DECISION

Fair Work Act 2009
s.394—Unfair dismissal

David Paul Lonnie
v
WA Council on Addictions Incorporated
(U2023/565)

DEPUTY PRESIDENT BEAUMONT PERTH, 20 APRIL 2023

Application for an unfair dismissal remedy; jurisdictional objection high income threshold; principles of construction – employment contract; meaning of 'in accordance with'; Fringe Benefits Tax

1 Issues and outcome

[1] Mr David Paul Lonnie (the **Applicant**) has made an application under s 394 of the *Fair Work Act 2009* (Cth) (**Act**) for an unfair dismissal remedy. A former employee of WA Council on Addictions Incorporated (the **Respondent** or **WACOA**), he worked there as the General Manager of Residential Services. As part of his remuneration package, the Applicant received a salary and had the benefit of a fully maintained motor vehicle for business and private use. The Applicant further received a mobile phone and laptop computer. The Respondent has raised a jurisdictional objection to the application, arguing that the Applicant is not a person protected from unfair dismissal within the terms of s 382 of the Act. The Respondent contends that the Applicant enjoyed annual earnings above the high income threshold, he was not covered by a modern award, and an enterprise agreement did not apply to his employment, therefore rendering him unprotected from unfair dismissal.

[2] In response to the objection, the Applicant has argued that the *Western Australian Council on Addictions Incorporated Enterprise Agreement 2012* (the **Agreement**)[1] applied to his employment and he was paid below the high income threshold of $162,000.00. The Applicant asserts that his rate of annual earnings did not exceed $152.290.47.

[3] The issues for determination are whether the Agreement applied to the Applicant in his employment, and if it did not, whether his annual rate of earnings were less than the high income threshold. If the Applicant establishes either element, the Respondent's objection will be dismissed.

[4] In respect of the first argument that the Agreement applied to the Applicant's employment, I have determined that it did not. Regarding the second argument, I have found that the Applicant's annual rate of earnings were less than the high income threshold and he is therefore protected from unfair dismissal. My detailed reasons follow.

2 Background

[5] The broader context of the matter was set out in the evidence of Applicant and the Respondent's witnesses, Ms Carol Daws, Chief Executive Officer, and Mr Stephen Scarrott, Chief Financial Officer of the Respondent.

[6] The Applicant initially commenced employment with the Respondent as a Project Officer in the Respondent's Vocational Training Program in November 2011.[2]

[7] In May 2021, the Applicant was appointed to the position of General Manager Residential Services.[3] The Applicant explained that his duties as the General Manager of Residential Services included policy development, strategic planning, developing and implementing service improvement initiatives, and financial outcome reporting.[4]

[8] The Applicant's employment contract read, in part, the following:

> …Your contract will be in accordance with the *WA Council on Addictions (Inc) (WACOA) Enterprise Bargaining Agreement 2012-2016* and the following:
> …
> Effective from 1st January 2021 your salary is based on Level 10.1 at $129,000 per annum or $65.07 per hour, inclusive of a company vehicle.
> …
> We are pleased to offer you salary packaging to $15,899.93. There is an administration fee of $300.00 per annum charged for this service. If you required further information in relation to this, please contact our corporate services payroll department. It should be noted that while WACOA is pleased to offer this benefit scheme, we do so subject to our eligibility for Fringe Benefit Tax exemption. Should this be changed or withdrawn, we may not be able to continue this benefit.[5] (italics for emphasis)

[9] It is uncontroversial that the reference in the employment contract to the *WA Council on Addictions (Inc) (WACOA) Enterprise Bargaining Agreement 2012-2016* referred to the Agreement.

[10] Amongst other matters, the Agreement set out the following provisions:

> **1.3 Definitions**
> 1.3.1 "Employer" means "Cyrenian House" and is the trading name of the Western Australian Council on Addictions Incorporated.
> 1.3.2 "Agreement" means the Cyrenian House Enterprise Agreement 2012.
> 1.3.3 "Parties" means the Employer and all employees of the Employer that are bound by this agreement.
> …
> **1.4 Application of Agreement**
> This Agreement applies to all current and future WACOA and Cyrenian House Employees located within the Perth Metropolitan Area and excludes Child Care and Creche Workers.
>
> **1.5 Commencement and Duration of Agreement**
> 1.5.1 This Agreement will commence 7 days after the date of approval by Fair Work Australia in accordance with the Act. This Agreement will remain in operation for a period of (4) four years from date of approval.

1.5.2 This Agreement will continue to apply after the expiry date until the Agreement is varied, replaced or terminated in accordance with the Act.

1.6 Parties Bound/Coverage
This Agreement is binding on the Western Australian Council On Addictions Incorporated, trading as Cyrenian House and for Cyrenian House Employees located within the Perth Metropolitan Area and excludes Child Care and Creche Workers who are employed at the Rick Hammersley Centre at 920 Gnangara Road Cullacabardee, WA.[6]

[11] At 'Part 4 Salary', the Agreement details the salary scale, position classifications, salary payments and the salary sacrifice/packaging provisions.

4.1 Salary Scale
See Appendix 1.
Rates of pay in the salary scale will be adjusted in line with Fair Work Australia's annual wage review determination as required by Part 2-6 at Division 3 of the Fair Work Act 2009.
For the purpose of the calculation and payment of salaries, the weekly salary shall be calculated by dividing the annual salary by 52.1667.

4.2 Position Classifications
The classification of new positions or reclassification of existing positions will be based on the classification descriptions in the Position Classification descriptors in Appendix 2 of this agreement.

4.3 Salary Payments
Salary payments will be made fortnightly in arrears by electronic funds transfer to a financial institution nominated by the employee. Cyrenian House will make payment by cheque if electronic funds transfer is not practical. Pay slips will be provided to all employees each pay day to a nominated email address.

4.4 Salary Sacrifice/Packaging
a. An employee may choose to take her/his remuneration as cash salary or a mix of cash salary and expense payments. Rules governing Salary Packaging are prescribed by the Australian Taxation Department and are subject to change.
b. The terms of the salary package will not, when viewed as a whole, be less favourable than the entitlements otherwise available under this Agreement. An employee who chooses not to participate in salary packaging will be paid the base annual salary for her/his position.
c. Salary packaging is not available to casual employees or employees on limited term contracts of 3 months or less.
d. Cyrenian House will apply salary packaging guidelines, including eligible payments, issued by the Australian Taxation Office from time to time. Cyrenian House will ensure that the structure of the salary packaging complies with taxation and other relevant laws.
e. Cyrenian House will advise each employee in writing of her/his classification level and base annual salary and the right to choose full payment of the base salary instead of a remuneration package. The agreed remuneration package, stating the configuration and duration of the package, will be documented in writing and signed by Cyrenian House and the employee and a copy given to both parties. The employee will be entitled to inspect details of payments and transactions made under the terms of the remuneration package. …

[12] Appendix 1 of the Agreement provides the Classification and Salary Point for nine levels, each of which are further delineated by 'steps'. The highest level, as indicated by salary, is Level 9 Step 4. The Appendix further notes, 'Classifications additional to those in the Social, Community and Disability Services Award 2010'.

[13] Appendix 2 of the Agreement sets out the nine levels of classification, outlining the characteristics of the level, responsibilities, and requirements of the position. Level 9 appears to be the highest position level, with the Agreement noting that appointment is at the discretion of the employer.[7]

[14] The Applicant attached to his witness statements two payslips received from the Respondent dated 25 October 2022 and 11 January 2023.[8] The payslips set out that the Applicant's annual salary was $141,343.28 and that his classification was Level 10.2.[9] The Applicant noted that in addition to his annual salary, the payslips identified that he received compulsory superannuation contributions, on-call allowances, and a Christmas bonus. However, the Applicant stated that he was on-call on an irregular basis and he did not have an automatic right to receive a Christmas bonus.[10]

[15] Mr Scarrott said that at the time of the Applicant's dismissal, his cash salary was $141,797.00 (**Salary**). The Respondent's records show that this was confirmed for the Applicant by the Respondent's HR Department on 15 November 2022, while he was applying for a home loan.[11]

[16] Mr Scarrott gave evidence that the Applicant's Salary was converted to an hourly rate of $71.53 per hour (**Hourly Rate**) using the following equation:

> $141,797/52.1667 (the number of weeks in a year) = $2,718.1516
> $2,718.1516/38 (working hours in a week) = $71.53
> (Salary Equation)

[17] Whilst the Applicant's payslips listed the Applicant's annual salary as $141,343.28, Mr Scarrott said this was incorrect.[12] Mr Scarrott said he understood that the figure had been arrived at by the Respondent's payroll software calculating the Applicant's annual Salary from the Hourly Rate, and multiplying it by 38 hours, and then multiplying that by 52 weeks.[13]

2.1 Motor vehicle

[18] According to the Applicant, the Respondent gave senior employees, including himself, an option to take a fully maintained motor vehicle as part of the remuneration package.[14] The Applicant provided a spreadsheet[15] which he purports was provided to him by the Respondent. The Applicant said the spreadsheet shows the annual wages for employees as of 1 July 2020, calculated both with and without a company motor vehicle. The Applicant noted that it could be seen from the spreadsheet that if a Level 8 employee elected to take a company vehicle, his or her wages decreased by $8000.00, and if a Level 9 or Level 10 employee elected to take a motor vehicle, his or her wages would decrease by $10,000.00.[16]

[19] The Applicant stated that at the time of his dismissal, his annual wage had decreased by $10,783.00 because he had elected to have a fully maintained company motor vehicle.[17]

[20] The fully maintained company motor vehicle was used by the Applicant for both business and private purposes.[18] The Applicant had elected to take a 2020 Holden Colorado 4x4 Twin Cab Diesel Ute (the **Colorado/company vehicle**),[19] which was not considered to be a standard vehicle that the Respondent would usually offer to employees.[20] However, the Applicant was given the option of driving that more valuable company vehicle on the proviso that he pay a contribution toward the cost of it. That cost resulted in the Applicant's annual wage being reduced by the agreed value of $17,501.40.[21]

[21] The value of $17,501.40 for the company vehicle arose from $10,783.00 being the reduced wage payment for use of the motor vehicle, and $6,718.40 being the amount which the Applicant paid to the Respondent for the vehicle's use.[22] The Applicant paid the amount of $6,718.40 in weekly payments of $129.20.[23] The Applicant stated that if he had not elected to take a company vehicle, his annual wage would have increased by the amount of $10,783.00 and he would not have had to make the weekly contributions towards a higher level motor vehicle.[24]

[22] Mr Scarrott stated that when an employee requests a more expensive vehicle (than the 'Standard Vehicle'), the calculations on the spreadsheet (Annexure DL-4) did not apply.[25] Mr Scarrott said that the Respondent had to take into account factors such as the higher cost of the vehicle, higher running costs, higher maintenance costs and, importantly, an increase in Fringe Benefits Tax (**FBT**) liability for the Respondent.[26]

[23] Having offered the Applicant a company vehicle in 2020, the Respondent proceeded to purchase the Colorado, which was delivered to the Applicant on 18 June 2020.[27] The purchase price for the Colorado was $52,795.00.[28]

[24] Mr Scarrott said that when the Applicant was provided with the company vehicle, there was no agreed value, or agreed reduction in salary in exchange for the company vehicle.[29]

[25] Mr Scarrott noted that the Respondent had to pay the Applicant his Salary and make adjustments to take into account the increased costs and the FBT liability in the following ways:

a) the Applicant made a weekly contribution of $129.20 toward the costs of the company vehicle (**Applicant Contribution**);
b) the Applicant did not have his personal FBT salary packaging amount reduced for the extra amount that the vehicle attracted to ensure that no FBT liability arose (as was done for employees who accepted Standard Vehicles);
c) to cover the FBT costs, the Applicant was annually paid an amount of 20% of the Colorado price, less the Applicant's contributions, which was then grossed up at the Applicant's applicable marginal tax rate (**FBT Taxable Value**). Each year since receiving the company vehicle, the FBT Taxable Value made to the Applicant was $10,369, prorated to the period applicable to the corresponding FBT year;
d) the Applicant would receive a gross salary adjustment payment at 31 March (the end of the FBT year in Australia) each year to cover the Applicant's FBT liability (**March Adjustment Payment**). The March Adjustment Payment was made to reduce the FBT costs to the Respondent. The Applicant's usual March Adjustment Payment was $5,795.24, as made on 31 March 2022;

i. due to the Applicant's employment being terminated, and because he would have only worked 279 days of the 2022–2023 FBT year, on 31 March 2023 the Applicant was to receive a pro rata payment of $4,254.55, less tax of $1,574,18; and

e) in order for the Applicant to make an after-tax contribution to extinguish the FBT liability, the FBT liability is then grossed up at the Applicant's marginal taxation rate (in this case 37%) on which then PAYG is then deducted.[30]

[26] Mr Scarrott said that because the Applicant was dismissed before the end of the FBT year, in the 2023 FBT year (2022–2023), the FBT Taxable Value will be reduced as follows:

$10,369 x (279 applicable days of the FBT year /365) = $7,925.89
Reduced by the Applicant's contributions of $5,245.52
Total FBT Liability for 2023 = $2,680.37
PAYG Applicable on Gross up = $1,574.17
Gross Amount to Applicant = $4,254.55[31]

[27] According to Mr Scarrott, the combined effect of the Applicant Contribution, the March Adjustment Payment and the FBT Taxable Value payment, will be to increase the Applicant's income by $423.55 for FY 2022/23 as per the calculations above.[32]

2.2 Use of the motor vehicle

[28] Regarding the costs of running the Colorado, the Applicant considered that the most comparable car to the company vehicle was the 'Mitsubishi Triton GLX 2.4T/dsl 6sp auto 4x4 Dual cab Pickup' due to its similarities with the company vehicle – including purchase price, engine type, electronics, drive control and current market values.[33] The Applicant further considered that the fuel efficiencies of the two vehicles and the engine performance was almost identical.[34]

[29] The Applicant observed that the RAC Guide stated that the total costs per month for the Mitsubishi Triton is $1,415.96 which equated to an annual running cost of $16,991.52.[35] However, the Applicant noted that the RAC Guide is based on each vehicle driving 15,000km a year – and the amount was inclusive of loan repayments, registration, insurances, and services.[36] The Applicant further observed that those amounts do not increase if the vehicle travels more than 15,000km in a year.[37]

[30] The Applicant said that when the annual cost of the Mitsubishi Triton ($16,991.52) is calculated over 15,000kms, the driving cost equates to $1.13 per km. By using the rate of $1.13 per km, the total cost to drive the Colorado for 17,424 km (being 50% of 34,848 km) is $19,689.12. However, the driving cost of $1.13 per km is significantly overestimated because the loan repayments, registration, insurance and servicing will all remain the same despite any increase in distance travelled, said the Applicant.[38]

[31] The Applicant said that after deducting the amount of $6,718.40 that he paid to the Respondent to use the higher level motor vehicle, the amount of $19,689.12, is reduced to $12,970.72. As such, said the Applicant, if the agreed value of the motor vehicle is left to one side, the motor vehicle component of his remuneration is $12,970.72.[39]

[32] The Applicant stated that the Respondent has residential premises at Gnangara, Midland, Nannup, and Rockingham, all of which he was required to visit.[40]

[33] The Applicant stated that the distance between head office in East Perth and the Nannup residential premises is 262km or a round trip of 524km.[41] The Applicant purported to drive ten times a year to Nannup.[42]

[34] The Applicant provided the following detail with respect to distances from the Respondent's head office to other residential premises:

a) Gnangara 22.5km;
b) Midland 18.8km; and
c) Rockingham 47.7km.

[35] The Applicant said that on many occasions he drove from his home to one or more of the residential premises and then to the head office in North Perth.[43] There were many other occasions, according to the Applicant, where he drove from the head office to one or more of the residential premises and then home.[44]

[36] In addition to the abovementioned trips, the Applicant spoke of there being days when he commuted directly from home to a residential site or sites, returning directly home at the end of the day.[45]

[37] In addition to those trips, the Applicant said he drove to other destinations for business purposes, including, but not limited to, the Next Step Inpatient Withdrawal Unit in East Perth and the Step Up Step Down Service in Bunbury.[46]

[38] The Applicant, referring to the evidence that had been given by Mr Scarrott, noted that the Respondent stated the company vehicle had travelled a total distance of 88,689km between 18 June 2020 and 2 January 2023.[47] The Applicant calculate that this equated to some 929 days, which on a yearly basis equated to travel which averaged 34,848 km per year.[48]

[39] The Applicant estimated his personal use of the motor vehicle to be well below 50% of the total distance travelled, meaning that the annual distance travelled for private purposes would have been much less than 17,424km.[49]

[40] Mr Scarrott stated that the company vehicle was purchased with 10km on the odometer and two days before the Applicant's dismissal it read 88,699km.[50]

[41] Having utilised Google Maps to ascertain the distance between the Applicant's house and his main place of work (the Respondent's Fitzgerald Street premises), Mr Scarrott said that the Applicant drove 30.5km each way to and from work every day.[51] Mr Scarrott continued that there were 251 working days in the 12 months prior to the Applicant's dismissal, which equated to 15,311km driving just to and from work in that 12 month period.[52] According to Mr Scarrott, the Applicant rarely attended the Respondent's residential premises during 2022.[53]

[42] In his first witness statement, Mr Scarrott considered the most comparable car to be the Ford Ranger XL 2.0 TT/Dsl 6 sp auto 4x4 Dual cab pickup (**Ford**).[54] Using the Ford as the comparator, Mr Scarrott said that the company vehicle costs were $1.29 per km.[55]

2.3 Capital gains tax

[43] The Applicant pressed that he had no knowledge of receiving an adjustment payment of $5,795.24 on or about 31 March 2022,[56] and he also had no knowledge that his income would be adjusted at the end of March 2023 to take into account the fringe benefits taxable value of the motor vehicle.[57]

2.4 Mobile phone

[44] The Applicant said that the Respondent provided a phone plan that had unlimited texts and calls for the user. It followed that the number of personal calls made by the Applicant proved irrelevant, in the Applicant's view.[58] The Applicant estimated that less than 25% of the use of the phone could be attributed to personal use.[59]

[45] Mr Scarrott said that the Respondent provided the Applicant with a mobile phone and plan, which cost the business $139.00 per month.

2.5 Laptop computer

[46] In response to the Respondent's assertion that the Applicant received non-monetary benefits in respect of a laptop computer, the Applicant said his personal use of the laptop would have been less than 15% of his use of that same computer.[60]

[47] Mr Scarrott advised that the laptop was purchased in December 2018 for $2099.00.

3 Legislative framework

[48] It was not disputed, and I am satisfied, that the Applicant had served the minimum employment period and he was not covered by a modern award. Therefore, as observed, the issues that fall for determination are whether the Agreement applied to the Applicant's employment or whether his annual rate of earnings was less than the high income threshold. Sections 396 and 382 relevantly provide:

> **396 Initial matters to be considered before merits**
>
> The FWC must decide the following matters relating to an application for an order under Division 4 before considering the merits of the application:
>
> (a) whether the application was made within the period required in subsection 394(2);
>
> (b) whether the person was protected from unfair dismissal;
>
> (c) whether the dismissal was consistent with the Small Business Fair Dismissal Code;
>
> (d) whether the dismissal was a case of genuine redundancy.

> **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.

[49] The phrase 'protected from unfair dismissal at a time if, at that time…' in s 382 of the Act means that an employee must show that, at the time of their dismissal, their employment circumstances (i.e. coverage by a modern award, applicability of an enterprise agreement or amount of rate of earnings) met the criteria in s 382 of the Act.[61]

4 Whether the Agreement applied to the Applicant in relation to his employment

[50] For the following reasons, I have found that the Agreement did not apply to the Applicant in relation to his employment.

[51] The principles that govern the interpretation of enterprise agreements are well-established. In *WorkPac Pty ltd v Skene* (**WorkPac**), the Full Federal Court elucidated the following:

> The starting point for interpretation of an enterprise agreement is the ordinary meaning of the words, read as a whole and in context: *City of Wanneroo v Holmes* (1989) 30 IR 362 (*Holmes*) at 378 (French J). The interpretation "turns on the language of the particular agreement, understood in the light of its industrial context and purpose": *Amcor Ltd v Construction, Forestry, Mining and Energy* Union (2005) 222 CLR 241 (*Amcor*) at [2] (Gleeson CJ and McHugh J). The words are not to be interpreted in a vacuum divorced from industrial realities (*Holmes* at 378); rather, industrial agreements are made for various industries in the light of the customs and working conditions of each and they are frequently couched in terms intelligible to the parties but without the careful attention to form and draftsmanship that one expects to find in an Act of Parliament (*Holmes* at 378-379, citing *George A Bond & Company Ltd (in liq) v McKenzie* [1929] AR (NSW) 498 at 503 (Street J)). To similar effect, it has been said that the framers of such documents were likely of a "practical bent of mind" and may well have been more concerned with expressing an intention in a way likely to be understood in the relevant industry rather than with legal niceties and jargon, so that a purposive approach to interpretation is appropriate and a narrow or pedantic approach is misplaced: see *Kucks v CSR Ltd* (1996) 66 IR 182 at 184 (Madgwick J); *Shop, Distributive and Allied Employees' Association v Woolworths SA Pty Ltd* [2011] FCAFC 67 at [16] (Marshall, Tracey and Flick JJ); *Amcor* at [96] (Kirby J).[62]

[52] The Full Federal Court in *WorkPac* further explained that where a term is undefined, unless there is a contrary indication, it ought to be presumed that the draftsperson intended that

the term have its ordinary meaning.[63] It follows that despite the broad purposive approach to be adopted when interpreting industrial agreements, that canon of construction regarding the 'ordinary meaning' remains applicable as a starting point.[64]

[53] The Full Bench of the Commission in *Construction, Forestry, Mining and Energy Union v Endeavour Coal Pty Ltd*,[65] *Australian Manufacturing Workers' Union v Berri Pty Ltd* (**Berri**),[66] and the earlier decision in *Australasian Meat Industry Employees Union v Golden Cockerel*,[67] embraced such principles.

[54] *Berri* affirmed that the interpretation of an enterprise agreement, like that of a statute or contract, begins with a consideration of the ordinary meaning of the relevant words, and as such requires a determination of whether an agreement has a plain meaning, or is ambiguous or susceptible of more than one meaning.[68]

[55] In determining whether ambiguity was at play, the Full Bench stated that regard may be had to evidence of surrounding circumstances to assist in determining whether an ambiguity exists.[69] If the agreement has a plain meaning, evidence of the surrounding circumstances will not be admitted to contradict the plain language of the agreement.[70] But, if the language of the agreement is ambiguous or susceptible to more than one meaning, then evidence of the surrounding circumstances will be admissible to aid the interpretation of the agreement.[71]

[56] The Applicant observes that the Agreement applies to all current and future WACOA and Cyrenian House employees located within the Perth Metropolitan Area and excludes Child Care and Creche Workers.[72] The Applicant argues that he was a current employee located within the Perth Metropolitan Area when the Agreement commenced and did not fall within the express exclusions.

[57] In support of his argument, the Applicant presses that the role he performed was covered by Levels 8 and 9 of the Agreement, and both parties clearly understood that the Applicant was covered by the Agreement.[73]

[58] The Respondent contends that there are two points of ambiguity in clause 1.4. First, it is unclear whether 'all current and future WACOA and Cyrenian House Employees' includes only employees in the levels outlined in Schedule 1 and Schedule 2 of the Agreement. Second, the capitalisation of the term 'WACOA and Cyrenian House Employees' suggests it is intended to be a defined term, but it is not included in the dictionary at clause 1.3. The Respondent proposes that this adds uncertainty as to whether clause 1.4 intends to only include a certain type, or class of, employee.

[59] The Respondent further contends that the Applicant is not covered by the Agreement because:

a) he was a Level 10.2 employee, and a General Manager, a level and job description which are not in the Agreement; and
b) the Agreement was entered into almost a decade before the Applicant was employed as the General Manager. It was drafted when the Respondent was a much smaller business and did not employ anyone in a position the same as, or similar to, a General Manager.[74]

[60] The Respondent submitted that the titles and descriptions set out in Appendix 2 of the Agreement evidently do not cover the Applicant's role as General Manager of Residential Services. Level 9, the most senior level listed, does not explicitly describe an employee who manages others.

[61] The Respondent further submitted that the remuneration levels set out in Appendix 1 of the Agreement did not cover the Applicant's level and remuneration as Level 10.2 General Manager of Residential Services.[75]

[62] The Applicant has premised his argument on being both a current employee located within the Perth Metropolitan Area and not falling within the express exclusions, in addition to pressing that his classification was either that of Level 8 or 9 under the Agreement. In this respect, while the coverage clause of the Agreement does not expressly reference the 'Classification/Salary Point' in Appendix 1 or the 'Classification Definitions Social and Community Services Employees' in Appendix 2, it is evident that the Applicant considers that the Appendices have work to do regarding coverage.

[63] It is apparent that nothing in clause 1.4 and 1.6, or any other provision in the Agreement, *expressly* limits the application of the Agreement to the classifications referred to in Appendices 1 and 2. However, although there is no express link between clauses 1.4 and 1.6 and the Appendices, it is clear by reference to clauses 4.1 and 4.2 that Appendix 2 is intended to establish a classification structure for employees who can be covered by the Agreement, and that the scope of the Agreement is confined accordingly. The contrary interpretation would have the Agreement applying to employees covered by clause 1.4 and 1.6 for whom no rate of pay was set under clause 4.1. It seems to me improbable that this could have been intended. Moreover, clauses 4.1 and 4.2 of the Agreement state:

> **4.1 Salary Scale**
> See Appendix 1…
>
> **4.2 Position Classifications**
> The classification of new positions or reclassification of existing positions will be based on the classification descriptions in the Position Classification descriptors in Appendix 2 of this agreement.

[64] That 'the classification structure' is set out in Appendix 2, which is a comprehensive structure, and clause 4.1 states '[s]ee Appendix 1', with Appendix 1 adopting the classification structure referred to in Appendix 2, 'all current and future WACOA and Cyrenian House Employees' appear to be those contemplated within the framework of clauses 4.1, 4.2 and Appendices 1 and 2.

[65] While the Applicant contends that he falls within Level 8 and Level 9 of the Agreement, it is an incontrovertible fact that during his employment as General Manager the Applicant has, at all material times, understood he was classified as Level 10 – a level not provided for in the Agreement.[76] Further, the Salary afforded to the Applicant is not to be found within the confines of the Agreement.

[66] A perceived difficulty arises from the terms of the Applicant's employment contract, which reads, in part:

> …Your contract will be *in accordance with* the *WA Council on Addictions (Inc) (WACOA) Enterprise Bargaining Agreement 2012-2016* and the following:… (italics my emphasis)

[67] It might be assumed that the reference to '[y]our contract will be *in accordance with*' the Agreement should be interpreted such that the phrase 'in accordance with' means the Applicant is covered by the Agreement and it applies to his employment. The assumption would be wrong. It is the terms of the Agreement and the Act which determine whether the Agreement covered and applied to the Applicant. However, for the sake of fulsomeness, the construction of the employment contract is considered.

[68] In *BP Australia Pty Ltd v Nyran Pty Ltd*,[77] Nicholson J distilled, by reference to *Codelfa*,[78] points of principle for resolving ambiguity in contracts. First, one is required to determine whether the contract has a plain meaning or contains an ambiguity.[79] If the contract has a plain meaning, evidence of surrounding circumstances will not be admissible to contradict the language of the contract.[80]

[69] In the context of the Applicant's employment contract, the phrase 'in accordance with' is not ambiguous. The word 'accord' simply means 'to be in correspondence or harmony'.[81] 'Accordance' speaks of agreement and conformity.[82] The meaning attributed to the phrase is not discordant with judgments of the Federal Court and other jurisdictions, where the phrase 'in accordance with' has been considered akin to 'in harmony with'.[83]

[70] The Applicant's employment contract is relatively short and devoid of entitlements such as annual leave and the like. It is evident that the employment contract is to be read in harmony with the Agreement, such that where an obligation or benefit is not provided for in express contractual terms, it can be located within the terms of the Agreement. This does not in turn mean that the Agreement covered and applied to the employment of the Applicant.

[71] The Applicant's argument that he is protected from unfair dismissal because the Agreement applied to him in his employment cannot be sustained.

5 Was the Applicant's annual rate of earnings and other amounts less than the high income threshold?

[72] Assessment of the high income threshold involves two considerations. First, consideration needs to be given to the applicant's annual rate of earnings, which requires an examination of several factors, including those set out in s 332 of the Act, and, because of a reference in that section, potentially factors included in the regulations. Second, and separately, consideration needs to be given to whether there are any amounts to be added to the person's annual rate of earnings because of factors included in the regulations. The sum of these two considerations is what is compared against the high income threshold.

[73] The word 'Earnings' is described at s 332 of the Act, as:

> **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.

[74] Whilst no regulations have been made for the purposes of s 332(1)(d) or s 332(2)(d) of the Act, regulation 3.05(6) of the *Fair Work Regulations 2009* (Cth) (**Regulations**) has been made in respect of s 382(b)(iii) of the Act. Regulation 3.05(6) provides:

> 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.

[75] The wording of regulation 3.05(6)(c) implies that the Commission has a degree of discretion in deciding whether it should consider a benefit for the purposes of assessing whether the high income threshold applies to a person at the time of dismissal.[84] Once it has been determined that a benefit meets the criteria contained in regulations 3.05(6)(a) and (b), the Commission must consider whether it is satisfied, having regard to the circumstances, that each of regulations 3.05(6)(c)(i), (ii) and (iii) apply.

[76] In these types of cases, it is the Respondent that bears the evidentiary onus to support its objection that the Applicant was not protected from unfair dismissal.[85]

5.1 Annual rate of earnings

[77] First, I must determine the Applicant's annual rate of earnings. The term 'annual rate of earnings' in s 382(b)(iii) of the Act refers to the annual rate of earnings at that time, and not the annual earnings to that time (that is the amount earned in the 12 months to that time).[86]

[78] The Applicant submitted that at the time of his dismissal his annual wages amounted to $141,343.28 plus compulsory superannuation, on-call allowances and a Christmas bonus. In respect of his wages, the Applicant relied upon two payslips to evince the amount of $141,343.28, one from during the period of employment and one at the time of dismissal.

[79] The Applicant submitted that the compulsory superannuation contributions were excluded pursuant to s 332(2)(c) and the allowances and bonus were excluded pursuant to s 332(a) because they were payments the amount of which could not be determined in advance.

[80] The Respondent submitted that at the time of his dismissal the Applicant's Salary was $141,797.00. Mr Scarrott explained why the Applicant's payslips stated the amount of

$141,343.28, and that the amount of $141,797.00 had been confirmed for the Applicant by the Respondent's HR Department on 15 November 2022, while he was applying for a home loan.[87]

[81] Having considered all of the evidence on this point, I find that the Applicant's Salary amounted to $141,797.00. Regarding the on-call allowances and the Christmas bonus, I am satisfied that these could not be determined in advance and note that at hearing the Respondent did not contend otherwise.

5.1.1 Company vehicle

[82] It has been accepted that, where an employee is provided with a fully maintained vehicle for use in the course of her or his 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.[88]

[83] The Applicant stated that his wages were reduced by the agreed monetary amount of $10,783.00 because he had elected to take the company vehicle and in addition, he made a weekly contribution of $129.20 to the Respondent for the Colorado. The Applicant said the amount of $10,783.00 was the agreed money value of the non-monetary benefits as identified in s 332(1).

[84] Regarding the company vehicle, the Applicant submitted that if a Level 8 employee elected to take a company vehicle, his or her wages would decrease by $8000.00. If a Level 9 or 10 employee elected to take a company vehicle, his or her wages would decrease by $10,000.00 (an amount less than the $10,783.00 the Applicant notes that his wages were decreased by).

[85] The Applicant noted that the standard vehicle offered was a Toyota Camry (or a vehicle equivalent to a Toyota Camry) but he was given an option of driving a more valuable vehicle if he paid a contribution towards the cost of that vehicle. The Applicant elected to take a higher level vehicle (the Colorado) and paid a weekly contribution of $129.20 to the Respondent for that vehicle. The Applicant's annual contribution for the company vehicle was $6,718.40.

[86] It is apparent from the Respondent's submissions that it did not consider that it had reached an agreement with the Applicant regarding the reasonable money value of the company vehicle. However, it did acknowledge that the private use of a motor vehicle is properly included as a benefit for the purpose of assessing whether an employee falls within the high income threshold and further noted that provision of a motor vehicle for business purposes does not form part of the remuneration for this purpose.

[87] Regarding the personal use of the company vehicle by the Applicant, the Respondent referred to the evidence of Mr Scarrott and premised its submissions on the proposition that travel to and from work is categorised as personal use. The Respondent surmised that the Applicant drove an average of 34,916.93km per year,[89] approximately 43% of which was driving to and from work.[90]

[88] The Respondent observed that although the Applicant had regular meetings with the Respondent's other offices, these were largely conducted electronically, and the Applicant did

not regularly travel to the Respondent's suburban offices.[91] It was the Respondent's view that it was reasonable to assume that at least 50% of the company vehicle usage was personal. However, the Respondent added that if this amount was found not to be a reasonable estimate (which was denied), the Respondent submitted in the alternative at least 43% of the Applicant's company vehicle use was personal, being his travel to and from work.

[89] The Respondent provided two figures for the value of the company vehicle. Both calculations were based on the '*Fewings* approach' as referred to at paragraph [91] and used the amount of $1.29 for the cost per kilometre of the Colorado. The figure of $1.29 had been extracted from the RAC Car Running Costs Guide 2022.[92] The first figure, being based on 50% personal use, amounted to $22,521.42. The second figure, being based on 43% personal use, amounted to $19,368.42.

[90] Section 332(1)(c) provides that earnings include the agreed money value of any non-monetary benefits. Where there was no value agreed between the parties for the Applicant's private use of the vehicle, regulation 3.05(6) allows the Commission to make a determination as to the value of the benefit of the company vehicle.

[91] In the absence of an agreed sum, the process generally used to determine the value of the use of a company vehicle is that described in *Kunbarllanjnja Community Government Council v Fewings* (**Fewings**).[93] The '*Fewings* approach' is as follows:

a) determine the annual distance travelled by the vehicle in question;
b) determine the percentage of that distance that was for private use;
c) multiply the above two figures to obtain the annual distance travelled for private purposes;
d) 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; and
e) 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 remuneration.

[92] To recap, the Full Bench in *Fewings* further observed that the party advancing the proposition that an applicant is excluded from the relevant provisions of the Act (protection from unfair dismissal) carries the burden of establishing the evidentiary basis upon which such a determination can be made.[94]

[93] In *Sam Technology Engineers Pty Ltd v Bernadou*,[95] the Full Bench observed that it did not take issue with the method of apportionment adopted by the Full Bench in *Fewings* and considered it entirely appropriate for circumstances in which an employee had a company-supplied vehicle (from which she or he derived a benefit) and a reasonable monetary value had not been agreed for its private use. It continued that the *Fewings* method of apportionment was appropriate to enable the Commission to estimate the real or notional value of the benefit, in the manner contemplated by regulation 3.05(6) of the Regulations, which deals with benefits *other than the payment of money*.

[94] I have, however, found in the circumstances that it is unnecessary to adopt the *Fewings* method of apportionment, on the basis that the parties had reached an agreed money value of the company vehicle.

[95] At hearing, Mr Scarrott was taken to page 180 of Part 2 of the Digital Hearing Book. That page set out six tables: three tables at the top of the page and three tables directly underneath. Mr Scarrott explained that the top tables detailed the remuneration where an employee was not assigned a vehicle with her or his position.[96] Regarding the bottom tables, Mr Scarrott explained that they set out an employee's remuneration where a motor vehicle is included for the position and where it is just a standard motor vehicle.[97]

[96] Much was made by Mr Scarrott that the tables on page 180 of Part 2 of the Digital Hearing Book referred to the adoption of *standard motor vehicles* (i.e. not the Colorado). Further, Mr Scarrott explained that the top tables had different figures to the bottom tables, with the difference being the value of the standard motor vehicle.[98]

[97] In cross examination, Mr Scarrott was asked whether the Applicant had elected to take a higher level motor vehicle, to which Mr Scarrott responded 'yes'.[99] Mr Scarrott also confirmed that the Applicant was making an additional after tax payment each week to the Respondent for the company vehicle (a weekly contribution of $129.20 to the Respondent, amounting to an annual contribution for the company vehicle of $6,718.40).[100] When asked about why the Applicant made the additional contribution, Mr Scarrott gave evidence that it was the contribution for the additional cost of a non-standard vehicle and the FBT associated with that.[101]

[98] Having weighed all the evidence regarding the company vehicle, I consider that the Applicant was entitled to the company vehicle, which was a benefit. That benefit was provided in return for the performance of work, and the parties had agreed a reasonable money value for the benefit – its value for the purpose of s 332(1)(c) of the Act amounting to $10,783.00.

5.1.2 The laptop computer and mobile phone

[99] The Applicant observed that the Respondent had alleged that the Applicant received non-monetary benefits in the form of a mobile phone and a laptop computer. The Applicant submitted that the Respondent had failed to produce evidence about how the values of those two items had been calculated and had calculated amounts which were excessive.

[100] For the purpose of calculating the Applicant's annual rate of earnings, including amounts worked out under the Regulations, the Applicant said that he had incorporated the Respondent's figures for the mobile phone and laptop computer:

Mobile phone	$816.00
Laptop computer	$131.19

[101] In the circumstances, I am content to find that the agreed costs of both items, namely the mobile phone and the laptop computer, amounted to $816.00 and $131.19, respectively.

5.1.3 Fringe benefits tax

[102] The Respondent submitted that due to the supply of the company vehicle, the Applicant received a series of annual payments and salary adjustments made to reduce both his and the

Respondent's FBT liability. The Respondent noted that the FBT year runs 1 April to 31 March and in respect of the Applicant the following payments had been, and would be, received:

a) on 31 March 2022, the Applicant received a payment of $5,795.24 (gross) (**2021–2022 March Adjustment Payment**);[102]
b) on 31 March 2023, the Applicant was to receive a payment of $4,254.55 (gross) (**2022–2023 March Adjustment Payment**).

[103] The Respondent submitted that it is the 2021–2022 March Adjustment Payment (being the adjustment that would have applied had the Applicant not been dismissed) that should be taken into account when calculating the Applicant's income, not the 2022–2023 March Adjustment Payment. Acknowledging that the relevant question is not how much the employee earned in the 12 months prior to their dismissal but rather what they were earning, per annum, at the time of their dismissal, the Respondent submitted that if the 2021–2022 March Adjustment Payment did not form part of the Applicant's relevant income, then the 2022–2023 March Adjustment does.

[104] At hearing, a simple question was asked of Mr Scarrott, which was who had received the amount of $3,651.00 as referred to in the 'Payroll Advice' dated '31/03/2022 To 31/03/2022'.[103] That same Payroll Advice included the figure of $5,795.24 (2021–2022 March Adjustment Payment). At this juncture, it is important to acknowledge that the Applicant purports having never received either the Payroll Advice or any payment of $3,651.00 or $5,795.24. After a series of questions, it was proposed to Mr Scarrott that 'it' (the 2021–2022 March Adjustment Payment) was purely done to remove the Respondent's liability for FBT, to which Mr Scarrott clarified it was not to avoid the liability but rather to pay the FBT.[104] Mr Scarrott did explain that as part of salary packaging there was a FBT exemption amount of $30,000.000 (gross).[105] The net amount that is able to be salary packaged is, said Mr Scarrott, $15,899.00.[106] Mr Scarott said that if these company vehicle amounts were not adjusted, they would reduce the amount of $15,899.00 by $3,651.00.[107]

[105] The application of regulation 3.05(6) and the determination of the amounts flowing from it requires consideration of the three questions:

a) firstly, was the Applicant entitled to receive the 2021–2022 March Adjustment Payment and the 2022–2023 March Adjustment Payment in accordance with an agreement, or were they something else?;
b) secondly, were they 'non-monetary benefits' within the meaning of section 332 (3)?; and
c) thirdly, if they were not non-monetary benefits, am I able to be satisfied of the elements within regulation 3.05(6)(c)? Those elements go to whether I should consider the benefit for the purpose of assessing the high income threshold, that a reasonable money value has not been agreed, and that I can estimate a real or notional money value of the benefit.

[106] The case of *Rofin Australia Pty Ltd v Newton* (**Rofin's Case**), a decision on appeal in the Australian Industrial Relations Commission, develops the word 'benefit' according to the statutory framework then prevailing regarding the maximum remuneration an employee could earn regarding a 'specified rate' in order to make an unfair dismissal claim under the *Workplace*

Relations Act 1996 (Cth).[108] The issues before the Full Bench were characterised in the following way:

> It was common ground in the hearing before the Commissioner that, for the purposes of s 170CC(3), the employee's rate of remuneration included the annual salary of $52,000.00 and superannuation of $3,200.00, making a total of $55,120.00. What was in dispute was whether there were any non-pecuniary benefits that should have been taken into account and, if so, whether the sum total of those benefits amounted, in dollar terms, to more than $8,880.00 per annum.
>
> The employer contended that non-pecuniary benefits arising out of the provision of the motor vehicle should be taken into account. These benefits consisted of $3,405.00 for fringe benefits tax, $7,738.00 for depreciation, $2,748.00 for finance charges, $750.00 for insurance charges, $440.00 for registration, $47.00 for RACV membership and $3,206.00 for fuel and repairs. The employer estimated that the employee used the vehicle for 95 per cent of the time for personal reasons. On this basis, it contended that the employee's rate of remuneration exceeded the specified rate.[109]

[107] In *Robinson v AJ Gandel*,[110] Wilson C observed that *Rofin's Case* established two propositions, one of which is relevant for current purposes. The apposite proposition relates to genuine salary sacrifice arrangements:

> [g]enerally where an amount is paid by an employer other than to an employee and other than on behalf of or at the direction of the employee, such an amount would not amount would not fall within the ordinary meaning of the word "remuneration".[111]

[108] In *Rofin's Case*, the Full Bench held that the particular facts were not of a salary sacrifice arrangement and that the FBT paid was not to be included in consideration of the employee's rate of remuneration.

[109] However, in *Chang v Ntscorp Ltd* (**Chang**),[112] Hamberger SDP reached a different view about the FBT in circumstances where he considered the value to be attributed to a motor vehicle pursuant to the *Fewings* approach. In *Chang*, it was not possible to estimate the cost per kilometre for a vehicle obtained from the RACV or NRMA because of the age of the motor vehicle in question (figures were not provided for an aged vehicle).[113] It was in those circumstances that Hamberger SDP drew upon the evidence available to provide a good estimate in relation to the actual cost of operating the vehicle. He did so by adopting the NRMA methodology for estimating such costs substituting estimates of actual costs for industry averages.[114]

[110] Hamberger SDP observed that the main criteria used by the NRMA in deriving its cost estimates are depreciation, opportunity cost, vehicle registration and insurance, fuel, vehicle maintenance and FBT. Turning to FBT, it was observed that the NRMA includes FBT as a factor in calculating the cost for a business in operating a vehicle. Hamberger SDP acknowledged that the Full Bench in *Fewings* indicated that one should use the costs calculated by motoring organisations and as such this supported the inclusion of FBT.[115]

[111] Turning to *Rofin's Case*, where the Full Bench concluded that the Commissioner was not in error in concluding that, in the circumstances of the case in question, any FBT paid by the employer in relation to the provision of a motor vehicle should not be included as a non-

pecuniary part of the employee's 'rate of remuneration' for the purposes of determining whether the specified rate was exceeded, the Senior Deputy President stated that the Full Bench focused on the fact that FBT is a tax paid by the employer. Hamberger SDP noted that the Full Bench said that it is not paid to the employee, nor on behalf of or at the direction of the employee, and 'such an amount would not fall within the ordinary meaning of the word "remuneration".'[116] However, the Senior Deputy President observed that the Full Bench recognised it might be appropriate to include FBT in a genuine 'salary sacrifice' situation.

[112] In *Chang*, the Senior Deputy President proposed in circumstances where the Commission must estimate a real or notional money value of the benefit in question:

> …While employees pay income tax on their salary, they do not on fringe benefits. As a matter of administration, FBT is payable by the employer. However failure to include FBT in the value of a fringe benefit would be (significantly) to underestimate its value to the employee.[117]

[113] Drawing upon the decisions of both *Rofin's Case* and *Chang*, I consider the preferred approach in the circumstances is not to include the amounts of the 2021–2022 March Adjustment Payment or the 2022–2023 March Adjustment Payment. The Respondent's evidence is that the two adjustments (the 2021–2022 March Adjustment Payment and the 2022–2023 March Adjustment Payment) are made due to the supply of the company vehicle. Unlike the case of *Chang*, it has proved unnecessary to adopt the *Fewings* approach because of my finding that the company vehicle was assigned an agreed value by the parties. It is observed that in *Chang* the Senior Deputy President included the value for the fringe benefit in circumstances where he was of calculating the value of the motor vehicle component of the applicant's remuneration. In this case, it is unnecessary to undertake that exercise. The evidence of Mr Scarrott, when asked about salary sacrifice in respect of the motor vehicle, was that the drop in the Applicant's wages ($10,783.00) was because of him taking a company vehicle and that company vehicle being a higher level car.[118]

6 Conclusion

[114] The Respondent pressed that its jurisdictional objection should be upheld because when the benefits afforded to the Applicant were taken into account, the Applicant was earning between $166,367.16 and $171,060.85 at the time of dismissal and was therefore earning in excess of the high income threshold. That assertion cannot be upheld on the evidence before me.

[115] I have found that the Applicant's earnings consisted of the following:

Wages	$141,797.00
Agreed value of the motor vehicle	$10,783.00
Mobile phone	$816.00
Laptop computer	$131.19
Total	$153,527.19

[116] As the Applicant's earnings did not exceed the high income threshold of $162,000.00, he is a person protected from unfair dismissal by virtue of s 382 of the Act. The Respondent's

jurisdictional objection cannot be sustained and is therefore dismissed. Directions will shortly issue to the parties and the matter will be set down for a hearing on merits and remedy.

DEPUTY PRESIDENT

Appearances:

E Rennie for the Applicant.
C Lewin for the Respondent.

Hearing details:

2023.
Perth (by telephone):
22 March.

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<PR760456>

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[1] AE895382 (**Agreement**).

[2] Witness Statement of David Paul Lonnie, [1]–[2] (**Lonnie Statement**).

[3] Ibid [3].

[4] Ibid [5].

[5] Ibid annexure DL-1; Digital Hearing Book Part 2, 11 (**DHB Pt 2**).

[6] Lonnie Statement (n 2) annexure DL-2; DHB Pt 2 (n 5) 17.

[7] Lonnie Statement (n 2) annexure DL-2; DHB Pt 2 (n 5) 48.

[8] Lonnie Statement (n 2) annexure DL-3; DHB Pt 2 (n 5) 53.

[9] Lonnie Statement (n 2) annexure DL-3; DHB Pt 2 (n 5) 53–4.

[10] Lonnie Statement (n 2) [22].

[11] Witness Statement of Stephen Scarrott, [7], annexure SS-3 (**Scarrott Statement**).

[12] Ibid [9].

[13] Ibid.

[14] Lonnie Statement (n 2) [23].

[15] Ibid annexure DL-4.

[16] Ibid [25].

[17] Ibid [27].
[18] Ibid [30].
[19] Ibid [32].
[20] Ibid [31].
[21] Ibid [33].
[22] Ibid [33].
[23] Ibid [33].
[24] Ibid [34].
[25] Scarrott Statement (n 11) [13].
[26] Ibid.
[27] Ibid [15].
[28] Ibid.
[29] Ibid [16].
[30] Ibid.
[31] Ibid [17].
[32] Ibid [18].
[33] Lonnie Statement (n 2) [52].
[34] Ibid.
[35] Ibid [54].
[36] Ibid [55].
[37] Ibid.
[38] Ibid [57].
[39] Ibid [59].
[40] Ibid [37].
[41] Ibid [39].
[42] Ibid [40].
[43] Ibid [42].
[44] Ibid.
[45] Ibid [43].
[46] Ibid [44].
[47] Ibid [46].
[48] Ibid [49].
[49] Ibid [50].
[50] Scarrott Statement (n 11) [23], annexure SS-7.
[51] Ibid [25].
[52] Ibid [26].
[53] Ibid [28].
[54] Ibid [20].
[55] Ibid [22].
[56] Lonnie Statement (n 2) [62].
[57] Ibid [63].
[58] Ibid [65].
[59] Ibid [71].
[60] Ibid [73].

[61] *Zappia v Universal Music Australia Pty Ltd* (2012) 225 IR 122, 125 [9] (**Zappia**).

[62] (2018) 264 FCR 536, 580 [197].

[63] Ibid 581 [202].

[64] Ibid.

[65] [2017] FWCFB 4487.

[66] (2017) 268 IR 285 (**Berri**).

[67] (2014) 245 IR 394.

[68] *Berri* (n 66) 311 [114.7].

[69] Ibid 311 [114.8].

[70] Ibid 311 [114.9].

[71] Ibid 311 [114.10].

[72] Agreement (n 1) cl 1.4.

[73] Lonnie Statement (n 2) [9]–[19].

[74] Witness Statement of Carol Daws, [7]–[11].

[75] Ibid annexure CD-1.

[76] Lonnie Statement (n 2) annexure DL-1; DHB Pt 2 (n 5) 11.

[77] (2003) 198 ALR 442, 452 [32] (**BP Australia**).

[78] (1982) 149 CLR 337.

[79] *BP Australia* (n 77) 452 [33].

[80] Ibid.

[81] *Macquarie Concise Dictionary Fifth Edition*.

[82] Ibid.

[83] *Whitt v Clough Projects* [2019] FCCA 3457, [36]; *Mount Barker Properties Ltd v District Council of Mount Barker* (2001) 80 SASR 449, 461 [24].

[84] *Zappia v Universal Music Australia Pty Limited* [2012] FWA 3208, [8].

[85] Ibid.

[86] *Zappia* (n 61) 125 [9].

[87] Scarrott Statement (n 11) [7], annexure SS-3.

[88] *Monteiro v Valco Group Australia Pty Ltd* [2019] FWC 2410, [17]; *Rofin Australia Pty Ltd v Newton* (1997) 78 IR 78, 82 (**Rofin's Case**).

[89] Scarrott Statement (n 11) [24].

[90] Ibid.

[91] Ibid [27]–[28].

[92] Ibid [19]–[22].

[93] (Australian Industrial Relations Commission, Ross VP, Watson SDP and Commissioner Bacon, 7 May 1998).

[94] Ibid.

[95] (2018) 275 IR 419.

[96] Transcript of Proceedings, *Lonnie v WA Council on Addictions Incorporated* (Fair Work Commission, U2023/565, Beaumont DP, 22 March 2023) [PN263] (**Transcript**).

[97] Ibid.

[98] Ibid [PN264], [PN267].

[99] Ibid [PN268].

[100] Ibid [PN271]–[PN273].

[101] Ibid [PN274].

[102] Scarrott Statement (n 11) annexure SS-2.

[103] Transcript (n 96) [PN293].

[104] Ibid [PN309].

[105] Ibid [PN287].

[106] Ibid.

[107] Ibid.

[108] *Rofin's Case* (n 88).

[109] Ibid 81.

[110] [2013] FWC 4583.

[111] Ibid [77], quoting *Rofin's Case* (n 88) 81.

[112] [2010] FWA 1952.

[113] Ibid [12].

[114] Ibid.

[115] Ibid [20].

[116] Ibid [21].

[117] Ibid [22].

[118] Transcript (n 96) [PN303].