in the last 12 months of his employment by dividing the amount of fuel reimbursements paid to Mr Monteiro by a nominal fuel cost per litre and estimating a range of fuel economy per 100 kilometres. Valco estimated that Mr Monteiro had travelled between 11,366.63 km to 13,682.06 km in the last 12 months of his employment.¹⁹

[74] Valco submitted that the distance from Mr Monteiro's home to his workplace was between 18.3 and 19.6 km, calculated using Google Maps and depending on the route taken. Valco did not address whether Mr Monteiro had resided at two different addresses during the last 12 months of his employment.

[75] Valco submitted that according to its car park log, Mr Monteiro had travelled from home to work and returned on 153 days over the last 12 months of his employment. Valco submitted that Mr Monteiro's parking expenses within the last 12 months of his employment were \$3,670.11.

[76] Valco submitted that it had covered Mr Monteiro's expenses for \$1,723.68 of diesel fuel not related to business-related trips undertaken by Mr Monteiro.

[77] Valco submitted that it did not have any detailed records regarding Mr Monteiro's business-related travel, apart from where Mr Monteiro travelled by plane. Valco submitted that to its knowledge, all of Mr Monteiro's business-related trips using the vehicles had been completed within Perth.

[78] Valco submitted that several expenses accrued by Mr Monteiro and borne by Valco constituted a personal benefit to him and/or his family.

[79] Valco submitted that when Mr Monteiro had travelled to Karratha, WA in mid-August 2017, part of that trip was for business purposes, but the majority of Mr Monteiro's time in Karratha had been for a holiday with his family. Valco submitted that:

- (a) Mr Monteiro and his family had stayed in several hotels during a trip to Karratha from 11 – 14 August 2017, to a total value of \$475.78;
- (b) Mr Monteiro had required roadside assistance after the Amarok broke down during his trip to Karratha, to a value of \$150.00;
- (c) Valco had covered the cost of Mr Monteiro to hire a car in Carnarvon, WA after the Amarok's breakdown, to a value of \$874.70
- (d) Valco had covered the cost of Mr Monteiro and his family to travel by coach from Carnarvon, WA to Perth after the breakdown of the Amarok, to a value of \$501.00;
- (e) Valco had covered the cost of the Amarok to be towed back to Perth, to a value of \$1,610.00.

[80] Valco submitted that Mr Monteiro and his family had travelled to France during June and July 2017 for 39 days. Mr Monteiro had completed business-related activities for the first 9 days of the trip, followed by a period of annual leave. Valco submitted that:

- (a) Valco had covered the cost of return flights for Mr Monteiro's wife and son to fly to France. The cost of the flights for Mr Monteiro's wife and son was \$2,456.16;
- (b) Valco had covered the cost of Mr Monteiro's car hire while in France. The proportion of that expense which was of solely personal benefit to Mr Monteiro (being 30/39 days) was \$1,143.18;
- (c) Valco had covered the cost of Mr Monteiro's and his family's luggage delivery, to a value of \$215.57.

[81] In Valco's original submissions, the total personal benefit to Mr Monteiro for vehicle-related expenses or expenses relating to travel for Mr Monteiro's family was \$12,820.18.

[82] Valco submitted that Mr Monteiro incurred a further \$2,491.81 of expenses borne by Valco not related to travel in any of the vehicles or travel for Mr Monteiro's family.

Submissions in response to Mr Monteiro's submissions

[83] On 12 July 2018 Valco filed further submissions in response to Mr Monteiro's submissions of 11 July 2018. Valco submitted that Mr Monteiro's estimate of his distance of travel during the last 12 months of his employment had been reduced by 11,000 km from his estimate given earlier in the history of this matter.

[84] Valco submitted that five particular trips described by Mr Monteiro were demonstrably false, as follows:

- (a) A return trip of 3,141.6 km to Karratha, WA, from on or about 10 August 2017 to 15 August 2017;

- (b) A return trip of 1,434.2 km to Chadwick, WA, from on or about 16 August 2017 to 18 August 2017;
- (c) A return trip of 394.6 km to Collie, WA on 30 August 2017;
- (d) A return trip of 84.6 km to Coogee, WA on 7 September 2017; and
- (e) A return trip of 356 km to Davenport, WA on 28 September 2017.

[85] Valco submitted that where Mr Monteiro's vehicle had broken down during his trip to Karratha, he had required roadside assistance and had hired a car for business purposes while in Karratha, and had travelled by coach on 14 – 15 August 2017 to return to Perth. Valco provided receipts and bank statements showing Mr Monteiro's expenditure for car rental, roadside assistance and coach travel during his trip to Karratha. Valco submitted similarly that Mr Monteiro did not use any of the vehicles to travel to Chadwick following the breakdown in Karratha.

[86] Valco noted that Mr Monteiro had described in his submissions a return trip he had allegedly taken to a power station in Collie, WA (the Collie power station) on 30 – 31 August 2017 of 394.6 km. Valco submitted receipts and bank statements showing that Mr Monteiro had in fact flown to Adelaide on 30 August 2017 to attend the opening for a 'Naval Group Future Submarine' office, had stayed there on 30 August 2017 and had returned to Perth on 31 August 2017. Valco also had 'serious doubts' about trips that Mr Monteiro had allegedly taken to the Collie power station on 11 January 2017 and 5 April 2017.

[87] Valco noted that Mr Monteiro had submitted that on 7 September 2017 he had completed a return trip to Coogee, WA in the Golf. Valco submitted an Uber receipt for Mr Monteiro's Uber account showing that he had travelled by Uber from Perth to Coogee that day, and submitted that Mr Monteiro had not used the Golf to undertake that travel.

[88] Valco made similar submissions regarding an alleged return trip by Mr Monteiro on 28 September 2017 to Davenport, WA. Valco submitted Uber receipts showing that on the same day Mr Monteiro alleged to have travelled to Davenport, WA and back, he had taken an Uber in the morning, had had lunch in Perth, and had then taken another Uber that afternoon. Valco submitted that Mr Monteiro had not travelled to Davenport at all on 28 September 2017.

[89] Valco noted that Mr Monteiro had submitted that he had come to work on 12 October 2017 without using any of the vehicles, which was supported by an Uber receipt for Mr Monteiro's travel on the morning of 12 October 2017 which Valco provided. Valco submitted that he had left work by taxi later that day. However, Valco noted that Mr Monteiro also recorded a fuel expense of \$92.92 on the same day and questioned how he could have incurred that expense.

[90] Valco noted that Mr Monteiro alleged in his submissions to have travelled 731.4 km on 23 March 2017 related to 'Project Waitsia'. Valco submitted that Mr Monteiro's Microsoft Outlook calendar showed that he had taken personal leave on 23 March 2017 and could not have undertaken that travel.

[91] Relevant to Valco's deduction of the pro-rata amount of the car allowance on termination, Valco stated that the car allowance had been paid annually in advance to Mr Monteiro in both September 2016 and September 2017. The 12 month period before

dismissal was covered by approximately 9 months of the payment made in September 2016 and by approximately 3 months of the payment made in September 2017.²⁰

Submissions following hearings

[92] On 28 December 2018 Valco provided submissions in response to Mr Monteiro's further submissions of 18 December 2018 and in light of the matters discussed during the hearing of 14 December 2018.

[93] Regarding Mr Monteiro's submissions on his PAYG summary and earnings for the 2017 – 2018 financial year, Valco submitted that it had never argued that the accrued annual leave 'paid out' to Mr Monteiro following his dismissal formed part of his earnings. However, Valco maintained that amounts paid to the Applicant for periods of annual leave taken during his employment qualified as 'earnings'. Valco submitted that Mr Monteiro's earnings for the 12 months prior to his dismissal were:

- (a) \$126,250 base salary;
- (b) \$3,934.44 health insurance;
- (c) \$21,311.48 vehicle allowance; totalling

\$151,495.92 annualised earnings

[94] Valco submitted that Mr Monteiro's further explanations regarding the contested business trips were untruthful and should not be accepted.

[95] Valco noted Mr Monteiro's submission that he had travelled to Chadwick, WA on 21 August 2017. Valco noted Mr Monteiro's own submissions that the Golf was refuelled on 18 August 2017 and not refuelled again until 23 August 2017, despite allegedly travelling 1,555.2 km in that period. Valco submitted that it would have been impossible for the Golf to have completed a return trip from Perth to Chadwick without at least one additional refuelling stop.

[96] Valco provided a copy of a receipt of 10:15am on 28 August 2017 from the "Expresso Bar" at 197 St Georges Terrace in Perth, which it alleged showed that Mr Monteiro had been in Perth at 10:15am on 21 August 2017 and had purchased refreshments. Further, Valco referred to a parking receipt which had been provided in its submissions of 11 July 2018 showing that the Golf had been parked at the City of Perth Convention Centre on 21 August 2017. Valco submitted that it should not be accepted that Mr Monteiro could have completed the 1,434.2 km round trip to Chadwick after leaving Perth no earlier than 10:15am.

[97] Valco also submitted that while Mr Monteiro had changed his submissions to allege that he had travelled to Chadwick on 21 August 2017, he had not addressed why he had claimed in his original submissions to have attended meetings in Perth on that date and to have completed a round trip from his home to Perth and back on that date.

[98] Valco noted Mr Monteiro's further submissions that his trip to the Collie power station occurred on 31 August 2017, after he had returned from Adelaide. Valco provided three receipts allegedly relating to Mr Monteiro's purchases on 31 August 2017, for:

- (a) Breakfast at the Adelaide airport terminal at 5:47am;

- (b) A coffee and croissant at a Perth restaurant at 9:58am; and
- (c) Coffee at a different Perth restaurant at 1:04pm

[99] Valco submitted that Mr Monteiro could not have travelled to the Collie power station on the morning of 31 August 2017, had a client meeting, and then returned to Perth within the timeframes fixed by the receipts showing the Applicant's location at certain times.

[100] Valco made further submissions regarding a trip that Mr Monteiro alleged to have taken to Kalgoorlie, WA from 28 December 2016 to 30 December 2016, travelling 1,188.4 km in that period. Valco submitted that the accompanying fuel expenses claimed by Mr Monteiro before and after that travel could not have covered that distance and would have exceeded the capacity of the Golf's fuel tank.

[101] Valco submitted that the following trips described by Mr Monteiro could not be correct, as they were to locations nearby to Perth and would not have involved travel to the extent claimed by Mr Monteiro:

- (a) A trip of 119 km to 8 Leeway Court, Osborne Park on 13 December 2016;
- (b) A trip of 98.2 km to 68 Hasler Road, Osborne Park on 23 January 2017;
- (c) A trip 127.2 km to 76 Hasler Road, Osborne Park on 3 February 2017;
- (d) A trip of 66 km to 21 Mounts Bay Rd on 7 June 2017.

[102] On 9 January 2019 Valco provided submissions regarding r.3.05(6) of the Regulations as I had requested through my chambers.

[103] Valco submissions did not expressly address how it had been agreed that Valco would pay for Mr Monteiro's parking or make submissions on the scope of that agreement. However, Valco maintained that an agreement had been in place and Mr Monteiro derived a private benefit from the agreement that Valco would cover his parking costs. Valco submitted that parking costs incurred by Mr Monteiro for attending his workplace where he did not conduct any business related travel on the applicable day should be considered as a private benefit to Mr Monteiro. Valco submitted that Mr Monteiro's total parking expenditure from 5 December 2016 until the end of his employment was \$3,559.31, and of that amount \$2,421.30 had been incurred on days that Mr Monteiro did not conduct any business related travel.

[104] Valco submitted similarly that the value of Mr Monteiro's fuel expenses should be reduced by an amount for 'private fuel' that it alleged Mr Monteiro had used in the vehicles. Valco submitted that the value attributed to Mr Monteiro's business-related travel should be reduced by the full cost of Mr Monteiro's fuel expenses paid by Valco, or that the per/km rate of Mr Monteiro's business-related travel should be reduced. Valco did not submit any recalculated values that it claimed should be adopted regarding the value of the personal proportion of Mr Monteiro's vehicle allowance.

[105] As described in its original submission, Valco submitted that Mr Monteiro had travelled to France with his family during June and July 2017; the Respondent bore the cost of the flights relating to that travel to an amount of \$4,795.72. Valco also paid for Mr Monteiro to attend a corporate seminar on 22 – 23 June 2017 while in France. Valco submitted that Mr Monteiro hired a car while in France and included the hire costs in his expenses for the month of June 2017, to the value of \$1,486.13.

[106] Valco's submission of 9 January 2019 did not comment further on my estimate of Mr Monteiro's total earnings in the updated Spreadsheet provided to the parties on 14 December 2018. However, the effect of Valco's final submissions is that:

- (a) The business-related kilometres travelled by Mr Monteiro in the Golf should be reduced by approximately 4982.2 km, which would increase the 'personal proportion' of Mr Monteiro's vehicle allowance by \$3,606.66;
- (b) An amount of \$2,660.21 regarding Mr Monteiro's fuel expenditure should be added to the personal proportion of the vehicle allowance;
- (c) An amount of \$2,421.30 regarding Mr Monteiro's parking expenses should be added to his earnings.

[107] Therefore, Valco submitted that Mr Monteiro's total earnings for the 12 months preceding his dismissal were \$148,971.57, which is in excess of the applicable high income threshold.

Consideration

Salary and health insurance entitlement

[108] It is uncontested between the parties that during the last 12 months of his employment Mr Monteiro received a salary and a health insurance entitlement. I note that in its decision upholding Mr Monteiro's previous appeal the Full Bench stated:²¹

“[31] In respect of the Commissioner's determination of the private health insurance expenses as 'earnings' for the purpose of s.332(1) of the Act, we do not find any error. We consider this to be an appropriate conclusion despite the contract entered into between the parties labelling it as a 'reimbursement'. It is not a reimbursement. The payment by an employer for an employee's private health insurance is a benefit to an employee, and is not, unless agreed, an entitlement of employment for which an employee would need to reimburse an employee.”

[109] Having considered the evidence before me and each party's submissions, together with the Full Bench decision on the private health insurance, I consider that Mr Monteiro earned a salary of \$126,250.08 and a health insurance payment of \$3,934.44 which is included as earnings.

Value of private use of the vehicles

[110] To determine the value of Mr Monteiro's private use of the vehicles I must follow the method of calculation set out in *Sam Technology*. I am satisfied that the amount of \$21,311.48 was paid to Mr Monteiro as a vehicle allowance in the 12 months prior to his dismissal.

[111] For the most part, I accept Mr Monteiro's evidence regarding his business-related travel during the last 12 months of his employment. The final state of Mr Monteiro's submissions is that each vehicle travelled the following distance for business-related purposes during the last 12 months of his employment.

- (a) The Golf travelled a distance of 10,944.6 km;

- (b) The Tiguan travelled a distance of 1,834.8 km;
- (c) The Amarok travelled a distance of 3,072.8 km.

[112] I have considered Valco's objections regarding particular trips taken by Mr Monteiro being included in the business kilometres travelled by the vehicles. I have reviewed each party's evidence regarding the trips that Valco objected to, and consider as follows.

The Karratha trip

[113] Mr Monteiro first suggested that after the Amarok vehicle broke down travelling to Karratha, on its return to Perth its odometer would have been turning, but not incurring the expense of fuel. This is not correct and was generally conceded during the hearing of 14 December 2018. The vehicle was towed on the back of a car carrier, and accordingly, the trip was 900 km from Perth to where the vehicle broke down. I accept this was business travel as Mr Monteiro was travelling firstly to conduct business before he holidayed with his family.

The Chadwick trip

[114] I do not accept Mr Monteiro's submissions regarding his trip to Chadwick, WA on 21 August 2017. I do not accept that Mr Monteiro could have travelled to Chadwick, conducted a business meeting, and then returned to Perth (a trip of some 1,434.2 km) within a single day and with a single driver. I find Valco's submissions regarding the lack of necessary fuel stops to complete such a trip persuasive. I am not satisfied that the distance of Mr Monteiro's trip to Chadwick should be included in his business-related travel distance.

[115] I will, however, provide calculations that do include the Chadwick trip and do not include the Chadwick trip for comparison.

The Collie power station trip

[116] The receipts submitted by Valco effectively fix Mr Monteiro's locations at certain times on 31 August 2017. On the basis of those receipts, Mr Monteiro was at the following locations at the following times on 31 August 2017:

Time	Location/trip	Receipt information
5:47am	Adelaide airport terminal, shown by receipt for breakfast	Receipt for breakfast at Adelaide airport terminal
8:30am	Perth airport terminal to 15 William Street, Perth	Receipt for Uber travel using Mr Monteiro's Uber account
9:58am	Coffee and Croissant and 'Jean Pierre Sancho' restaurant in Perth	Receipt for coffee and croissant
1:04pm	Lunch at unidentified restaurant in Perth	Receipt for lunch

[117] Mr Monteiro's final submissions were that he completed the return trip to the Collie power station during the morning of 31 August 2017. From the above receipts, Mr Monteiro must have completed his trip between approximately 10:00am and shortly before 1:00pm that day.

[118] I have conducted a Google Maps search of the estimated time it would take to travel from the 'Jean Pierre Sancho' restaurant in Perth to the Collie Power Station. That search shows that the distance for the return trip is approximately the same as the distance claimed by Mr Monteiro. However, it would have taken Mr Monteiro approximately 2.5 hours to travel from Perth to the Collie power station; with the return trip taken slightly less than 5 hours. Even excluding the time that Mr Monteiro would have spent at the Collie power station conducting the purpose for his trip, it would be impossible for him to complete the return trip between 10:00am and 1:00pm on 31 August 2017.

[119] I accept Valco's submissions that Mr Monteiro was in Adelaide on 30 August 2017 to attend the opening for a 'Naval Group Future Submarine' office, and therefore could not have travelled to the Collie power station on that day. I do not accept Mr Monteiro's submissions that he travelled to the Collie power station on 31 August 2017 immediately upon his return to Perth on 31 August 2017.

[120] I will, however, provide calculations that do include the return trip to the Collie power station in the event that it occurred on an alternative date.

The Coogee trip

[121] I accept that Mr Monteiro completed a return trip from Perth to Coogee on 7 September 2017 of approximately 84.6 km and that that trip was for business purposes and should be counted in his total business-related travel.

The Davenport trip

[122] I accept that Mr Monteiro completed a return trip of approximately 356 km from Perth to Davenport, WA on 28 September 2017. I accept that Uber trips charged to Mr Monteiro's Uber account on 28 September 2017 were likely in relation to trips that Mr Monteiro had booked through his Uber account for the pick-up and transport of small parts which Mr Monteiro could not himself transport due to his travel to Davenport.

[123] As a result the only fixed point in time that Mr Monteiro must have been in Perth was at the time that he had lunch at a Perth restaurant, likely after returning to Perth from Davenport. I consider that Mr Monteiro would have been able to complete a return trip from Perth to Davenport and back before lunch, given it is a distance of just under two hours each way.

Total kilometres travelled for business purposes

[124] I confirm that I have not included the distance from Mr Monteiro's home to his ordinary workplace, and return as business purposes. That is personal travel. The calculations earlier provided to the parties make it clear that those kilometres have not been included.

[125] I consider that the annual distance travelled by each of the vehicles for business purposes was as follows:

- (a) The Golf travelled a distance of 10,994.60 km - less 1,434.2 km (Chadwick) - less 394.6km (Collie power station) = 9,115.80 km;
- (b) The Tiguan travelled a distance of 1,834.8 km;

(c) The Amarok travelled a distance of 3,072.8 km = 14,023.4 kilometres.

[126] The alternative calculations, if all of Mr Monteiro’s evidence was accepted, puts Mr Monteiro’s business-related travel in line with his submissions which is:

- (a) The Golf travelled a distance of 10,944.6 km;
- (b) The Tiguan travelled a distance of 1,834.8 km;
- (c) The Amarok travelled a distance of 3,072.8 km = 15,852.20 kilometres.

Cost per kilometre for each of the vehicles

[127] I have considered each party’s submissions regarding the cost per kilometre of running each of the vehicles. It is agreed by the parties and I accept that the vehicles driven by Mr Monteiro were as described above at [20].

[128] I consider that the vehicle running cost information produced by the RACWA and provided to my chambers by Mr Monteiro represents the best information before me of the running costs of the vehicles.

[129] I note that inquiries were made of the parties and investigations made through my own chambers to obtain similar vehicle running cost data for the precise year models of the vehicles driven by Mr Monteiro and for the period of November 2016 to December 2017. However, neither of the parties nor my chambers was able to obtain any more accurate estimates of the vehicles’ running costs.

[130] The running costs provided by Mr Monteiro demonstrate the following for each of similar vehicles to the ones owned by Mr Monteiro:

Vehicle	Total costs cents/km (including fuel costs)	Fuel costs only cents/km
Volkswagen Golf 110 TSI AU MY18 Update 5D Hatchback Turbo 4 1395cc TDFI 7 Sp Auto direct shift	68.23	7.74
Volkswagen Tiguan 132 Tsi Comfortline 5NA MY18 Update 4D Wagon Turbo 4 1984cc TMPFI 7 sp Auto Direct shift	101.04	10.76
Volkswagen Amarok TDI420 Core Edition (4x4) 2H MY18 Dual Cab Utility Diesel Turbo 4 1968cc DTFI 8 sp Automatic	106.70	11.16

[131] I note Valco’s submissions that the per/km running costs of the vehicles should be reduced by an amount to reflect that Mr Monteiro at least partially used each of the vehicles for private purposes, for examples, in driving between his home and his workplace in Perth.

[132] It is uncontested between the parties that Valco reimbursed Mr Monteiro for fuel costs that he incurred in respect of the vehicles, on top of the vehicle allowance paid to him. It is Valco’s contention that to receive both the vehicle allowance and fuel reimbursement is to effectively double-dip. The amount paid for fuel in the 12 months prior to the dismissal was \$2,660.21.

[133] It is, of course, unclear how much of the fuel expense is related to business versus private usage. It is impossible to estimate given the lack of records kept. What is known, however, on the best evidence before the Commission is that Mr Monteiro travelled either 14,023.4 business kilometres, or 15,852.2 business kilometres.

[134] If the fuel that was paid to him amounted to \$2,660.21, and on the table above in [130] was an average of around 10 cents per kilometre travelled, it would put the kilometres travelled by Mr Monteiro in the 12 months prior to his dismissal at approximately 26,600, similar to the amount he estimated he had travelled.

[135] I do consider that Mr Monteiro has been paid by Valco twice for fuel expenditure, whether for business or private use. I do not accept that the fuel paid in addition to the vehicle allowance is a reimbursement pursuant to s.332(2)(b) of the Act, as the relative cost of fuel had already been paid for by Valco in the vehicle allowance. Mr Monteiro had the benefit of the vehicle allowance, and the benefit of being reimbursed for sums paid for him to fill his private vehicles for all travel, including private travel. There are, accordingly, two ways to consider the benefit of the fuel being paid to Mr Monteiro, on top of the vehicle allowance paid to him.

[136] It might be appropriate to consider the full per kilometre RACWA running costs for each of the vehicles, and allow Mr Monteiro only the amount, less the fuel cost, on account of him having received it a second time in the fuel payment. For example, it might be said that Mr Monteiro would only be entitled to claim 68.23 cents when driving the Golf, less the 7.74 cents per kilometre for fuel. That would not, in my view, be the correct calculation, on account of there still being a private component of the approximate 26,600 total kilometres travelled, but there being 14,023.4 business kilometres travelled.

[137] On account of ensuring that there is not a double calculation, I consider it appropriate to include in the calculation of earnings the full amount of \$2,660.21 paid by Valco to Mr Monteiro for fuel used by him for both business and personal use. Where Mr Monteiro used his vehicles for business purposes, he is entitled to a full per kilometre account in the table at [130].

[138] I am satisfied that:

- (a) there was agreement between the parties for Mr Monteiro to purchase fuel used in his vehicles and for Valco to pay for it, on top of the car allowance already paid to him. In all the circumstances I consider this to be a benefit to Mr Monteiro pursuant to r.3.05(6);
- (b) the benefit is not an entitlement to a payment of money and is not a non-monetary benefit within the meaning of subsection 332(3) of the Act;
- (c) having regard to the circumstances that Mr Monteiro was already receiving a car allowance, the benefit should be included for the purposes of the calculation;
- (d) a reasonable money value of the benefit has not been agreed by Mr Monteiro and Valco; and
- (e) I can estimate a real or notional money value of the benefit.

Annual distance for business purposes by cost per kilometre

[139] Having considered the distance Mr Monteiro travelled for business purposes in each of the vehicles and the per/km running costs for each of the vehicles, the costs of operating each of the vehicles is as follows:

- (a) For the Golf: $68.23c \times 9,115.8 \text{ km} = \$6,219.71$
- (b) For the Tiguan: $101.04c \times 1,834.8 \text{ km} = \$1,853.88$
- (c) For the Amarok: $106.70c \times 3,072.8 \text{ km} = \$3,278.68$

Total = \$11,352.27

[140] On Mr Monteiro's alternative calculations, with the urging that he in fact travelled 10,944.60km in the Golf, the calculations would be respectively:

- (a) For the Golf: $68.23c \times 10,944.60 \text{ km} = \$7,467.50$
- (b) For the Tiguan: $101.04c \times 1,834.8 \text{ km} = \$1,853.88$
- (c) For the Amarok: $106.70c \times 3,072.8 \text{ km} = \$3,278.68$

Total = \$12,600.06

Value of Mr Monteiro's private use of the vehicles

[141] The private benefit of the vehicle allowance for Mr Monteiro is the amount of Mr Monteiro's total vehicle allowance less the cost of operating the vehicles for business purposes in the 12 months prior to his dismissal. Mr Monteiro received a vehicle allowance of \$21,311.48. I am satisfied that of that amount received by Mr Monteiro, \$11,352.27 related to running costs for the vehicles arising from business-related travel. Therefore, I am satisfied that the private benefit derived by Mr Monteiro from the vehicle allowance was \$9,959.21. That amount must be added to Mr Monteiro's annual earnings.

[142] On Mr Monteiro's best-case scenario, if the Commission were to accept he travelled 10,944.60km for business purposes in the Golf, the amount to be included in his annual earnings is \$8,711.42.

Associated vehicle costs – towing, car wash, etc.

[143] I have used my discretion not to include in the calculations of Mr Monteiro's annual earnings incidental payments made for the washing of his vehicle and the towing of his vehicle when it broke down while firstly on business travel with personal travel planned afterwards. Having regard to r.3.05(6)(c), and the discretion afforded, I am not satisfied in the circumstances that I should consider such matters a benefit for the purposes of assessing whether the high income threshold applies.

[144] Relevant to the towing of the vehicle, Mr Monteiro had set off to do business travel when his vehicle broke down. It is an appropriate, albeit not strictly necessary response from Valco to have covered the cost of returning Mr Monteiro's vehicle to Perth. I consider it to have been made in good will, but having regard to the circumstances, it is not appropriate to include it in the calculations of Mr Monteiro's earnings. I consider this to be true also for the

expenses of hotel stays during the trip, the roadside assistance and the hire car after the unfortunate car break-down.

[145] Regarding the car hire in France, Valco's evidence is that there was a corporate seminar on 22 and 23 June 2017, and business meetings for Mr Monteiro to attend up until the end of June. He then was on annual leave and had use of a hire car until 28 July 2017. The cost of the hire car for July only was \$1,143.18, being the portion of the total car hire of \$1,486.13 covering late June and July. I am satisfied that:

- (a) there was agreement between the parties for the car hire to be paid, and in all the circumstances I consider this to be a benefit to Mr Monteiro pursuant to r.3.05(6);
- (b) the benefit is not an entitlement to a payment of money and is not a non-monetary benefit within the meaning of subsection 332(3) of the Act;
- (c) having regard to the circumstances that Mr Monteiro was on annual leave and could have otherwise hired a vehicle at his own expense, the benefit should be included for the purposes of the calculation;
- (d) a reasonable money value of the benefit has not been agreed by Mr Monteiro and Valco; and
- (e) I can estimate a real or notional money value of the benefit.

[146] Accordingly, the amount of \$1,143.18 is to be included in the assessment, being a real estimate of the money value of the benefit.

[147] Relevant to occasional car washing expenses for Mr Monteiro's vehicle, I consider this to be inconsequential, and I have decided against including any such value to the calculation.

Parking

[148] I have considered each party's submissions regarding whether Mr Monteiro's parking costs should be included in his earnings. The first consideration is, when regard is had to Regulation 3.05(6), was Mr Monteiro entitled to receive, or has received, a benefit in accordance with an agreement between the person and the person's employer?

[149] I am satisfied that there was at least an implied agreement between the parties that Valco would cover Mr Monteiro's parking costs for attending work, even where he was not required to conduct any business-related travel. Valco did not at any time object to Mr Monteiro using his company card to pay for parking or to compensating Mr Monteiro for parking costs that he had incurred personally, even where he travelled only from his home to his workplace and back. I am satisfied that r.3.05(6)(a) is met and that Mr Monteiro, at the time of his employment was (is) entitled to receive, and he did receive, a benefit in accordance with an agreement between him and Valco.

[150] I have considered whether the parking costs paid for by Mr Monteiro and later compensated by Valco after Mr Monteiro provided receipts for his expenditure could be considered 'reimbursements' within s.332(2)(b) of the Act. In that respect, I have considered the approach of the Full Bench of this Commission in *Zappia v Universal Music Australia Pty Ltd* [2012] FWAFB 6108 (*Zappia*) to the reimbursement of toll payments to the applicant in that matter, where the Full Bench held:

“[13] ...his Honour was correct in taking into account the value of the tolls paid by the respondent in respect of the private portion of the appellant’s travel. It matters not that this was by way of reimbursement, rather than by direct payment. The payment of the tolls was a benefit other than payment of money for the purposes of regulation 3.05(6). In the event that it was not, applying a purposive approach to the interpretation of the word “reimbursements” in section 332(2)(b) of the Act, the word does not contemplate reimbursements of outlays incurred for private, as approved by business, purposes. The payment by an employer for an employee’s private outgoings, whether directly or by way of reimbursement, clearly constitutes part of that employee’s remuneration.”

[151] I consider that any parking costs incurred by Mr Monteiro and later compensated by Valco are similar to the toll payments made to the applicant in *Zappia*. Mr Monteiro’s travel from his home to his workplace is not travel for a business-related purpose. It follows that, unless Mr Monteiro was required to have access to one of the vehicles later on a particular day to conduct business-related travel, the cost of parking that vehicle in attending his workplace is a private cost, and if Valco has borne that cost for Mr Monteiro, a private benefit has passed to Mr Monteiro to the value of the parking expense that Valco has borne. Amounts paid to Mr Monteiro for his parking expenses are not reimbursements, regardless of how the benefit took effect.

[152] I do not accept Mr Monteiro’s submissions that his inconsistent business travel requirements and his duties to transport promotional materials stored at his home to his workplace meant that all parking costs he incurred in his employment should be considered business expenses because of the ‘necessity to have the vehicle at disposal for any parcel pick up or urgent customer call out on site’. Where Mr Monteiro used his vehicle to travel to and from work without undertaking any business travel on that day, he derived a benefit of parking paid for by Valco.

[153] The second consideration is if the benefit is not an entitlement to a payment of money, and is not a non-monetary benefit within the meaning of subsection 332(3) of the Act. I am satisfied that the parking benefit was not an entitlement to a payment of money and was not a non-monetary benefit within the meaning of s.332(3) of the Act

[154] I am satisfied, having regard to the circumstances that I should exercise my discretion and consider the benefit Mr Monteiro obtained in having Valco pay for parking expenses when he was not required to use his vehicle for business purposes, in assessing whether Mr Monteiro’s earnings exceeded the high income threshold at the time of his dismissal. I am satisfied that it was a benefit to Mr Monteiro of a real and substantial kind.

[155] It is clear on the evidence that the parties did not agree a reasonable money value of the benefit. I am satisfied that I can estimate a real or notional money value of the benefit, with reference to the receipts and bank statements which have been provided to me by the parties.

[156] I do not accept Mr Monteiro’s submissions that the real value of Valco paying for his parking costs were equal to a return trip by public transport from Mr Monteiro’s home to his workplace because the ‘parking cost itself did not fall into Mr Monteiro’s pocket’. The benefit afforded to Mr Monteiro was that the cost of parking his vehicle in attending his workplace did not fall *out* of his pocket, and instead was borne by Valco.

[157] Valco's submissions set out a total value for Mr Monteiro's parking costs on days that he did not conduct any business travel, which was produced from the receipts and bank statements in Valco's possession showing Mr Monteiro's parking expenditure. Mr Monteiro's original submissions included a spreadsheet which set out his evidence of his parking costs during the 12 months prior to his dismissal. I have also reviewed that spreadsheet in light of my findings regarding the dates that Mr Monteiro incurred a parking cost in attending his workplace but did not conduct any business travel.

[158] From December 2016 to June 2017 it appears that the parking arrangement between the parties was that Mr Monteiro would pay for parking himself and was then compensated by Valco after providing a receipt for his parking. Each party's submissions regarding those parking costs are very similar. After June 2017 it appears that the parking arrangement changed such that Mr Monteiro used a company card to pay for parking, i.e. Valco paid for his parking in the first instance. It is here that each party's submissions diverge. Valco continues to record parking costs shown in bank statements for the account linked to the company card, whereas Mr Monteiro's submissions record far fewer parking costs after June 2017.

[159] For the most part I consider Valco's submissions to be more persuasive and to better align with the parking costs shown in the receipts and bank statements which have been produced to me in this matter. However, there are a number of instances where I do not accept Valco's submissions; mostly in relation to dates where Mr Monteiro incurred two parking costs in a single day where he also conducted business travel and Valco submits that either the first or second time that Mr Monteiro parked on the given day constituted a private benefit to him.

[160] After deducting the costs of those instances from Valco's submissions I consider that the private value of Mr Monteiro's parking costs in the 12 months prior to his dismissal was \$2,294.41.

[161] If I am incorrect in deducting those amounts from Valco's submissions and if I were to accept Valco's submissions without modification, the private value of Mr Monteiro's parking costs in the 12 months prior to his dismissal would be \$2,421.30.

[162] If I am incorrect in largely accepting Valco's submissions and if I were to accept Mr Monteiro's submissions about his parking costs, the private value of Mr Monteiro's parking costs in the 12 months prior to his dismissal would be \$1,707.73.

Family flight expenses

[163] I have considered each party's submissions of whether the cost of the return air fares for Mr Monteiro's family to fly to France during July 2017 should be included in Mr Monteiro's earnings, as well as the cost of Mr Monteiro's and his family's luggage delivery.

[164] Mr Monteiro inquired of Valco as to how much he could spend in travelling to Paris for work purposes, with his partner and new-born child with him. He was informed Valco would authorise up to €3,500, which if Mr Monteiro had travelled alone, would be in business class. He was authorised by Valco to spend no more than up to €3,500 for two economy tickets, if he so wished.

[165] I do not consider that any of the €3,500 constitutes earnings, as it is an amount of money that Valco was prepared to pay to send Mr Monteiro to Paris for work purposes. That he then elected not to travel business class, and instead purchase two economy tickets was a matter afforded by Valco to Mr Monteiro at its discretion.

[166] On the same basis that Valco was prepared to pay for the delivery of Mr Monteiro’s luggage in the course of his trip to Paris for work purposes, I do not consider that the cost of Mr Monteiro’s luggage delivery constitutes an amount of earnings. I am not satisfied in the circumstances that I should consider the cost of Mr Monteiro’s family’s luggage delivery as a benefit for the purposes of assessing whether the high income threshold applies pursuant to r.3.05(6)(c).

Superannuation on the vehicle allowance

[167] Only if Valco paid superannuation greater than its obligations would that amount of superannuation count towards earnings for the purposes of the threshold. Valco agreed to pay superannuation on the vehicle allowance paid to Mr Monteiro. Mr Monteiro maintains that some superannuation payments have not been made to him and he has lodged with the Australian Taxation Office (ATO) a complaint.

[168] Helpfully, the ATO provides a checklist for superannuation obligations, as per the table below.²²

Payment	Salary or wages	Ordinary time earnings (OTE)
Allowance by way of unconditional extra payment	Yes	Yes
Expense allowance expected to be fully expended	No	No

[169] I consider the vehicle allowance paid to Mr Monteiro to be an allowance by way of unconditional extra payment; that is, Mr Monteiro was free to spend the allowance as he saw fit. He was not under any obligation to expend it on any particular thing. Accordingly, Valco held an obligation to make payment of superannuation on the vehicle allowance. Superannuation paid on the vehicle allowance does not count towards earnings for the purposes of assessing the high-income threshold.

Total annual rate of earnings

[170] There are many variables in assessing Mr Monteiro's earnings, and I have provided alternative calculations in the event that I am incorrect about various parts that make up Mr Monteiro's earnings.

[171] On the evidence before me, I am satisfied that Mr Monteiro's annual rate of earnings for the 12 months prior to his dismissal was as follows:

Item	Amount
Salary	\$126,250.08
Private benefit of health insurance payments	\$3,934.44
Payment for fuel on top of vehicle allowance	\$2,660.21
Private benefit of vehicle allowance	\$9,959.21
Private benefit of parking payments	\$2,294.41
Care hire in France	\$1,143.18
Total	\$146,241.53

[172] The applicable high income threshold at the time of Mr Monteiro's dismissal on 5 December 2017 was \$142,000. Mr Monteiro's annual rate of earnings exceeded that amount. It is agreed by the parties that Mr Monteiro's employment was not covered by an enterprise agreement or a modern award, and I so find. I am satisfied that Mr Monteiro's earnings at the time of his dismissal exceeded the high income threshold and he was therefore not a person protected from unfair dismissal pursuant to s.382(b) of the Act.

Alternative calculations

[173] Mr Monteiro's best-case submission is for the Commission to find that he travelled the following distances in each of the vehicles, and that the full kilometre rate should apply, without any parking applying to the calculation, without the fuel paid in addition to the vehicle allowance being included, and without the car hire in France included:

- (a) The Golf travelled a distance of 10,944.6 km @ 68.23c = \$7,467.50;
- (b) The Tiguan travelled a distance of 1,834.8 km @ 101.04c = \$1,853.88;
- (c) The Amarok travelled a distance of 3,072.8 km @ 106.70c = \$3,278.68.

[174] If Mr Monteiro is correct, his business kilometre amount is \$12,600.06, and the private portion of the vehicle allowance would be \$8,711.42, and his annual earnings would be:

Item	Amount
Salary	\$126,250.08
Private benefit of health insurance payments	\$3,934.44
Payment for fuel on top of vehicle allowance	Nil
Private benefit of vehicle allowance	\$8,711.42
Private benefit of parking payments	Nil
Car hire in France	Nil
Total	\$138,895.94

[175] However, as stated throughout my consideration of this matter, I do not accept all of Mr Monteiro's evidence and submissions and I do not accept that his annualised earnings at the time of his dismissal amounted to \$138,895.94.

Conclusion

[176] For the reasons given above I am satisfied that Mr Monteiro's annual rate of earnings was above the applicable high income threshold at the time of his dismissal. Valco's jurisdictional objection is therefore upheld.

[177] For this reason, I am satisfied that Mr Monteiro was not, pursuant to s.382 of the Act a person protected from unfair dismissal.

[178] Accordingly, I must dismiss Mr Monteiro's application and I do so.



COMMISSIONER

Appearances:

Mr J Monteiro, Applicant;
Mr R Bazin, for the Respondent;
Mr M Forbes, for the Respondent.

Hearing details:

Brisbane, 21 September 2018, by telephone;
Brisbane, 14 December 2018, by telephone.

Final written submissions:

Submissions of the Applicant, 9 January 2019;
Submissions of the Respondent, 9 January 2019.

Printed by authority of the Commonwealth Government Printer

<PR706747>

¹ *Monteiro v Valco Group Australia Pty Ltd* [2018] FWC 1520. (Note : Note: This decision has been quashed - refer to the Full Bench decision dated 20 June 2018 [[2018] FWCFCB 3280]);

² *Monteiro v Valco Group Australia Pty Ltd T/A Valco Group Australia* [2018] FWCFCB 3280, [7].

³ *Ibid*, [27] – [31].

⁴ Ibid, [32](d).

⁵ *Fair Work Act 2009* (Cth), s.396(b).

⁶ *Rofin Australia Pty Ltd v Newton* Print P6855 (AIRC FB, Williams SDP, Acton DP, Eames C, 21 November 1997), [(1997) 78 IR 78 at p. 82]; citing *Condon v G James Extrusion Company* Print N9963 (AIRC, Watson DP, 4 April 1997), [(1997) 74 IR 283 at p. 288].

⁷ Applicant's outline of submissions, 11 July 2018, pg 1.

⁸ Ibid, pg 1.

⁹ Ibid, pg 2.

¹⁰ Ibid, pg 2.

¹¹ Ibid, pg 3.

¹² Applicant's response, 27 September 2018.

¹³ Applicant's reply submissions, 10 August 2018, pg 1.

¹⁴ Ibid, pg 1.

¹⁵ Ibid, pg 2.

¹⁶ Ibid, pg 3.

¹⁷ Mr Monteiro relied on s.332 of the *Fair Work Act 2009* (Cth).

¹⁸ Respondent's submissions, 11 July 2018.

¹⁹ Ibid.

²⁰ Respondent's response to further submissions by Applicant, 4 October 2018.

²¹ *Monteiro v Valco Group Australia Pty Ltd T/A Valco Group Australia* [2018] FWCFB 3280, [31].

²² <https://www.ato.gov.au/Business/Super-for-employers/How-much-to-pay/Checklist--salary-or-wages-and-ordinary-time-earnings/>